

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-01258-COA

MARY JANE BORDEN

**APPELLANT/CROSS-
APPELLEE**

v.

EDWARD SHANNON BORDEN

**APPELLEE/CROSS-
APPELLANT**

DATE OF JUDGMENT:	06/08/2012
TRIAL JUDGE:	HON. TALMADGE D. LITTLEJOHN
COURT FROM WHICH APPEALED:	LEE COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT:	J. MARK SHELTON JANA L. DAWSON
ATTORNEY FOR APPELLEE:	DAVID O. BUTTS JR.
NATURE OF THE CASE:	CIVIL - CUSTODY
TRIAL COURT DISPOSITION:	PRIMARY PHYSICAL CUSTODY AWARDED TO APPELLEE
DISPOSITION:	AFFIRMED - 01/21/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE IRVING, P.J., ROBERTS AND JAMES, JJ.

ROBERTS, J., FOR THE COURT:

¶1. This appeal arises out of a child-custody dispute between Mary Jane Borden and Edward Shannon Borden (Shannon). The Lee County Chancery Court awarded primary physical custody of the parties' two minor children to Shannon. Mary Jane appeals and claims that the chancellor's application of the factors discussed in *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983), was not supported by substantial credible evidence. Mary Jane also claims that the chancellor awarded custody of the children to Shannon to punish

her for her extramarital communications with other men. Additionally, Mary Jane argues that the chancellor erred by failing to summarize the guardian ad litem's recommendations, and by failing to explain why the chancellor rejected the guardian ad litem's recommendations. Shannon cross-appeals and argues that the chancellor erred by declining to award him reasonable attorney's fees related to his defense against Mary Jane's claim that he had abused the children. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2. Shannon and Mary Jane were married in Memphis, Tennessee, on September 10, 2000. During the marriage, the couple had two children, Elijah (Eli), born December 5, 2002, and William, born November 20, 2006. Shannon worked in a management position for Penske Trucking Company. Mary Jane worked full-time as a nurse at St. Joseph's Hospital. In 2005, the couple moved to Tupelo, Mississippi, due to Shannon's job transfer. Mary Jane continued to work as a nurse in Memphis, but she only worked sixteen days per year. When she worked in Memphis, she stayed there overnight.

¶3. After the move to Tupelo, Mary Jane and Shannon began to experience problems in their marriage. The couple separated on August 16, 2010. Mary Jane picked up the oldest child from school and took both children with her to her parents' home in Tennessee. Mary Jane did not tell Shannon she was leaving. Mary Jane also took her computer with her.¹ Two days later, Shannon filed a complaint for divorce on the grounds of habitual cruel and

¹ Mary Jane's computer was later destroyed. According to Mary Jane, her mother threw her computer away. Mary Jane denied that she attempted to conceal evidence that could have been harmful to her case.

inhuman treatment and irreconcilable differences. On August 20, 2010, Mary Jane filed her answer and counter-complaint for divorce on the same grounds.

¶4. On August 30, 2010, Mary Jane filed a motion to appoint a guardian ad litem and for a forensic examination of the children. According to Mary Jane, Eli and William exhibited behavior that led Mary Jane to believe they had been sexually abused. Although Mary Jane never alleged that anyone in particular had abused the children, she states in her brief that her suspicion of sexual abuse “arose from (1) alarming statements made by the children, and (2) bizarre responses given by Shannon.” The chancellor appointed Jonathan Martin as guardian ad litem to investigate the allegations and represent the interests of the children. The guardian ad litem interviewed Shannon, Mary Jane, their two children, and several other individuals. The guardian ad litem also had polygraph examinations administered to both Mary Jane and Shannon. The results of the polygraph examinations showed that both parties were being truthful. However, the investigation revealed no evidence that the children had been sexually abused. Based on his *Albright* analysis, the guardian ad litem recommended that Mary Jane receive primary physical custody of the children.

¶5. On November 9, 2010, Mary Jane and Shannon entered an agreed temporary order based on the guardian ad litem’s recommendations. The parties were awarded joint legal custody of the children, and Mary Jane was awarded primary physical custody. Shannon was awarded reasonable visitation.

