IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2017-CA-00914-COA

TAMARA A. BARBARO **APPELLANT**

v.

COTY A. SMITH **APPELLEE**

DATE OF JUDGMENT:	01/25/2017
TRIAL JUDGE:	HON. HAYDN JUDD ROBERTS
COURT FROM WHICH APPEALED:	RANKIN COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT:	JEFFREY BIRL RIMES SARAH LINDSEY OTT
ATTORNEY FOR APPELLEE:	JOSHUA CECIL McCRORY
NATURE OF THE CASE:	CIVIL - CUSTODY
DISPOSITION:	AFFIRMED - 07/16/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE CARLTON AND J. WILSON, P.JJ., AND TINDELL, J.

J. WILSON, P.J., FOR THE COURT:

¶1. Pursuant to an agreed judgment, Tamara Barbaro was granted physical custody of her son, Will,[1] and Will's father, Coty Smith, was granted visitation. About one year later, when Will was eighteen months old, Barbaro alleged that Smith had allowed Will to ingest two opioids. In support of her claim, Barbaro submitted the results of a drug test that purported to show that Will had tested positive for the drugs. Barbaro also informed the court that Smith had been arrested recently and charged with drug trafficking. Smith maintained his innocence, denied that he exposed Will to the drugs, and accused Barbaro of fabricating the

[1] We use a fictitious name to protect the privacy of the minor child.

positive drug test. After an emergency hearing, the court temporarily suspended Smith's visitation and appointed a guardian ad litem (GAL).

¶2. After investigating Barbaro's allegations, the GAL concluded that Barbaro not only fabricated the drug test but also participated in a scheme to plant drugs in Smith's truck. Law enforcement also concluded that Smith had been setup and remanded the charge against him to the file. The GAL recommended that the chancellor grant Smith custody of Will. After a trial, the chancellor agreed with the GAL's recommendation, granted Smith sole physical and legal custody of Will, and granted Barbaro visitation. Barbaro filed a motion to alter or amend the judgment, which the chancellor denied, and then appealed.

¶3. On appeal, Barbaro argues that the chancellor erred by denying her motion to alter or amend the judgment as untimely. She also argues that the chancellor erred by finding that she falsified the drug test and played a role in a scheme to plant drugs, by finding a material change in circumstances that adversely affected Will, and by finding that it would be in Will's best interest to modify custody. Finally, Barbaro contends that the chancellor "abused his discretion to the extent that he gave any weight to the [GAL's] report." We find no reversible error and affirm the judgment of the chancery court.

FACTS AND PROCEDURAL HISTORY

¶4. Will was born in November 2014. In April 2015, the chancery court entered an agreed judgment granting physical custody to Barbaro, joint legal custody to Barbaro and Smith, and visitation to Smith.

¶5. On Friday, May 13, 2016, Barbaro was scheduled to meet Smith for a visitation

exchange. Barbaro testified that she suspected that Smith had been giving Will some type of medication or drug to make him sleepy and more compliant, so she decided to have Will drug tested before she left him with Smith and again after she picked him up. She took Will to Capital DNA on May 13 for a urine sample drug test. That test was negative.

¶6. When Smith returned Will to Barbaro on Sunday, May 15, Barbaro again took Will to Capital DNA for a urine sample drug test. Subsequent results of the test indicated that Will's urine contained 3,100 nanograms per milliliter of hydrocodone and 1,590 nanograms per milliliter of hydromorphone, also known as Dilaudid.

¶7. On May 25, a narcotics investigator with the Rankin County Sheriff's Department pulled over a pickup truck driven by Smith after he witnessed Smith commit traffic violations. The investigator had received a tip that Smith would be transporting drugs in his truck. Smith told the investigator that he did not have any drugs, and he gave the investigator permission to search the truck. A drug-sniffing dog alerted the officer to an unlocked toolbox in the bed of the truck. The investigator found pills, marijuana, and possible steroids in the toolbox. Smith was arrested and charged with trafficking controlled substances.

Hearing on Barbaro's Emergency Motion

¶8. On May 30, 2016, Barbaro filed an emergency motion to suspend Smith's summer visitation. The chancery court held a hearing on the motion the next day.

¶9. Barbaro testified that when Smith returned Will to her on May 15, Will was groggy and lethargic. Barbaro called Brandy Jones of Capital DNA, and Jones met her at Capital DNA's office. Barbaro testified that the "instant-read" cup that she used to collect Will's

urine sample immediately showed a positive result for "opiates." According to Barbaro, Jones sent her a text message with the results of the laboratory test—showing levels of hydrocodone and hydromorphone—on Friday, May 20.

¶10. Smith denied giving Will any substance that would have resulted in a positive drug test. He testified that he had only given Will medicines prescribed by Will's pediatrician. Smith testified that he was sick and went to a doctor after his last visit with Will. The doctor prescribed a codeine cough syrup, and Smith had the prescription filled. However, that all occurred after his last visit with Will. Smith denied that he had any codeine in his possession during his last visit with Will. Smith testified that no one else had given Will any drugs the weekend of May 13-15. During that weekend, Smith's mother, Gail Hopkins, and Smith's girlfriend, Layla Mitchell, had also been with Will.

¶11. Mitchell also testified at the hearing. Mitchell provided childcare for Will until April 2016, which was around the time she started dating Smith. Mitchell suspected that Barbaro stopped using her for childcare because of her relationship with Smith. Mitchell had been with Smith and Will the weekend of May 15. Mitchell said that Will seemed to have a cold and that he was a little cranky and sleepy. Smith gave him some Bromfed, which Will had been prescribed. Bromfed does not have hydrocodone, hydromorphone, or codeine in it. Other than his cold, Will's behavior seemed normal.

¶12. At the conclusion of the hearing, the chancellor suspended Smith's visitation. He appointed a GAL to investigate the allegations of abuse and neglect. He ordered Smith and Barbaro to submit to both urine and hair follicle drug tests. He also ordered a hair follicle

test to be performed on Will.

Hearing on GAL's Emergency Motion

¶13. On June 20, 2016, the GAL filed an emergency motion seeking an injunction against Barbaro and a change of custody to Smith. The chancery court held a hearing on the motion two days later.

¶14. Gail Hopkins, Smith's mother, testified that she had been with Will and Smith the weekend of May 13-15, that Will had a cough, and that the only medicine she gave him was his usual allergy medicine. Hopkins testified that Will was not groggy or lethargic and behaved normally throughout the weekend.

¶15. Brandy Jones of Capital DNA testified that Barbaro requested urine sample drug tests for her and Will on Friday, May 13. Barbaro requested another urine sample drug test for Will on Sunday, May 15. Will was fitted with a urine collection bag to capture a sample. Jones testified that Will was agitated on May 15, which was normal for an eighteen-month-old child being fitted with a urine collection bag. Jones denied that Will seemed lethargic. The drug tests were all "private" tests, meaning they were neither court-ordered nor personally observed by testing personnel. Jones explained to Barbaro the differences between a private test and an observed test, and Barbaro opted for a private test.

