

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRENT KEITH PENDLETON and KIM PENDLETON

APPELLANT

VERSUS

CASE NO. 2008-CA-00093


JAMES ANTHONY LEVEROCK

APPELLEE

**ON APPEAL FROM
THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI**

REPLY BRIEF OF APPELLANT

**ATTORNEY FOR APPELLANT:
RENEE McBRIDE PORTER
PORTER LAW FIRM
915 Main Street
Post Office Box 982
Columbia, Mississippi 39429
601-731-1886/1887**



ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible conflicts, disqualifications or recusal:

1. BRENT KEITH PENDLETON and KIM PENDLETON Appellant
2. JAMES ANTHONY LEVEROCK Appellee
3. Renee McBride Porter
Porter Law Firm, P.A.
P.O. Box 982
915 Main Street
Columbia, Mississippi 39429 Attorney for Appellant
4. Shirlee Fager Baldwin and Brandon Brooks
Post Office 1008
Hattiesburg, Mississippi 39403 Attorney for Appellee
5. Honorable Judge H. C. Thomas, Jr.
Chancellor, 15th District
P.O. Box 807
Hattiesburg, Mississippi 39403 Lower Court Judge

Respectfully submitted, on this the 10th day of March, 2009.



Renee McBride Porter

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	1
TABLE OF CONTENTS	2
TABLE OF CASES AND AUTHORITIES.....	3
REPLY TO THE STATEMENT OF FACTS.....	4
REPLY TO ARGUMENT.....	7
Reply to I. Appellants Cannot Meet the Burden to Terminate Tony's Parental Rights.	
Reply to B. The Trial Court Was Correct in Its Decision that there was no Erosion in the Relationship between Tony and Zachary	
Reply to: II. It is in Zachary's Best interest to be raised by his biological father.....	
Reply to Response to Allegation that contained on Page 12.....	
CURRENT EVENTS SHOW THAT ZACHARY IS NOT BEING CARED FOR BY HIS FATHER.....	10
CONCLUSION	10
CERTIFICATES OF SERVICE.....	12

TABLE OF CASES AND AUTHORITIES

<u>Sellers v. Sellers</u> , 638 So.2d 481.....	9
Mississippi Civil Procedure No. 62.....	7

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Appellants feel it is necessary to file a Reply Brief to clear up some errors that are contained in Appellee's brief.

Reply to the Statement of Facts

1. In response to the Statement of the Case presented by Appellee. The record in this matter reveals that indeed Tony, Appellee, was in Iraq when his son was born, and returned to the United States when Zachary was four and a half months old. Three months after Tony returned home to the United States and met Zachary, he forced Deanna to leave with Zachary. Deanna and Zachary left Fort Bragg, North Carolina, because Tony sent them home to the Appellant's home. In the brief of Appellee it is argued that "Deanna decided to move back home to Mississippi, taking Zachary with her." (Appellee's brief page 1) On the record, Tony admitted that he did not see Zachary until he was four months old and then in a few months he called and said that he couldn't take Zachary any more and they needed to fly Zachary home. ("Yes, sir." Record page 10, line 15).

2. In response to the Statement of Case in Appellee's brief, he argues that he left the army. (Appellee's brief page 1). However, the record reveals that he was discharged from the military on a less than honorable discharge. ("I received other than honorable." Record page 19, line 1 and Trial Exhibit 9). Tony admitted he received a less than honorable discharge for smoking marijuana. ("For smoking marijuana." Record page 20, line 6).

3. In Appellee's brief he argues that he went to Jacksonville to be near his parents.

Tony admitted in the record that even though he was married to Deanna, one Jennifer Cooper picked him up in North Carolina. ("Jennifer, her mother and her stepfather, Jerry." Record page 22, line 15)

4. From January 2004 to May 13, 2006, Zachary lived with the Pendleton's for the entire time. The record reveals that Janell Richardson, Tony's biological mother, and Jessica Leverock, Tony's sister, testified that they told Tony that Zachary lived with the Pendleton's. Janell Richardson also testified about giving Tony pictures of Zachary, taken at the Pendleton home, by Kim Pendleton, along with the Pendleton's address and phone number, trying to encourage Tony to contact the Pendleton's and develop a relationship with his son. ("He would just comment on cute he was looking and how, yeah, maybe you know, I should call them or write them a letter or something." Record page 80, line 23). Jessica testified that she would go to Mississippi to visit Zachary and that Tony never came with them. ("No, he never came with us." Record page 81, line 16). Jessica testified that Deanna was upset because Tony would not see Zachary. ("Yes. Deanna was really upset because I remember when she was on the phone with him, she was claiming, Why don't you want to see your own son. ..." Record page 82, lines 14-19).