¶6. On November 30, 2010, Shannon filed an amended complaint to include adultery as an additional ground for divorce. Shannon alleged that prior to their separation, Mary Jane had engaged in extramarital affairs with two of her old high-school classmates, Eric Brown

and Brian Hurt. Brown and Hurt both lived in Memphis. Sometime between January 2008 and November 2009, Mary Jane reconnected with Brown and Hurt via Facebook.

¶7. During October 2009, Mary Jane was photographed with both Brown and Hurt at a bar in Memphis. In July 2010, Mary Jane went to a friend's birthday party in Memphis, where both Hurt and Brown were present. Mary Jane admitted to communicating with Hurt and Brown via Facebook, but she denied that she had an extramarital affair with either of them. However, Mary Jane admitted that she engaged in inappropriate sexual communications with Brown through Facebook. She also admitted that she and Brown met in Tupelo during November 2009. Brown picked her up at a shopping center across the street from his hotel room. They then went back to Brown's hotel room, but their meeting was interrupted by a surprise visit by Brown's wife, who confronted Mary Jane regarding her inappropriate Facebook communications with Brown.

¶8. The parties went to trial on August 8-11 and September 26, 2011. During the trial, Shannon introduced a seventy-five page transcript of Facebook chats between Mary Jane and Brown. The chats, which contained numerous sexual references, began in November 2009. Suffice it to say, some of the messages were quite explicit. According to Mary Jane, her inappropriate Facebook chats with Brown occurred during a period where she and Shannon were experiencing difficulties in their marriage. Mary Jane also testified that her children were not home during her inappropriate contact with other men.

¶9. Ultimately, the chancellor found that there was insufficient evidence to award Shannon a divorce from Mary Jane based on adultery. The chancellor also found insufficient evidence to award either party a divorce based on habitual cruel and inhuman treatment.

Thus, the chancellor declined to award a divorce. But the chancellor awarded primary physical custody of the children to Shannon. The chancellor also declined to award Shannon attorney's fees related to the expenses associated with his defense against Mary Jane's claim that the children had been abused. Mary Jane appeals, and Shannon cross-appeals.

STANDARD OF REVIEW

¶10. In cases involving the award of child custody, “[t]his Court will not disturb the factual findings of the chancellor unless [they] are manifestly wrong or clearly erroneous.” *Brekeen v. Brekeen*, 880 So. 2d 280, 283 (¶4) (Miss. 2004) (quoting *Jerome v. Stroud*, 689 So. 2d 755, 757 (Miss. 1997)). “[I]f there is substantial evidence in the record to support the chancellor's findings, we will not reverse.” *Tanner v. Tanner*, 956 So. 2d 1106, 1108 (¶5) (Miss. Ct. App. 2007) (citing *Wilbourne v. Wilbourne*, 748 So. 2d 184, 186 (¶3) (Miss. Ct. App. 1999)).

ANALYSIS

I. CUSTODY

¶11. Mary Jane contends that the chancellor's application of the *Albright* factors was contrary to the weight of the evidence. It is well settled that “the polestar consideration in child[-]custody cases is the best interest and welfare of the child.” *Albright*, 437 So. 2d at 1005. To determine which parent is better suited to have primary physical custody of the children, the chancellor must consider the following factors:

- 1) age, health and sex of the child;
- 2) determination of the parent that had the continuity of care prior to the separation;
- 3) which has the best parenting skills and which has the willingness and capacity to provide primary child care;
- 4) the employment of the parent and responsibilities of that employment;
- 5) physical and mental health and age of the parents;
- 6) emotional ties of parent and child;
- 7) moral fitness of parents;
- 8) the home, school, and community record of the child;
- 9) the preference of the child at the age sufficient to

express a preference by law; 10) stability of home environment and employment of each parent; 11) other factors relevant to the parent-child relationship.