¶16. Capital DNA sent Will's sample to a laboratory for testing. On May 20, the results came back showing that the urine contained 3,100 nanograms per milliliter of hydrocodone and 1,590 nanograms per milliliter of hydromorphone.

¶17. Jones also testified as an expert in drug testing. She testified that the cutoff level for

Will's urine tests was 300 nanograms per milliliter, meaning that lower levels of a substance would not result in a "positive" test. Will's sample contained more than ten times the cutoff level for hydrocodone and more than five times the cutoff level for hydromorphone. Jones testified that the strength of a dosage would vary based on body type and other factors, but she stated that those were "significant" levels of hydrocodone and hydromorphone in an eighteen-month-old child.

¶18. Jones explained the differences between urine tests and hair follicle tests. She testified that hydrocodone or codeine typically will show up in a child's urine within "about an hour" or "one to three hours." Jones further testified that, depending on factors such as the size of the dose and the person's body weight and metabolism, a urine test can reveal drugs consumed during the previous twenty-four to forty-eight hours. In contrast, depending on the rate of hair growth and other factors, it "typically" takes fourteen to thirty days for a drug to show up in a hair follicle test, and a hair follicle test can reveal drugs taken up to one year prior to the test.

¶19. Jones also testified about the results of the court-ordered drug tests of Smith, Barbaro, and Will that were conducted on May 31. Smith's May 31 hair follicle test came back positive for hydrocodone. Jones testified that the positive test result indicated that Smith had used the drug between two weeks and one year prior to the test. Smith's urine test was negative. Both of Barbaro's tests were negative. Will's hair follicle test was negative, but Jones stated that it can take up to thirty days for a drug to show up in a hair follicle test.

¶20. Brett McAlpin, a narcotics investigator with the Rankin County Sheriff's Department,

testified as a fact witness and an expert in narcotics investigations. McAlpin was the officer who arrested Smith on May 25. McAlpin testified that another officer in his office had received a tip from Jesse Tatum, an officer with the Jackson Police Department. McAlpin learned that an informant had advised law enforcement that Smith would be transporting drugs in his truck when he returned home from his job in Jackson. The tip included Smith's place of work, what time he would leave work and arrive in Rankin County, and the make, model, color, and license plate number of the truck. The informant even stated that officers would find hydrocodone, steroids, marijuana, and possibly methamphetamine inside a toolbox in the bed of the truck. McAlpin followed Smith's truck from Jackson to Pearl and initiated a traffic stop after observing multiple traffic violations.

¶21. McAlpin testified that Smith denied that he had any illegal drugs in the truck, and he voluntarily gave officers permission to search his truck. The toolbox in the bed of the truck was unlocked. McAlpin opened it and found pills, marijuana, and steroids inside. McAlpin testified that Smith appeared upset and genuinely surprised by the officers' discovery of the drugs. Smith said something to the effect that Barbaro had to be involved somehow.

¶22. McAlpin subsequently learned that the original source of the tip was Chris Kyzar. McAlpin then learned that Kyzar had been in a romantic relationship with Layla Mitchell, Smith's current girlfriend. Kyzar told McAlpin that Barbaro had given him the information about drugs being in Smith's truck. Kyzar told McAlpin that he had no independent knowledge about the drugs and knew only what Barbaro had told him. McAlpin testified that the drug charge against Smith was being remanded to the file. McAlpin explained that the

charge was not going to be pursued because Kyzar's tip was suspicious and, based on totality of the circumstances, Smith appeared to have been setup.

¶23. Kyzar also testified. He acknowledged that he had been engaged to Mitchell, who was dating Smith at the time of the hearing. Kyzar knew Barbaro through Mitchell, but he testified that he and Barbaro were not friends. In May 2016, Kyzar and Barbaro began talking on the phone and exchanging text messages. According to Kyzar, he wanted to know why Barbaro no longer wanted Mitchell to provide childcare for Will. Kyzar testified that Barbaro said she was concerned because Mitchell tried to buy Adderall from Barbaro.[2] Kyzar also testified that Barbaro contacted him to ask whether he had ever seen Mitchell neglect Will or any other children in her care.

¶24. Kyzar and Barbaro complained to one another about Smith and Mitchell. Kyzar testified that Barbaro told him that Smith had abused drugs in the past, and she suspected that he was using steroids again. Barbaro said that if Smith was using steroids, he was probably selling them too. Kyzar testified that Barbaro believed Smith's drug use was putting Will at risk. According to Kyzar, he decided to call Tatum[3] after Barbaro told him that Will had tested positive for drugs.

¶25. Kyzar testified that he told Tatum only that Barbaro suspected that Smith might be using and selling drugs and might be drugging Will. Kyzar denied telling Tatum that Smith definitely had drugs in his truck. Kyzar also denied stating that the drugs would be in

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[2] Mitchell denied this allegation.

[3] Kyzar could not recall Tatum's name. Kyzar knew Tatum from a prior case in which Kyzar was the victim of an assault.

Smith's toolbox or that Smith was in possession of specific drugs. Kyzar acknowledged that he provided the make and model of Smith's truck, Smith's address, Smith's employer, and the time that Smith left work. Kyzar stated that he provided that information only because an officer asked for it. Kyzar obtained that information from Barbaro, and he testified that Barbaro knew about his tip to law enforcement. An officer told Kyzar about Smith's arrest on the day it happened, and Kyzar immediately informed Barbaro.

¶26. Kyzar denied that he planted drugs in Smith's truck or helped Barbaro create a false drug test result for Will. Kyzar claimed that he had never been to Barbaro's house prior to Will's positive drug test. Kyzar testified that he was a home health nurse, and he admitted that he does have some access to patients' drugs. Much of Kyzar's testimony was rambling, contradictory, and difficult to follow.

¶27. After Kyzar testified, Barbaro testified again. In contrast to her testimony at the hearing a few weeks earlier, Barbaro testified that Will was "agitated," "restless," and "very fussy" when Smith returned him to her on May 15. Barbaro testified that Will became "very lethargic" and even "passed out" after they left Capital DNA. She testified that Will looked different than he did in the photographs taken of him only fifteen to twenty minutes prior to the custody exchange.

¶28. Barbaro testified that Will could not provide a urine sample while they were at Capital DNA on May 15. She testified that they left Capital DNA with Will still wearing the urine collection bag and that there was a sample in the bag when they returned home. Barbaro testified that she poured the sample into a cup. She left the cup on her counter overnight and

returned it to Brandy Jones the following morning.[4]

¶29. Barbaro testified that she first contacted Kyzar to ask whether he had ever seen Mitchell neglect Will. She and Kyzar then "vented" about Smith and Mitchell. Barbaro told Kyzar about Smith's prior drug use, and Kyzar asked why she had not reported Smith or pursued drug testing. Barbaro told Kyzar that Smith had refused drug tests in the past, and she did not think that reporting him would do any good. She told Kyzar that Brandy Jones had said that she could have Will tested, which might indicate that Smith was doing drugs in Will's presence.