The record reveals that Janell Richardson, Jessica Leverock, Tony's grandparents, Ronald Vernon Leverock Sr. and Sandra Leverock, all knew how to get in touch with Zachary. ("We have always called Tony; we sent him pictures; we always told him we were staying in contact with Zach." Record page 198, lines 27-29). ("We told him that he needed to stay in contact with his son." Record page 199, line 10).

5. The record reveals that the parties did file a Joint Complaint for Divorce with a Property Settlement Agreement in January 2006. Deanna went to Jacksonville Florida, to secure Tony's signature. Attached to the divorce agreement was a hand written note from Tony Leverock, that was dated March 2004, and then mailed to Deanna at the Pendleton home, stating that Tony would give sole custody of Zachary to Deanna, without any mention of visitations between Tony and Zachary.

6. After Deanna was killed, Tony did come to Mississippi to attend his wife's funeral and obtain Zachary. The record reveals that Tony told Brent he would sign any paper he needed to sign, so that Zachary could be raised by Brent and Kim Pendleton, because he knew that they had been raising Zachary, and they were the only family Zachary knew. (See record testimony by Brent Pendleton, Jessica Leverock, Janell Richardson and Tony Richardson.) Mr. Richardson states Tony told the Pendletons he would sign over his rights ("In fact, he got on the phone -- he told us that he would sign any papers or whatever -- he wanted Zach to remain with the Pendletons. In fact, he got on the phone right in my kitchen and called Brent and told him the same thing; that he could keep Zach; he would not cause any problems. Record page 200, lines 13-18).

7. The Pendleton's invited Tony to follow them to their home to visit Zachary after the funeral. It was only after playing with Zachary for a couple of hours, that Tony informed the Pendleton's of his plans to come back and get Zachary, after he got a job and moved out of the unfit environment he lived in, with his girl friend Jennifer Cooper, and the child they had together, Preston Tyler Leverock. Tony then left Zachary with the Pendleton's again, without offering any money to help support Zachary, or providing a date in which he would return to obtain son.

8. This suit was filed when the Pendleton's realized that Tony had not been honest with them, when he called Brent Pendleton and told him they would be raising Zachary, they feared what this sudden change would do to Zachary, especially so soon after his mother's death, so they filed for Emergency Temporary Custody of Zachary and it was granted to them on May 18, 2006. Tony waited until June 8, 2006, to file any documents or paperwork.

Tony testified that May 15th, 2006 was the first time he had traveled to Purvis, Mississippi to visit Zachary.

9. Appellee argues that the Pendletons refused to abide by the Court's Order. This Court issued its ruling and a Motion for Reconsideration was filed and as per Mississippi Rule of Civil Procedure No.62 this motion should have been heard or ten days expired before proceedings are filed for the execution of this Order, however despite this Motion being filed and after conference with the Court Appellants voluntarily tendered Zachary. On November 11, 2007, Tony did not come to the Pendletons home and in fact on the day custody was tendered Tony did not travel to get Zachary

Reply to Argument

Reply to I. Appellants Cannot Meet the Burden to Terminate Tony's Parental Rights

There were fourteen witnesses that testified in this trial, twelve of which testified that Tony had no contact with Zachary for over two and one-half years. Three of these witnesses were members of Tony's own family, which included his mother, Janell Richardson, his sister Jessica Leverock, and his step-father, Tony Richardson. The record reveals that Tony himself admitted that he had missed Zachary's First, second, and third Christmas and his first, second and third birthday's.

The record reveals that member of Tony Leverock's family, like his mother and step father, his sister, and his Grandfather and Grandmother Leverock, had kept in constant contact with Zachary by phone calls, letters, and even visits to the Pendleton home, where they all knew that Zachary lived.

Appellee argues in his brief that "Tony has never shown that he wished to relinquish his parental claims to Zachary." (Appellee's Brief page 5) If failure to see or support your child for over two and one-half years does not show that do not want to be a parent then what proof would show that intention. Tony made no contact nor supported his child for over two and one-half years.

The Pendleton's took Tony Leverock to court, because of his actions toward Zachary for the first three years of Zachary's life, in which the records and testimonies will show he made no attempt to visit, support, or communicate with Zachary in any way. Although Tony was given many opportunities to be a part of Zachary's life, he chose not to do so. Both Tony's mother, Janell Richardson, and his sister, Jessica Leverock, tried to help Tony get to know his son, Zachary. When Tony refused to get involved with Zachary his family became concerned, but after meeting the Pendleton's, both Janell Richardson and Jessica Leverock, knew that Zachary was in the right place living with the Pendleton's, a place where he could grow up to be a happy and healthy young man.

Reply to B. The Trial Court Was Correct in Its Decision that there was no Erosion in the Relationship between Tony and Zachary.