Hollon v. Hollon, 784 So. 2d 943, 947 (¶12) (Miss. 2001) (citing *Albright*, 437 So. 2d at 1005). “All [*Albright*] factors are important, but the chancellor has the ultimate discretion to weigh the evidence the way he sees fit.” *Thurman v. Johnson*, 998 So. 2d 1026, 1030 (¶18) (Miss. Ct. App. 2008) (quoting *Johnson v. Gray*, 859 So. 2d 1006, 1013-14 (¶36) (Miss. 2003)).

¶12. The chancellor found that the following factors favored Shannon: age, health, and sex of the children; parenting skills; willingness and capacity to provide primary child care; moral fitness of the parents; home, school, and community record of the children; and stability of the home environment. The chancellor only found that the continuity-of-care factor favored Mary Jane. The chancellor concluded that the remaining factors did not favor either party. Mary Jane argues that the chancellor punished her for her inappropriate communications with Brown and Hurt by denying her custody of the children. She also argues that the chancellor punished her for her unfounded allegations of child abuse.

¶13. It is undisputed that the guardian ad litem’s investigation revealed no evidence of child abuse. The chancellor considered Mary Jane’s allegations of child abuse under the parenting-skills factor:

[Mary Jane] turns around and tries to bolster her case, I think, really, makes these false accusations, which she later admits[,] and even the guardian ad litem states[,] there was no credible evidence to support them[,] and the polygraph test clearly indicates that, that [Shannon] clearly passed that. There was nothing to that. That’s not a very good parenting skill to advance against the father of your children unless you know it’s for sure.

¶14. We find that the chancellor acted within his discretion when he weighed Mary Jane's allegations under the parenting-skills factor. The chancellor related his analysis of Mary Jane's unfounded accusations to her skills as a parent. It would have been within the chancellor's discretion to conclude that Mary Jane raised those allegations to obtain a tactical advantage against Shannon. And although it is reasonable to conclude that the chancellor did not consider Mary Jane's unfounded allegations favorably to her, nothing suggests that the chancellor intended to punish Mary Jane for them.

¶15. It was also within the chancellor's discretion to negatively weigh Mary Jane's inappropriate and extensive contact with Brown and Hurt. Mary Jane's conduct weighed heavily against her in that the chancellor found that her extramarital contact with the two men negatively affected her responsibility as a parent. The chancellor stated:

[W]e also see that in all of this, [Mary Jane] is making inappropriate contact with these two people that I've already mentioned, Mr. Hurt and Mr. Brown. She should have been at home taking care of those children or should have been with them instead of out partying in Memphis[,] or [wherever] she was[,] at the night spots and going out on the town and meeting with another man here at a motel.

¶16. The record clearly shows that the chancellor carefully weighed each *Albright* factor, and he acted within his discretion when he held that six of those factors favored Shannon, as opposed to only one that favored Mary Jane. Although reasonable minds could weigh the evidence and reach different conclusions, the chancellor did not abuse his discretion when he applied the *Albright* factors. The dissent would reverse the chancellor's judgment and award Mary Jane custody of the children, thus rendering a judgment in Mary Jane's favor. With utmost respect for the dissent, our standard of review does not include reweighing the

evidence or substituting our opinion for the chancellor's. It is the chancellor's responsibility to "hear the evidence, assess the credibility of the witnesses, and determine ultimately what weight and worth to afford any particular aspect of the proof." *Trittle v. Trittle*, 956 So. 2d 369, 373 (¶8) (Miss. Ct. App. 2007). "Even if we would have given greater weight to different testimony, so long as substantial credible evidence supports the chancellor's decision, we will not substitute our opinion for the chancellor's." *Id.* The chancellor could have certainly found that Mary Jane was evasive during her testimony as an adverse witness. We find no merit to Mary Jane's claim that the chancellor awarded Shannon primary custody of the children as a means to punish her for her inappropriate conduct with other men or her false allegations of child abuse. Thus, we affirm the chancellor's award of primary custody to Shannon.