¶30. According to Barbaro, Kyzar said that he would ask a police officer he knew for advice, and Kyzar later said that the officer wanted to talk to her about Smith. Barbaro testified that she told Kyzar that she did not want to be involved and declined to talk to the officer. Kyzar later told her that he could talk to the officer for her. Barbaro then provided Kyzar with Smith's address and vehicle information. According to Barbaro, Kyzar said that the officer only wanted to keep an eye out for Smith in case he was driving under the influence. Barbaro acknowledged that she and Kyzar discussed Smith's arrest on the day it occurred. However, Barbaro said that she learned of the arrest from Smith's stepmother, Renee Smith. Barbaro claimed that she did not intend to cause Smith to be arrested; she only wanted the police to keep an eye out for him in case he was driving under the influence.

¶31. The GAL testified about his investigation. The GAL testified that Barbaro had told

[4] Jones was unable to recall whether Barbaro and Will left Capital DNA on May 15. Barbaro did not address that issue when she testified previously at the May 31 hearing on her emergency motion to suspend Smith's visitation.

him that she returned to Capital DNA with Will's urine sample the evening of Sunday, May 15. That statement conflicted with her testimony in court, which was that she kept the sample in her house overnight and returned it on May 16.[5]

¶32. The GAL obtained photographs of Will that Smith's mother (Gail Hopkins) took shortly before Smith returned Will to Barbaro on May 15. The photos show Will smiling, happy, and seemingly normal. Hopkins and Brandy Jones told the GAL that Will did not appear lethargic on May 15.

¶33. The GAL investigated the two substances that were allegedly found in Will's urine. The GAL doubted that a child of Will's age and size could receive a significant dose of the drugs and still be playing normally and happily, as shown in photos and described by others who saw him on May 15. The GAL did not believe Barbaro's claim that Will was lethargic, which was contradicted by all other witnesses who saw Will that day.

¶34. The GAL interviewed McAlpin and Tatum, and he concluded that McAlpin testified truthfully that he received a very specific tip that certain drugs would be found in the toolbox of Smith's truck. The GAL concluded that Kyzar had a motive to lie—Smith's relationship with Mitchell—and was being untruthful when he testified that he did not provide specific information to law enforcement. The GAL also concluded that Barbaro was being untruthful when she claimed that she did not know about the nature of Kyzar's tips to law enforcement. The GAL interviewed Barbaro for approximately two and a half hours and asked repeatedly whether she knew anything about the circumstances of Smith's arrest, but Barbaro never

[5] Barbaro later testified that she misspoke when she made this statement to the GAL.

mentioned that Kyzar had provided any information to law enforcement.

¶35. The GAL concluded that Barbaro was involved in tampering with Will's drug test and planting drugs in Smith's truck. The GAL also concluded that it was in Will's best interest to grant Smith custody and restrict Barbaro's visitation.

¶36. The hearing on the GAL's motion did not conclude on the first day. Nonetheless, at the end of the first day, the chancellor reinstated Smith's summer visitation, which he had previously suspended in response to Barbaro's emergency motion. The chancellor also stated that the disputed urine sample should be subjected to DNA testing.

¶37. When the hearing reconvened two months later, the GAL testified that Will's urine sample had only recently been submitted for DNA testing and that he had not received the results yet. The GAL reported that the laboratory was "not very hopeful" that there would be any identifiable DNA in the sample. The GAL indicated that the delay in submitting the sample for further testing was due to his two-week delay in issuing a subpoena and the parties' subsequent delay in paying for the test.

¶38. The GAL testified that he had interviewed Smith's father and stepmother, Mark and Renee Smith. Neither of them had a close relationship to Smith, but they remained close to Barbaro and provided childcare for Will on a daily basis.

¶39. The GAL testified that it would concern him if Smith was abusing hydrocodone. Smith's May 31 urine test was negative, but his hair follicle test indicated prior use of the drug. A doctor had written Smith a prescription for a codeine cough syrup. Testimony indicates that the prescription for cough syrup was written sometime after Smith's May 13-15

visit with Will but prior to his May 25 arrest.

¶40. Jesse Tatum, an officer with the Jackson Police Department, testified that, months earlier, Kyzar had called him out of the blue and told him that Coty Smith would have large amounts of controlled substances in his truck on his way home from work. Kyzar told Tatum that he had received this information from Barbaro. Tatum testified that Kyzar might have said that the drugs would be in the toolbox of Smith's truck, and Tatum thought that Kyzar had mentioned marijuana and other drugs. However, Tatum could not recall the specifics of his conversation with Kyzar, and he could not be certain whether Kyzar mentioned the toolbox or multiple specific drugs. Tatum conveyed Kyzar's tip to an officer with the Rankin County Sheriff's Department.

¶41. Smith's stepfather, Benny Hopkins, testified that Smith was a loving and attentive father. Hopkins did not recall Will behaving unusually or seeming lethargic the weekend of May 13-15. Hopkins had never seen anyone give Will any medicine that was not prescribed for him.

¶42. Smith's father, Mark Smith, testified that he had paid Barbaro's part of the bill for DNA testing. Smith later confronted him about it. Mark Smith testified that Smith angrily told him, "You've paid for a test that could have my son taken away from me."

¶43. Renee Smith, Smith's stepmother, testified that Barbaro was a good mother. Renee Smith testified that she had not spent much time with her stepson in two years, so she did not have an opinion of his parenting abilities. Renee Smith also testified that she and Barbaro are friends and that Barbaro had been "part of the family" since Will was born. She did not

know whether her stepson was using drugs, although she knew that he had in the past.

¶44. Brittany Baker, a friend of Barbaro, testified that Will had been fearful and clingy since he returned home from his summer visitation with Smith. Baker testified that she had witnessed Smith drink too much, although not in the prior ten months. Baker knew Smith because she had once dated his brother. However, she testified that Barbaro was her best friend, and Barbaro had told her that Smith was trying to take Will away.

¶45. Barbaro testified again on the second day of the hearing, and she was questioned about when and how she became aware that Will's May 15 urine sample had tested positive for opioids. Barbaro sent Smith a text message on May 18 in which she specifically asserted that Will "had a positive drug test" "[f]or hydrocodone." However, the lab report submitted to the court showed that the test results were not reported until May 20. Barbaro testified that although she did not know how to interpret the "instant-read" cup that she used to collect the urine sample, Jones told her that "it looked like [the test] was positive" for "some type of drugs in [Will's] system." Barbaro also testified that she may have seen a different report than the one submitted to the court, which showed that results were not reported until May 20. Barbaro again denied that she tampered with the urine sample or played any role in Smith's arrest. Barbaro also testified that Will had been very "clingy" and had regressed in his potty training since he returned home from visitation with Smith.

¶46. Smith testified that his summer visitation with Will went well and that Will seemed normal. He also testified that the drug charge against him had been remanded to the file.