Again if there was no relationship between Tony and Zachary at all for two and one-half years then certainly there was an erosion in the relationship.

Until this matter was filed and Tony secured visitation he had no contact whatsoever

with his son.

The Court was not correct in its decision that there was no erosion in the relationship between Tony and Zachary.

Reply to: II. It is in Zachary's Best interest to be raised by his biological father.

Zachary deserves stability. Just because there is a natural parent resumption does not mean that there are never situations where it is not in the best interest of a child for a third party to rear a child. Sellers v. Sellers, 638 So.2d 481, state "The well settled rule in a child custody case between a natural parent and a third party is that it is presumed that the best interest of the child", or children, "will be preserved by being in the custody of the natural parent. In order to overcome this presumption, there must be a clear showing that, number one, the parent has abandoned the child; number two, the conduct of the parent is so immoral as to be detrimental to the child; or number three, the parent is mentally or otherwise fit to have custody of the child". Sellers vs Sellers cites Rogers vs. Rogers, 274 So.2d 671.

In the case at hand certainly Tony abandoned Zachary for over two and one-half years. Therefore he has no parental rights presumption.

Reply to Allegation that contained on Page 12.

On page 12 it is alleged that Tony is a young man with no health problems. That he has his own home with his wife Jennifer Leverock. Please refer to the court testimony wherein on March 2008 it was admitted that Ron and Faith Leverock are caring for Zachary and Tony and his wife are separated. This was the case on August 14, 2008; therefore Appellee was not being truthful when he made the argument contained in page 12.

III. Current Events show that Zachary is not being cared for by his father.

Since the court's ruling Janell Richardson and the Pendletons have made several attempts to visit Zachary, but have not been allowed to see him. The Pendleton's have tried through the court system to get visits with Zachary, but have not even been given permission to talk to him on the phone. Zachary was removed from everything and everyone he knew and placed into Tony's home first and then as confirmed at the August 14, 2008 hearing, Zachary was placed in Ron and Faith Leverock home, where he remains to this day.

The Trial Court was not correct in its decision to remove Zachary from his stable home with Brent and Kim Pendleton, and place him with Tony Leverock. Tony abandoned Zachary for the first years of his life and as of today Tony's life is still unstable, in that he is not raising Zachary, but has left his wife Jennifer with their son Preston, and Tony left Zachary with his father and step mother, Ron and Faith Leverock.

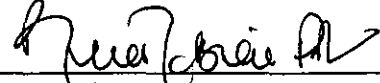
It is in Zachary's best interest for him to be returned to the custody of Brent and Kim Pendleton, to be raised in the safe and secure home environment that Zachary enjoyed for the first four and a half years of his life. Furthermore the Pendleton's would ask this court to terminate the parental rights of Tony Leverock, due to Tony's clear and evident intentions not to raise Zachary himself. Termination of Tony's parental rights would insure Zachary a secure and safe environment, free from the threat of constant contention and confusion, in which Zachary has been subjected to during this Trial Court process, by Tony, Ron, and Faith Leverock.

CONCLUSION

Appellant's would ask this Court to review the record closely and find that indeed

termination of Tony's rights was proper and custody should remain with Brent and Kim Pendleton.

Respectfully submitted,



RENEE McBRIDE PORTER

PORTER LAW FIRM, P.A.

POST OFFICE BOX 982

COLUMBIA, MISSISSIPPI 39429

(601) 731-1886

ATTORNEY FOR APPELLANT

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KIM PENDLETON

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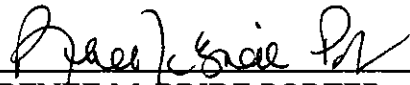
APPELLEE


CERTIFICATE OF SERVICE

This is to certify that I, Renee McBride Porter, on the 3rd day of November, 2008, furnished a true and correct copy of the above and foregoing

REPLY BRIEF OF APPELLANT

to the Honorable Judge Honorable Judge H. C. Thomas, Jr., Chancellor, 15th District, P.O. Box 807, Hattiesburg, Mississippi 39403, 10th District, by placing same in the United States Mail, postage prepaid, and mailing it to his usual office address of Post Office Box 1664, Hattiesburg, Mississippi 39403 and to Honorable Shirlee Fager Baldwin and Honorable Brandon Brooks, Attorney for Defendant, at their usual business address of Post Office 1008, Hattiesburg, Mississippi, 39403.



RENEE McBRIDE PORTER

PORTER LAW FIRM, P.A.
POST OFFICE BOX 982
COLUMBIA, MISSISSIPPI 39429
(601) 731-1886
ATTORNEY FOR APPELLANT
BRENT KEITH PENDLETON and
KIM PENDLETON