II. RECOMMENDATIONS OF THE GUARDIAN AD LITEM

¶17. Next, Mary Jane argues that the chancellor's failure to provide a summary of the guardian ad litem's recommendations and the reasons that he rejected those recommendations was reversible error. "[T]here is no requirement that the chancellor defer to the findings of the guardian ad litem[.]" *S.N.C. v. J.R.D.*, 755 So. 2d 1077, 1082 (¶17) (Miss. 2000). However, the chancellor "shall include at least a summary review of the qualifications and recommendations of the guardian ad litem in his findings of fact and conclusions of law" when the appointment of a guardian ad litem is statutorily required. *J.P. v. S.V.B.*, 987 So. 2d 975, 982 (¶20) (Miss. 2008) (citing *S.N.C.*, 755 So. 2d at 1082 (¶18)). Further, "if the court rejects the recommendations of the guardian, the court's findings must include its reasons for rejecting the guardian's recommendations." *Id.* (citing *Floyd v. Floyd*,

949 So. 2d 26, 29 (¶8) (Miss. 2007)).

¶18. Mississippi Code Annotated section 93-5-23 (Rev. 2013) requires the appointment of a guardian ad litem when there are allegations of child abuse. Here, the chancellor properly appointed a guardian ad litem after Mary Jane raised her allegations of child abuse. Though the allegations turned out to be unfounded, the guardian ad litem recommended that Mary Jane have primary physical custody of the children. Specifically, the guardian ad litem stated:

[I] would recommend to the Court a finding that it's in the best interest of the minor children that . . . primary physical custody . . . be vested with [Mary Jane], with [Shannon] enjoying visitation as set by this Court.

. . . .

I did not find . . . that [Mary Jane's] conduct reflected on her as a parent but rather as a poor spouse.

Regarding the guardian ad litem's recommendations, the chancellor stated:

I've also considered the . . . guardian ad litem's recommendations here. To some extent, I disagree with those, and to some extent, I've agreed. But I find under the circumstances and based on these factors under *Albright* that the primary physical care, custody and control of these two minor children will be and the same is hereby awarded to the father.

¶19. As previously stated, the chancellor was not bound by the guardian ad litem's recommendations. "[I]n custody cases, we are bound by our limited standard of review and may reverse only when the decision of the trial court was manifestly wrong or clearly erroneous, or an erroneous legal standard was employed." *Hensarling v. Hensarling*, 824 So. 2d 583, 587 (¶8) (Miss. 2002). The dissent finds that reversible error results from the fact that the chancellor did not summarize the guardian ad litem's recommendations or

explain his decision to reject them in part. However, in *Ethridge v. Ethridge*, 926 So. 2d 264, 267 (¶13) (Miss. Ct. App. 2006), this Court found that a chancellor did not err when he “only referred explicitly to the guardian ad litem’s report one time in his opinion.” Here, the chancellor clearly stated that he had considered the guardian ad litem’s recommendations. Based on the chancellor’s thorough application of the *Albright* factors, he determined that it was in the children’s best interest for Shannon to receive primary custody of the children. The chancellor found that Shannon was the more responsible parent, and was better suited to care for the children. And the chancellor provided his reasons during his *Albright* analysis. Thus, we find no error in the chancellor’s decision.

CROSS-APPEAL

¶20. In his cross-appeal, Shannon argues that the chancellor erred in failing to award him attorney’s fees and costs for defending Mary Jane’s allegations of child abuse. The chancellor ordered that the guardian ad litem’s fees be split equally between Shannon and Mary Jane, but ruled that Shannon was not entitled to attorney’s fees with respect to defending himself against Mary Jane’s allegations. Though the investigation revealed no evidence of abuse on the part of Shannon, that in and of itself did not entitle Shannon to compensation for defending the allegations. Primarily, the motion for appointment of a guardian ad litem was filed in the best interest of the children. Further, Mary Jane did not expressly accuse Shannon of abusing the children, although she tacitly did so. Nevertheless, the purpose of the forensic examination was not to prove or disprove that Shannon sexually abused the children, but merely to investigate circumstances surrounding statements allegedly made by the children. Shannon is not automatically entitled to attorney’s fees just

because there was no evidence that he abused the children.