¶47. At the conclusion of the hearing, the chancellor agreed with the GAL that Smith

should have temporary physical custody of Will. Barbaro was granted liberal visitation, but all visits were to be supervised by Mark or Renee Smith.

Hearing on Smith's Motion for Modification of Custody

¶48. In August 2016, Smith filed a motion for a permanent modification of custody. The chancery court held a hearing on Smith's motion in December 2016.

¶49. Smith testified that Will had been healthy and had only taken allergy medicine since the court granted him temporary custody in August. Smith testified that he worked from 7:30 a.m. to 5:30 p.m., so he took Will to stay with Gail Hopkins (Smith's mother) around 6:45 a.m. on days that he worked. Hopkins did not start work until later in the morning, so she took Will to daycare in the morning. Hopkins also picked Will up from daycare at 4 p.m. and kept him until Smith got off of work. Smith typically picked Will up at Hopkins's house around 6:30 p.m. Will also spent the night at Hopkins's house once or twice a week.

¶50. Smith testified that he did not believe that Barbaro would physically harm Will, but he did believe that Barbaro would use Will in emotionally damaging, manipulative ways in an effort to keep him from Smith. Smith testified that Barbaro should receive standard visitation but only after successfully completing a period of more limited, supervised visitation. Smith stated that it was important for Will to see his mother.

¶51. Barbaro testified again that she did not know that Kyzar had told law enforcement that Smith had drugs in his truck. She claimed that she thought that she was just "venting" to a friend about Smith. She insisted that she gave Kyzar Smith's vehicle information only because she thought that Kyzar would ask his friends in law enforcement to be on the lookout

for Smith in case he was driving under the influence. Barbaro denied any intentional involvement with planting drugs in Smith's car. She also stated that she never intended to mislead the court. She testified that her prior attorney may have given her bad advice about what to disclose or emphasize in her testimony at prior hearings.[6]

¶52. Later in the hearing, Barbaro testified again about the text message that she sent to Smith on May 18, 2016, in which she specifically asserted that Will had tested positive for "hydrocodone." Barbaro testified that she made that statement because Brandy Jones had said that the positive result from the instant-read cup was "probably hydrocodone":

> [W]hen I gave [the cup] to [Jones on May 16] when she met me. She said opiates. And I said what does that mean? And she said she couldn't say. And so I checked with her on [May 17] and she didn't have anything back . . . . I had checked with her on [May 18] . . . , and she said she didn't know. And I said, well, what does that mean? I said what is opiates? What would that be? And she finally said probably hydrocodone. She said I can't say for certain, she would -- that's the only thing I can think of would be hydrocodone.

This was the first time during any of the hearings that Barbaro had offered this explanation. Jones did not mention any of these alleged conversations in her own testimony.

¶53. Barbaro also attempted to explain her prior, contradictory testimony about Will's demeanor on May 15. She said that Will was not groggy when she picked him up, but he fell asleep in the car on the way to Capital DNA. When she woke him up and took him inside, he was agitated and restless.

¶54. Finally, Barbaro testified that she thought it was likely that Kyzar planted drugs in Smith's truck. Barbaro said that she realized that she was wrong to trust Kyzar and that

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[6] Barbaro hired new counsel prior to the hearing on Smith's motion for a permanent modification of custody.

Kyzar was not a good person. However, she also testified that the steroids found in Smith's truck were the same type that she had found in Smith's possession in the past.

¶55. Smith's stepmother, Renee Smith, testified that Barbaro was a good mother. Renee testified that Barbaro was like a daughter to her, and she had no concerns about Barbaro as a parent. Barbaro had essentially moved in to Renee and Mark Smith's home during her supervised weekend visits. Because Renee was required to supervise the visits, she had observed Barbaro and Will extensively. Renee believed that Will was much more clingy since the custody change and became upset if Barbaro left his sight.

¶56. Mark Smith agreed that Barbaro's supervised visits had gone well. He thought that Barbaro was a good mother, if somewhat overprotective. He said that if Barbaro played a role in planting drugs or fabricating a drug test, she might be a bad person, but she was still a good mother. He admitted that he did not have a good relationship with his son and, thus, had not seen much of his son's parenting abilities. Nonetheless, he thought that Barbaro was the better parent.

¶57. The GAL testified regarding his recommendation that the court grant Smith permanent custody. The GAL believed that Barbaro had been untruthful about Will's drug test and her involvement in Smith's arrest. The GAL did not believe that Will had ingested hydrocodone or hydromorphone. He further noted that Barbaro's testimony about Will's demeanor on May 15 had changed repeatedly and was contradicted by contemporaneous photographs and all other witnesses.

¶58. The GAL did not believe that Barbaro was a present danger to Will, but he was

concerned about how Barbaro's actions toward Smith would affect Will. The GAL acknowledged that Will may not have been adversely affected yet—but only because Barbaro's efforts to fake a drug test and plant drugs in Smith's truck were unsuccessful. The GAL recommended that Barbaro should be required to attend counseling to address her apparent issues with Smith.

Chancellor's Final Ruling

¶59. On January 8, 2017, the chancellor announced his ruling. He found a material change of circumstances based on Barbaro's tampering with Will's drug test and participation in a scheme to plant drugs in Smith's trucks. The chancellor also found that Will could have been harmed if Smith had been convicted of drug trafficking and imprisoned. In addition, the chancellor concluded that Will had experienced some harm because he was clingy and insecure after the change in custody that was necessitated by Barbaro's actions. The chancellor next addressed the *Albright*[7] factors and found that it was in Will's best interest to grant Smith physical custody and sole legal custody. The chancellor thus agreed with the GAL's recommendation to modify custody, although he disagreed with some of the specifics of the GAL's *Albright* analysis. The chancellor also ordered Barbaro to undergo a psychiatric evaluation and granted her temporary supervised visitation, subject to review.[8] A final judgment reflecting the chancellor's rulings was entered on January 25, 2017. Barbaro subsequently filed a motion to alter or amend the judgment, which the chancellor

[7] *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983).

[8] In April 2017, the chancellor reviewed the issue of visitation and entered an agreed order allowing Barbaro extensive, unsupervised visitation.

denied, and a notice of appeal.

¶60. On appeal, Barbara argues that the chancellor erred by denying her post-trial motion as untimely; by finding that she tampered with Will's urine sample and participated in a scheme to plant drugs in Smith's truck; by finding a material change in circumstances that adversely affected Will; and by finding that it was in Will's best interest to modify custody. Barbaro also argues that the chancellor erred by giving any weight to the GAL's report. We address these issues below. After review, we affirm.

ANALYSIS

I. Barbaro's motion to alter or amend the judgment was untimely.

¶61. The final judgment modifying custody was entered on January 25, 2017. However, because the case was sealed, the parties did not receive electronic notice of the judgment, and the docket indicates that the clerk did not mail the judgment to the parties until February 1. Barbaro subsequently filed a motion to alter or amend the judgment. Her motion was not stamped "filed" and entered on the docket until February 16. At the hearing on the motion, Barbaro's attorney stated that on February 7 he sent the motion (1) to the clerk by mail and (2) to Smith and the chancellor by email. Smith did not dispute counsel's representations. However, the motion's certificate of service states that it was mailed on *January* 7, which is obviously an error, and the record does not include any emails to Smith or the chancellor. In his bench ruling, the chancellor stated he would deny Barbaro's motion both on the merits and as untimely, and his subsequent written order denied the motion as untimely. On appeal, Barbaro argues that the chancellor erred by denying her motion as untimely.

¶62. Rule 59(e) of the Mississippi Rules of Civil Procedure states that "[a] motion to alter or amend the judgment shall be *filed* not later than ten days after *entry* of the judgment." M.R.C.P. 59(e) (emphasis added). "This ten-day requirement is absolute, and the court is not permitted to extend this time period." *Wilburn v. Wilburn*, 991 So. 2d 1185, 1190-91 (¶11) (Miss. 2008) (quotation marks omitted). A motion is "filed" when it is received by the clerk—not when it is placed in the mail. *Massey v. Oasis Health & Rehab of Yazoo City LLC*, 269 So. 3d 1242, 1250 (¶16) (Miss. Ct. App. 2018). Barbaro's motion to alter or amend the judgment was filed twenty-two days after the judgment was entered. Therefore, the chancellor correctly held that it was untimely.

¶63. On appeal, Barbaro argues that the chancellor made a "mistake of law" by concluding that he lacked discretion to accept her motion for filing by email. She notes that Rule 5(e)(1) provides that motions and other papers "shall" be filed "with the clerk of the court, *except that the judge may permit the papers to be filed with him*, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk." M.R.C.P. 5(e)(1) (emphasis added). However, Barbaro was already outside of Rule 59's ten-day time limit by the time she allegedly emailed her motion to the chancellor on February 7. Therefore, this argument is without merit.

¶64. Barbaro also argues that we should require trial courts to apply a "mailbox rule" for pleadings in sealed cases. She relies on the "prison mailbox rule," which holds that a pro se prisoner's pleadings are deemed "filed" when they are delivered to prison authorities for mailing. *See Easley v. Roach*, 879 So. 2d 1041, 1042-43 (¶¶4-6) (Miss. 2004); *Sykes v. State*,

757 So. 2d 997, 1000-01 (¶14) (Miss. 2000). She asks us to adopt a similar rule for sealed cases. We decline to do so for two reasons: First, Barbaro's motion was already untimely when it was allegedly mailed on February 7.[9] Thus, a "mailbox rule" would not be of any help to Barbaro. Second, the prison mailbox rule is based on the unique "disadvantages" facing incarcerated litigants, including their inability to "personally deliver [their] papers to the court" and their lack of "access to . . . other means of rapid delivery." *Sykes*, 757 So. 2d at 1000 (¶10). Litigants in sealed cases do not face these same issues. A litigant in a sealed case can hand-deliver a motion to the clerk for filing.

¶65. Finally, we note that the chancellor's ruling that Barbaro's motion was untimely does not have any practical effect on our resolution of this appeal. As noted above, the chancellor also stated in his ruling from the bench that he would deny Barbaro's motion on its merits. Moreover, Barbaro's motion essentially asked the chancellor to reconsider and reverse his ruling on Smith's motion to modify custody. Barbaro preserved those issues for appeal by litigating them at trial, and we address her arguments on the merits below. Therefore, while the chancellor did not err by denying Barbaro's Rule 59 motion as untimely, we will still proceed to address the merits of Barbaro's arguments related to Will's custody.[10]

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[9] We note again that there is no evidence in the record that the motion was mailed on February 7. All we can say is that the certificate of service erroneously states that the motion was mailed on January 7, and the motion was not filed with the clerk until February 16.

[10] Rule 4(d) of the Mississippi Rules of Appellate Procedure provides that if a party files a "timely" motion to alter or amend the judgment under Rule 59, then the time for appeal runs from the date of the order disposing of the motion rather than the original judgment. M.R.A.P. 4(d). As explained above, Barbaro's motion was *not* timely. However, in the chancery court, Smith did not argue that Barbaro's motion was untimely. Rather, the chancellor raised the issue sua sponte at the hearing on the motion. Because Smith did not

II. The chancellor's findings are not clearly erroneous.

¶66. Barbaro next challenges the chancellor's factual findings that she tampered with Will's drug test and played a role in planting drugs in Smith's truck. She also argues that the chancellor erred by finding a material change in circumstances and adverse impact to Will. Finally, she challenges the chancellor's *Albright* analysis. We address these issues in turn. "Our scope of review in domestic relations matters is limited by the familiar substantial evidence/manifest error rule." *Mizell v. Mizell*, 708 So. 2d 55, 59 (¶12) (Miss. 1998). "This Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Id.* at (¶13) (quoting *Bell v. Parker*, 563 So. 2d 594, 596-97 (Miss. 1990)). "In other words, on appeal we are required to respect the findings of fact made by a chancellor supported by credible evidence and not manifestly wrong." *Id.* (brackets and quotation marks omitted).

A. The chancellor did not clearly err by finding that Barbaro tampered with Will's drug test.

¶67. Barbaro claims that there was insufficient evidence to show that she tampered with, altered, or falsified Will's urine sample. She further argues that the best evidence on this issue—a DNA test—was unavailable due to delay by the GAL. She asserts that, without a

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raise the issue in the chancery court, he is "procedurally barred" from doing so on appeal. *Wilburn*, 991 So. 2d at 1191 (¶13). Therefore, under our Supreme Court's decision in *Wilburn*, Barbaro's motion is "*deemed* . . . timely" for purposes of calculating her deadline for filing a notice of appeal. *Massey*, 269 So. 3d at 1250-51 (¶18) (citing *Wilburn*). The chancellor denied Barbaro's motion to alter or amend the judgment on May 26, 2017, the thirtieth day thereafter was Sunday, June 25, and Barbaro filed her notice of appeal on Monday, June 26. Therefore, Barbaro's notice of appeal is considered timely under *Wilburn*, and we have jurisdiction to decide the appeal.

DNA test, the only evidence against her was "speculation and conjecture." We disagree.

¶68. Even if a DNA test had established that the sample was Will's, that would not have excluded the possibility that Barbaro was responsible for the positive test. Moreover, the evidence presented at trial supported the chancellor's finding that Barbaro tampered with the test. Smith and Hopkins both testified that Will was behaving normally and was not groggy or lethargic prior to the custody exchange on May 15. Contemporaneous photographs also showed Will playing happily around that time. Brandy Jones testified that eighteen-month-old Will was understandably agitated while at Capital DNA—not groggy or lethargic. Finally, Barbaro's own testimony about Will's behavior shifted repeatedly over time, and the chancellor found that she was not a credible or truthful witness.

¶69. In addition, no one observed Barbaro collect the sample from Will, and she left it sitting out in her home overnight. The sample tested positive for significant levels of hydrocodone and hydromorphone, both powerful opioids. The GAL and the chancellor could reasonably find that a child of Will's size and age could not have ingested significant levels of those drugs without showing any adverse effects.