¶21. “An award of attorney’s fees in domestic cases is largely a matter entrusted to the sound discretion of the trial court.” *Zenman v. Stanford*, 789 So. 2d 798, 806 (¶30) (Miss. 2001) (citing *Poole v. Poole*, 701 So. 2d 813, 818 (Miss. 1997)). “Unless the chancellor is manifestly wrong, his decision regarding attorney’s fees will not be disturbed on appeal.” *Id.* (citing *Bredemeier v. Jackson*, 689 So. 2d 770, 778 (Miss. 1997)). We find no error in the chancellor’s decision not to award attorney’s fees to Shannon, nor in his decision that each party pay one-half of the guardian ad litem’s fees. Thus, Shannon’s cross-appeal is without merit.

CONCLUSION

¶22. We find no error in the chancellor’s *Albright* analysis, as his findings were supported by substantial credible evidence. The chancellor was not required to defer to the guardian ad litem’s recommendations. Further, the chancellor acted within his discretion when he denied Shannon’s request for attorney’s fees. Accordingly, we affirm the chancellor’s judgment.

¶23. THE JUDGMENT OF THE LEE COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, CARLTON, MAXWELL AND FAIR, JJ., CONCUR. JAMES, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION.

JAMES, J., CONCURRING IN PART AND DISSENTING IN PART:

¶24. I agree with the majority that the chancellor was within in his discretion in denying Shannon’s request for attorney’s fees. However, I find the chancellor improperly applied the

Albright factors in his award of child custody. The record does not support the chancellor's finding that Shannon is better suited to have primary physical custody of the children. I also find reversible error in the chancellor's failure to provide his reasons for rejecting the guardian ad litem's recommendations, considering the fact that child-abuse allegations were raised. Therefore, I would affirm in part and reverse and render in part.

STANDARD OF REVIEW

¶25. In cases involving the award of child custody, “[t]his Court will not disturb the factual findings of the chancellor unless [they] are manifestly wrong or clearly erroneous.” *Brekeen v. Brekeen*, 880 So. 2d 280, 283 (¶4) (Miss. 2004) (quoting *Jerome v. Stroud*, 689 So. 2d 755, 757 (Miss. 1997)). “However, where the chancellor improperly considers and applies the *Albright* factors, an appellate court is obliged to find the chancellor in error.” *Id.* (quoting *Hollon v. Hollon*, 784 So. 2d 943, 946 (¶11) (Miss. 2001)).

DISCUSSION

I. Whether the chancellor's *Albright* analysis was supported by substantial credible evidence.

¶26. The majority asserts that the chancellor's award of primary custody to Shannon was supported by substantial credible evidence. I respectfully disagree. It has long been held that “the polestar consideration in child custody cases is the best interest and welfare of the child.” *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). The applicable factors used by the chancellor in determining which parent is better suited for primary custody are:

- 1) age, health and sex of the child;
- 2) determination of the parent that had the continuity of care prior to the separation;
- 3) which has the best parenting skills and which has the willingness and capacity to provide primary child care;
- 4) the employment of the parent and responsibilities of that employment;
- 5)

physical and mental health and age of the parents; 6) emotional ties of parent and child; 7) moral fitness of parents; 8) the home, school, and community record of the child; 9) the preference of the child at the age sufficient to express a preference by law; 10) stability of home environment and employment of each parent; 11) other factors relevant to the parent-child relationship.

Hollon, 784 So. 2d at 947 (¶12) (citing *Albright*, 437 So. 2d at 1005). A discussion of each of these factors is warranted.

1. Age, Health, and Sex of the Children

¶27. The chancellor found this factor favored Shannon, considering that both children were male. The guardian ad litem found this factor did not weigh in favor of either parent.

2. Continuity of Care Prior to Separation

¶28. The chancellor found, as did the guardian ad litem, that this factor weighed in favor of Mary Jane. The record shows that Mary Jane, as a stay-at-home mom, was the primary caretaker of the children. Prior to the parties' separation, Mary Jane was responsible for taking the children to and from school, scheduling the children's doctor's appointments, and helping the children with their schoolwork. Mary Jane testified that she also took a leadership role in caring for William's developmental delays. She stated that William had speech problems, and that she was responsible for taking him to regular therapy sessions with a speech pathologist. Shannon testified that he never attended any of William's therapy sessions.