¶70. Finally, Barbaro told Smith that Will "had a positive drug test" "[f]or hydrocodone" two days before she received the results of the test. Barbaro's explanation for her text message changed repeatedly and lacked any corroboration. Based on all of the evidence in the record, we cannot say that the chancellor committed clear error by finding that Barbaro tampered with the test.

B. The chancellor did not clearly err by finding that Barbaro participated in a scheme to plant drugs in Smith's truck.

¶71. There was also substantial evidence to support the chancellor's finding that Barbaro participated in a scheme to plant drugs in Smith's truck. As discussed above, law enforcement officers testified that Kyzar provided an unusually detailed tip that Smith would be transporting drugs in his truck, and the drugs were found in the precise location (the unlocked toolbox) and at the precise time predicted by Kyzar. Kyzar testified and told Tatum that Barbaro had provided him with the information for the tip, although he denied providing detailed information about the type of drugs or their location. When Smith was stopped, he consented to a search of his truck, he seemed genuinely surprised when the drugs were found, and he denied any knowledge of the drugs. McAlpin ultimately concluded, based on the totality of the circumstances, that Smith had been setup. As a result, the charges against Smith were remanded to the file. Based on all of the evidence, the chancellor did not clearly err by finding that Barbaro participated in a scheme to plant drugs in Smith's truck.

C. The chancellor did not clearly err by finding a material change in circumstances that adversely affected Will.

¶72. A party who requests a modification of child custody "must prove by a preponderance of evidence that, since entry of the judgment or decree sought to be modified, there has been a material change in circumstances which adversely affects the welfare of the child." *Riley v. Doerner*, 677 So. 2d 740, 743 (Miss. 1996) (quoting *Ash v. Ash*, 622 So. 1264, 1265 (Miss. 1993)) (emphasis omitted). The chancellor must consider the "totality of the circumstances" to determine whether such a change in circumstances has occurred. *Id.* (quoting *Tucker v. Tucker*, 453 So. 2d 1294, 1297 (Miss. 1996)). "[I]f such an adverse change has been shown, the moving party must show by [a preponderance of the] evidence that the best interest of the

child requires the change of custody." *Id.* (quoting *Ash*, 622 So. 2d at 1266).

¶73. The chancellor found that Barbaro's participation in a scheme to plant illegal drugs in Smith's truck and her tampering with Will's drug test had resulted in a material change of circumstances. The chancellor also found that Barbaro's actions had necessitated restrictions on visitation and an abrupt, emergency change in custody, which adversely affected Will—as shown by his being more clingy and insecure. Finally, citing *Riley*, *supra*, the chancellor found "that there could have been [additional] adverse harm to [Will] had Barbaro's actions been successful" because the "father-child relationship would have been severed."

¶74. Barbaro argues that the chancellor erred because the evidence generally showed that she was a fit parent and even a good mother and because Will had not yet suffered harm. She further argues that even if she did help plant drugs or falsified a drug test, the charges against Smith were ultimately dropped, and the "alleged threat of harm is moot."

¶75. Barbaro's argument takes too narrow a view of the concept of a material and adverse change in circumstances. In addressing this issue, the chancellor must consider the "totality of the circumstances." *Riley*, 677 So. 2d at 743 (quoting *Tucker*, 453 So. 2d at 1297). "The concept [of a material change in circumstances that adversely affects the child] is intended to encompass its broadest possible meaning in order to protect children," including but not limited to changes that adversely affect the "child's mental and emotional well-being." *Marter v. Marter*, 914 So. 2d 743, 748-49 (¶14) (Miss. Ct. App. 2005) (citing *Bredemeier v. Jackson*, 689 So. 2d 770, 775 (Miss. 1997)).

¶76. In *Riley*, the Supreme Court held that "where a child living in a custodial environment clearly adverse to the child's best interest, somehow appears to remain unscarred by his or her surroundings, the chancellor is not precluded from removing the child for placement in a healthier environment." *Riley*, 677 So. 2d at 744. The Court held that a change in custody may be warranted "even without a specific finding that such environment has adversely affected the child's welfare. A child's resilience and ability to cope with difficult circumstances should not serve to shackle the child to an unhealthy home, especially when a healthier one beckons." *Id.* The Court stated that "[t]he test . . . for custody modification need not be applied so rigidly, nor in such a formalistic manner so as to preclude the chancellor from rendering a decision appropriate to the facts of an individual case. In particular, it should not thwart the chancellor from transferring custody of a child from one parent to another when, in the chancellor's judgment, the child's welfare would be best served by such transfer." *Id.* at 745.

¶77. As we have explained above, there is substantial evidence to support the chancellor's factual findings that Barbaro participated in a scheme to plant drugs and tampered with Will's drug test. The chancellor further found that Barbaro's extreme conduct threatened harm to Will because, if successful, it would have resulted in Smith's imprisonment and likely severed the father-child relationship. The chancellor concluded that this clear threat of harm to Will was a material and adverse change in circumstances—even though, thankfully, Barbaro was not successful, and the specific threat to Will was averted. We cannot say that the chancellor clearly erred or abused his discretion by applying the Supreme

Court's decision in *Riley* to the facts of this case. *Riley* recognizes that a parent's conduct that threatens harm to a child may rise to the level of a material and adverse change in circumstances even if the child "somehow appears to remain unscarred." *Id.*; *accord Johnson v. Gray*, 859 So. 2d 1006, 1014 (¶39) (Miss. 2003).

¶78. Moreover, there is substantial evidence to support the chancellor's finding that Will had already been adversely affected by Barbaro's conduct. Barbaro's conduct necessitated restrictions on Smith's visitation and then an abrupt, emergency change of custody and restrictions on Barbaro's visitation. These events would not have occurred but for Barbaro's misconduct. Furthermore, witnesses testified, and the chancellor found, that these changes caused Will to be more clingy and insecure.

¶79. In summary, the chancellor did not clearly err or abuse his discretion by applying *Riley* to the facts of this case or by finding a material change in circumstances that adversely affected Will. Therefore, the chancellor appropriately proceeded to consider whether a change in custody would be in Will's best interest. *See Riley*, 677 So. 2d at 743.

D. The chancellor did not clearly err or abuse his discretion by finding that a change in custody was in Will's best interest.

¶80. In any child custody case, "[t]he polestar consideration . . . is the best interest and welfare of the child." *Albright*, 437 So. 2d at 1005. In a custody modification case, if the chancellor finds a material and adverse change in circumstances, "the chancellor must then perform an *Albright* analysis to determine whether modification of custody is in the child's best interest." *Heisinger v. Riley*, 243 So. 3d 248, 256 (¶29) (Miss. Ct. App. 2018) (quoting *Strait v. Lorenz*, 155 So. 3d 197, 203 (¶20) (Miss. Ct. App. 2015)).

¶81. The chancellor in this case conducted the required *Albright* analysis. He found that several of the *Albright* factors favored Smith, that one factor (continuity of care) favored Barbaro, and that the remaining factors were neutral. After considering all relevant factors, the chancellor found that it was in Will's best interest to modify custody. On appeal, Barbaro argues that the chancellor erred in his overall determination of Will's best interest and in his subsidiary findings regarding nine of the eleven *Albright* factors. The only findings that Barbaro does not challenge are that continuity of care favored her and that Will was too young to express a preference regarding custody. We will address each of Barbaro's various arguments in turn below.

¶82. "A chancellor's custody decision will be reversed only if it was manifestly wrong or clearly erroneous, or if the chancellor applied an erroneous legal standard." *Smith v. Smith*, 97 So. 3d 43, 46 (¶7) (Miss. 2012). "[T]his Court cannot reweigh the evidence and must defer to the chancellor's findings of the facts, so long as they are supported by substantial evidence." *Hall v. Hall*, 134 So. 3d 822, 828 (¶21) (Miss. Ct. App. 2014). The issue is not whether this Court "agrees with the chancellor's ruling," but only whether "the chancellor's ruling is supported by credible evidence." *Hammers v. Hammers*, 890 So. 2d 944, 950 (¶14) (Miss. Ct. App. 2004). We review the chancellor's application of the *Albright* factors for manifest error, giving deference to the weight that he assigned to each factor. *Smith v. Smith*, 206 So. 3d 502, 513 (¶24) (Miss. 2016).

1. Age, Health, and Sex of the Child

¶83. The chancellor found that Will's age, sex, and health slightly favored Smith. Barbaro

argues that the chancellor failed to consider that she is a nurse and is "best equipped to care for [Will's] healthcare needs." She also argues that she has been primarily responsible for taking Will to the doctor, while Smith has not attended Will's doctor's appointments. However, this particular factor focuses on the child's health, not parenting skills or the parents' employment, which are covered by other *Albright* factors.

¶84. Barbaro also argues that Will's age favors her. This Court recently summarized the history and present state of the law on this issue:

> Prior to the 1980s, our Supreme Court "held that if the mother of a child of tender years . . . is . . . fit, then she should have custody." *Law v. Page*, 618 So. 2d 96, 101 (Miss. 1993). However, "over the years, the tender-years doctrine has been diminished and is now only a presumption." *Smith v. Smith*, 206 So. 3d 502, 513 (¶26) (Miss. 2016) (citing *Law*). "The doctrine is 'even less binding when the child is male.'" *Id.* (quoting *Law*). Today, "age is only one of several factors to be considered" under *Albright*. *Id.* (quoting *Mercier v. Mercier*, 717 So. 2d 304, 317 (¶14) (Miss. 1998)).

Harden v. Scarborough, 240 So. 3d 1246, 1252 (¶13) (Miss. Ct. App. 2018). This Court also noted that "[i]n 2000, the Legislature amended Mississippi Code Annotated section 93-5-24 to provide specifically that there 'shall be no presumption that it is in the best interest of a child that a mother be awarded either legal or physical custody.'" *Id.* at 1252 n.2 (quoting Miss. Code Ann. § 93-5-24(7) (Rev. 2013)). Nonetheless, our "Supreme Court has continued to discuss a tender years 'presumption.'" *Id.* (citing *Smith*, 206 So. 2d at 513 (¶26)).

¶85. However, under this same factor, the chancellor must also consider the child's sex. *Albright*, 437 So. 2d at 1005. "[A] chancellor may find that [the child's sex] does or does not weigh in favor of the parent of the same sex as the children, depending on the specific facts of the case." *Jackson v. Jackson*, 82 So. 3d 644, 646 (¶8) (Miss. Ct. App. 2011). Thus,

a chancellor may determine that the sex of a male child weighs in favor of granting custody to the father. *See, e.g.*, *Klink v. Brewer*, 986 So. 2d 1060, 1063-64 (¶13) (Miss. Ct. App. 2008). "What weight to assign to this fact in the *Albright* analysis is entrusted to the chancellor's sound discretion . . . . This is a finding of fact that cannot be disturbed on appeal absent a clear showing of an abuse of discretion . . . ." *Id.* In this case, the chancellor apparently assigned slightly greater weight to the child's sex than to the child's age. We cannot say that the chancellor abused his discretion by finding that this factor, as a whole, slightly favored Smith.

2. Parenting Skills

¶86. The chancellor found that the parenting skills factor slightly favored Smith. The chancellor stated that Smith and Barbaro both had good parenting skills and had capably cared for Will during their respective periods of custody. However, the chancellor also stated that Barbaro demonstrated poor judgment by involving herself with Kyzar and his drug-planting scheme, which reflected negatively on her parenting skills.

¶87. On appeal, Barbaro asserts that "Smith's mother . . . cares for [Will] in Barbaro's absence" and that there is "[n]o evidence . . . of Smith's parenting skills." However, this is simply Barbaro's own view of conflicting evidence. Multiple witnesses testified that Smith was a good father and provides day-to-day care.

¶88. Barbaro also asserts that the chancellor failed to consider Smith's alleged recreational drug use. However, the chancellor merely commented that Smith's positive hair follicle test could indicate prior recreational use of hydrocodone. There was no finding that Smith had

any present problem with drugs. Based on all of the evidence, we cannot say that the chancellor abused his discretion by finding that this factor slightly favored Smith.

3. Willingness and Capacity to Provide Primary Child Care

¶89. The chancellor found that both parties had the willingness and capacity to provide care, but he found that Barbaro's manipulation and withholding of visitation was relevant to her capacity to provide care. The chancellor found that this factor slightly favored Smith.

¶90. On appeal, Barbaro argues that Smith was unwilling to provide primary child care because he relies heavily on his mother (Hopkins). Barbaro points out that Smith takes Will to Hopkins's house each morning before work and that Will spends up to two nights per week with Hopkins. She argues that Smith spends less than two hours a day with Will, whereas she spends "every minute of her visitation with [him]."

¶91. However, Smith testified that he takes Will to Hopkins's house in the mornings because he has to get to work, Will's daycare is not open yet, and Hopkins likes to spend time with Will before she goes to work. Hopkins also picks Will up from daycare and keeps him until Smith gets off of work. But reliance on family members for such help does not necessarily demonstrate an unwillingness or incapacity to provide care. Moreover, while there was evidence that Barbaro spends "every minute of her visitation with [Will]," Barbaro also has a full-time job. Clearly, she could not spend "every minute" with Will if she had permanent custody. Based on all of the evidence, we cannot say that the chancellor abused his discretion by finding that this factor slightly favors Smith. When, as in this case, parents must share time with their child, the chancellor may consider their ability and willingness to

cooperate with one another. The chancellor did not abuse his discretion by considering Barbaro's prior interference with Smith's visitation.