3. Parenting Skills and the Willingness and Capacity to Provide for the Children

¶29. The chancellor found this factor favored Shannon. The chancellor based this determination primarily upon Mary Jane's inappropriate contact with Brown and Hurt. The

guardian ad litem found this factor weighed in favor of Mary Jane, as she was responsible for caring for the children on a daily basis. The guardian ad litem also considered Shannon's absence from William's therapy sessions. In addition, Shannon testified that, because Mary Jane was a nurse, she was better suited than he to handle William's therapy sessions. During trial, when asked why he never attended any of William's therapy sessions, Shannon responded, "I wasn't going to start that battle." Regarding Mary Jane's inappropriate spousal conduct as it relates to her parenting skills, the guardian ad litem stated the following:

[W]hile it may certainly be the case that Mrs. Borden was not a good wife over the last year-and-a-half prior to the separation, the guardian ad litem could not find that she was an inadequate[,] or below what was required of[,] a mother or that her parenting had changed in any appreciable way over the year As a result . . . would recommend that the factor of parenting skills . . . be found in favor of Mrs. Borden.

¶30. The chancellor erroneously found that Mary Jane's contact with Brown and Hurt reflected on her skills and responsibility as a parent. The record does not support that determination. Mary Jane's behavior was indisputably a poor reflection on her moral fitness, but not on her parenting skills. There is no evidence that Mary Jane's contact with Brown and Hurt impinged on her parental duties, nor is there any evidence that her limited communications with the men had a negative impact on the children.

4. Employment and Responsibilities of Each Parent

¶31. The chancellor found this factor to be neutral. The chancellor noted that while Shannon's employment was more stable and produced a much higher income than that of Mary Jane, Mary Jane's employment allowed her to spend more time with the children due to her having fewer job responsibilities. For those reasons, this factor balanced out equally

between the parties.

5. Physical and Mental Health and Age of Each Parent

¶32. The chancellor, as well as the guardian ad litem, found this factor to be neutral.

6. Emotional Ties Between the Parents and Children

¶33. Both the chancellor and the guardian ad litem found this factor to be neutral.

7. Moral Fitness of the Parents

¶34. Both the chancellor and the guardian ad litem found this factor favored Shannon. However, I find that the chancellor placed undue weight on this particular factor. Also, the chancellor erroneously considered and applied this factor in his analysis of several other factors, as discussed further below.

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

¶35. Both the chancellor and the guardian ad litem found this factor favored Shannon.

9. Preference of the Children

¶36. This factor was inapplicable.

10. Stability of the Home Environment of Each Parent

¶37. The chancellor found this factor favored Shannon. Again, the chancellor based this determination exclusively on Mary Jane's communications with Brown and Hurt, stating the following:

But now I have to look at the stability of the home. The mother testified that she's got these children in school now, that they're in a good private school, as I understand it, that they have a stable environment, she claims. But they had one before they left here if she'd stayed off the internet and stayed off of her contact with her two boyfriends especially and running around on her husband. All of this indicates to me that she has really no stability of home life
.....

Here, the chancellor acknowledged that Mary Jane provided a stable home environment for the children and that the children were enrolled in a good school. Nevertheless, the chancellor disregarded this evidence and erroneously considered Mary Jane's extramarital contact with Brown and Hurt under this factor.

11. Other Factors Relevant to the Parent-Child Relationship

¶38. Finding this factor to favor Shannon, the chancellor stated:

[O]ne thing that came to focus to me in the testimony here of the grandfather, parental grandfather, and it was this[:] what can his son give to these children[?] He was asked that question. He says love, discipline, affection, morals, ethics and responsibility. I think those six things sum up what can be expected in the raising of young children, especially young boys. And I have to give that factor[,] under these circumstances and based on the testimony[,] . . . to the father.

Again, the chancellor improperly applied the moral-fitness factor to this factor, as he did to other factors.

¶39. “Adultery of a parent may be an unwholesome influence and an impairment to the child’s best interest, but on the other hand, may have no effect.” *Brekeen*, 880 So. 2d at 284 (quoting *Carr v. Carr*, 480 So. 2d 1120, 1123 (Miss. 1985)). Here, the chancellor found no adultery on the part of Mary Jane, yet faulted Mary Jane for engaging in secretive, inappropriate communications with Brown and Hurt. However, there is no proof whatsoever that Mary Jane’s actions had an adverse effect on the children. There is no evidence in the record that the children ever had any contact with Brown or Hurt, or were even aware of their mother’s communications with the men. Further, Shannon offered no evidence of the children ever having contact with Brown or Hurt.

¶40. It is clear from the chancellor’s opinion that Mary Jane’s inappropriate

communications with Brown and Hurt caused her to be denied custody of her two children. The parties initially agreed that it was in the children's best interest that Mary Jane have primary custody, as shown by the November 9, 2010 temporary order. Though Mary Jane's contact with the two men may be a poor reflection on her as a spouse, that is no indication that she is no longer suited to have primary custody of her children. The record shows that it is in the children's best interest to remain in the primary care of their mother. Mary Jane has been their primary caregiver since birth. She has been responsible for the children's schoolwork and doctor's appointments, as well as monitoring and supervising William's progress with speech therapy, which Shannon admittedly refused to do. The chancellor ignored these factors and overemphasized Mary Jane's inappropriate contact, though there was no evidence of adultery. The award of primary physical custody to Shannon is simply unsupported by the evidence. Notably, the record before us lacks evidence of Mary Jane's inappropriate communications with Brown and Hurt being detrimental to the children. The chancellor improperly applied the *Albright* factors. Therefore, I feel we are obliged to find the chancellor in error.

II. Whether the chancery court erred by using custody to punish Mary Jane.

¶41. Mary Jane contends that the chancellor punished her by awarding primary physical custody to Shannon due to her communications with Brown and Hurt and her allegations of child abuse against Shannon. "Marital fault should not be used as a sanction in custody awards." *Albright*, 437 So. 2d at 1005. I find that undue weight was placed on Mary Jane's inappropriate contact with Brown and Hurt. As for the allegations of child abuse, while the guardian ad litem found no evidence to support the allegations, the record shows that Mary

Jane's concerns were legitimate. Mary Jane testified that the children said they were touched inappropriately on more than one occasion.

¶42. According to Mary Jane, statements made by the children led her to believe that they had been sexually abused, which was why she filed the motion for appointment of a guardian ad litem and for a forensic examination. In her motion, Mary Jane made clear that she was “making no allegations as to who[m] the perpetrator might be,” but instead she was requesting an examination to “determine whether the children have been abused and[,] if so[,] the identity of the perpetrator.” Nowhere in the motion does Mary Jane allege that Shannon sexually abused their children. Mary Jane was questioned at length by the guardian ad litem about the statements. The polygraph examination administered to Mary Jane by the guardian ad litem indicated that Mary Jane was being truthful about her concerns.

¶43. Regarding the allegations, the trial court stated:

[Mary Jane] turns around and tried to bolster her case, I think, really, makes these false accusations, which she later admits and even the guardian ad litem states there was no credible evidence to support them and the polygraph test clearly indicated that That's not a very good parenting skill to advance against the father of your children unless you know it's for sure.

Based on this statement alone, I cannot say with confidence that the chancellor intended to penalize Mary Jane for raising allegations of child abuse—specifically considering the fact that the chancellor denied Shannon's motion for an assessment of fees and costs related to his defense of the allegations. However, the record does show that the chancellor sanctioned Mary Jane for her inappropriate contact with Brown and Hurt by taking primary custody of the children away from her and awarding it to Shannon, as there was no evidence to indicate that her contact with the men had an adverse effect on the children. As previously stated,

marital fault may not be used as a sanction in child-custody awards. Therefore, I find the chancellor's custody award to be an abuse of discretion.

III. Whether the chancery court erred by failing to provide a summary of the guardian ad litem's recommendations and by failing to provide its reasons for rejecting those recommendations.

¶44. The majority finds no error in the chancellor's failure to provide a summary of the guardian ad litem's recommendations and failure to provide his reasons for rejecting those recommendations. I respectfully disagree. "[T]here is no requirement that the chancellor defer to the findings of the guardian ad litem[.]" *S.N.C. v. J.R.D.*, 755 So. 2d 1077, 1082 (¶17) (Miss. 2000). However, the chancellor "shall include at least a summary review of the qualifications and recommendations of the guardian ad litem in the court's findings of fact and conclusions of law" when the appointment of a guardian ad litem is statutorily required. *J.P. v. S.V.B.*, 987 So. 2d 975, 982 (¶20) (Miss. 2008) (citing *S.N.C.*, 755 So. 2d at 1082 (¶18)). "[I]f the court rejects the recommendations of the guardian, the court's findings *must* include its reasons for rejecting the guardian's recommendations." *Id.* (emphasis added) (citing *Floyd v. Floyd*, 949 So. 2d 26, 29 (¶8) (Miss. 2007)).

¶45. The majority correctly states that Mississippi Code Annotated section 93-5-23 (Rev. 2004) requires the appointment of a guardian ad litem where allegations of child abuse are made. Though the chancellor complied with the statute by appointing a guardian ad litem following the allegations of abuse, he did not provide a summary of the guardian's recommendations, nor did he provide his reasons for rejecting the guardian's recommendations. The guardian ad litem made the following recommendation:

[I] would recommend to the Court a finding that it's in the best interest of the

minor children that . . . primary physical custody . . . be vested with [Mary Jane], with [Shannon] enjoying visitation as set by this Court.

. . .

I did not find[,] respectfully[,] that [Mary Jane's] conduct reflected on her as a parent but rather as a poor spouse.

The only regard the chancellor gave to the guardian's findings and recommendations was the following:

I've also considered the . . . guardian ad litem's recommendations here. To some extent, I disagree with those, and to some extent, I've agreed. But I find under the circumstances and based on these factors under *Albright* that the primary physical care, custody and control of these two minor children will be and the same is hereby awarded to the father.

Nowhere else in the record does the chancellor mention the findings and recommendations of the guardian ad litem. The chancellor did not state his reasons for disagreeing with the guardian ad litem's recommendations. Considering the great disparity between the chancellor's findings and those of the guardian, and the fact that the guardian's appointment was statutorily required in this case, I find reversible error in the chancellor's failure to do so. Nevertheless, as previously discussed, the record simply does not support the finding that Shannon is better suited than Mary Jane to have primary physical custody of the children.

¶46. In the majority opinion, the Court cites *Tritle v. Tritle*, 956 So. 2d 369, 373 (¶8) (Miss. Ct. App. 2007), when it discusses the chancellor's responsibility to weigh the evidence. However, this opinion does not suggest a reweighing of the evidence or substitution of our opinion for the chancellor's opinion. In this opinion, it is asserted that the chancellor improperly applied the *Albright* factors and used an incorrect legal standard, which constitutes reversible error. This case is distinguishable from the *Tritle* case because in that case, the *Albright* factors were properly addressed and the correct legal standard was applied.

¶47. The majority opinion also cites *Ethridge v. Ethridge*, 926 So. 2d 264, 267 (¶13) (Miss. Ct. App. 2006), and it is stated that the chancellor there only referred to the guardian ad litem's report once. However, in the *Ethridge* opinion, the chancellor properly addressed the guardian ad litem's report even though it was only referred to once. *Id.* It is also noted in the *Ethridge* case that the chancellor fashioned a remedy for the best interest of the children when custody was awarded to the mother, who allegedly was having an affair. *Id.* at 267 (¶12).

¶48. The moral fitness of the mother can properly be questioned, but it cannot outweigh all the other evidence of the mother's fitness to be awarded custody. *See Hollon v. Hollon*, 784 So. 2d 943, 952 (¶37) (Miss. 2001). In the present case, there was no showing that the alleged immoral acts of the mother had any effect on the children.

¶49. For these reasons, I would reverse and render the child-custody award.