4. Employment of the Parent and Responsibilities of that Employment

¶92. The chancellor found this factor to be neutral. Both parents have steady, full-time jobs, but Barbaro asserts that this factor favors her because her current work hours would permit her to take Will to daycare in the morning and pick him up in the late afternoon without additional help from family members or others. However, the parties work similar hours, and there was no evidence that Smith's job had interfered with his ability to care for Will. Therefore, we cannot say that the chancellor abused his discretion by finding that this factor was neutral. *See Harden*, 240 So. 3d at 1253 (¶19) (affirming a chancellor's finding that this factor was neutral despite one parent's more flexible work schedule).

5. Physical and Mental Health of the Parties

¶93. The chancellor found that this factor favored Smith because Barbaro's misconduct raised questions about her mental health. On appeal, Barbaro points out that her subsequent court-ordered psychological evaluation did not identify any mental health issues, and she argues that the chancellor should have addressed Smith's prior drug use and positive drug test. However, as noted above, there was no evidence that Smith presently has a drug problem. We again find no clear error or abuse of discretion with respect to this finding.

6. Emotional Ties Between Parent and Child

¶94. The chancellor found that Will had a close bond with both of his parents and that this factor was neutral. Barbaro argues that Will is closer to her, but there is substantial evidence

to support the chancellor's finding.

7. Moral Fitness of the Parents

¶95. The chancellor found that this factor was neutral and that neither party was morally unfit at the time of the hearing. Barbaro again argues that this factor favors her because of Smith's prior drug use and positive drug test. However, we have addressed those issues above. We find no clear error or abuse of discretion.

8. Home, School, and Community Record of the Child

¶96. The chancellor found that this factor was neutral due to Will's young age. Barbaro disagrees. She argues that this factor favors her because Smith moved Will to a different daycare after the chancellor had "instructed" Smith to leave Will in the same daycare. However, no such instruction was given. The chancellor simply made a comment that he "would prefer" that Will stay in the same daycare, but the chancellor then recognized that Smith would have discretion as the custodial parent to make that decision based on his own work schedule and other "logistics." Barbaro's argument is without merit.

9. Stability of the Home Environment

¶97. The chancellor found that both parents had a stable home in a physical sense, but he found that Barbaro's misconduct and involvement with Kyzar had made her home less stable and necessitated an emergency change in custody. Therefore, the chancellor found that this factor slightly favored Smith. Barbaro argues that the chancellor erred because there was no testimony that her home environment directly harmed Will. However, the issues that the chancellor considered under this heading were relevant to Will's best interest, and we cannot

say that he abused his discretion by finding that the factor slightly favored Smith.

10. Will's Best Interest

¶98. Barbaro complains that the chancellor's *Albright* analysis gave too much weight to what she euphemistically refers to as "an isolated set of circumstances." However, there is substantial evidence to support the chancellor's findings that Barbaro participated in a scheme to plant drugs in Smith's truck and tampered with her son's drug test. Those are serious matters, and the chancellor did not abuse his discretion by weighing them heavily in his *Albright* analysis. As stated above, our standard of review in custody cases is deferential. We "cannot reweigh the evidence and must defer to the chancellor's findings of the facts, so long as they are supported by substantial evidence." *Hall*, 134 So. 3d at 828 (¶21). We also give deference to the weight that the chancellor assigned to each factor. *Smith*, 206 So. 3d at 513 (¶24). The chancellor's factual findings are not clearly erroneous, and he did not abuse his discretion in applying the *Albright* factors. Accordingly, we find no reversible error in the chancellor's *Albright* analysis.

III. The chancellor did not commit any error in his consideration of the GAL's report.

¶99. Finally, Barbaro makes two arguments related to the GAL's report. First, she argues that the chancellor erred by failing to specify the reasons for and extent of his disagreement with the GAL's report. Second, Barbaro argues that the chancellor should have "disregard[ed] the entire report of the [GAL]" because the GAL was biased and "performed his role in this case as a prosecutor." These arguments are without merit.

¶100. A chancellor is required by law to appoint a GAL in any child custody case in which

there is a "legitimate" charge of abuse or neglect—i.e., an allegation of abuse or neglect that appears to the court to have a "sufficient factual basis." *Carter v. Carter*, 204 So. 3d 747, 758-59 (¶¶50-52) (Miss. 2016); *see* Miss. Code Ann. §§ 93-5-23 & 93-11-65 (Rev. 2018). In such cases, "there is no requirement that the chancellor defer to the findings of the guardian ad litem . . . . Such a rule would intrude on the authority of the chancellor to make findings of fact and to apply the law to those facts." *S.N.C. v. J.R.D. Jr.*, 755 So. 2d 1077, 1082 (¶17) (Miss. 2000). However, the Supreme Court has held that "when a chancellor's ruling is contrary to the recommendation of a statutorily required guardian ad litem, the reasons for not adopting the guardian ad litem's recommendation shall be stated by the court in the findings of fact and conclusions of law." *Id.* at (¶18).

¶101. In this case, Barbaro alleged that Smith had allowed Will to ingest opioids, and her allegation initially appeared to be supported by a positive drug test. Therefore, the chancellor was required by law to appoint a GAL. The GAL recommended that Smith should have custody of Will, and the chancellor's ruling was consistent with that recommendation. The chancellor did state, without elaboration, that he "disagreed with [the GAL's] *Albright* analysis." However, the chancellor is not required to give reasons for every point of analytical disagreement with the GAL. Reasons are required only when "a chancellor's ruling is contrary to the recommendation of a statutorily required [GAL]." *Id.* Here, the chancellor's ruling was consistent with the GAL's recommendation. Accordingly, the chancellor sufficiently addressed the GAL's report.

¶102. Barbaro's arguments that the GAL was biased and acted like a "prosecutor" are also

without merit. The GAL testified that once he concluded that Barbaro was involved in tampering with her son's drug test and planting drug's in Smith's truck, he was no longer "neutral" with respect to the issue of Will's custody. Rather, he concluded—and recommended—that Smith should have custody. The GAL further testified that, based on his investigation, he determined that "Barbaro was guilty" of tampering with the drug test and participating in the drug-planting scheme. Finally, the GAL testified that it was his "job" in this case "to determine whether or not there was abuse and neglect," which he stated was somewhat like the role of a prosecutor. The GAL's testimony does not indicate bias, prejudgment of the case, or an improper view of his role. The GAL's testimony simply reflects that, based on the evidence gathered during his investigation, he had a definite opinion as to which parent should have custody. This was entirely consistent with the court's order, which appointed him to serve "[a]s an arm of the court, to investigate, find facts, and make an independent report to the [c]ourt." The chancellor did not err or abuse his discretion by giving the GAL's opinion some weight.

CONCLUSION

¶103. Barbaro has not shown any reversible error in the proceedings in the chancery court or in the chancellor's decision to modify custody.

¶104. **AFFIRMED.**

BARNES, C.J., CARLTON, P.J., GREENLEE, WESTBROOKS, McDONALD, LAWRENCE AND C. WILSON, JJ., CONCUR. TINDELL AND McCARTY, JJ., CONCUR IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION.