

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**

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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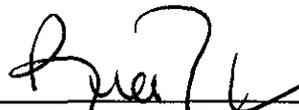
APPELLEE

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
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5. Honorable Judge H. C. Thomas, Jr.
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P.O. Box 807
Hattiesburg, Mississippi 39403 Lower Court Judge

Respectfully submitted, on this the 3rd day of November, 2008.



Renee McBride Porter
MSB: [REDACTED]

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97-5-31, 97-5-39, 97-5-41, 97-3-65

Mississippi Rules of Appellate Procedure, Rule 8 (b) (1)

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STATEMENT OF THE ISSUES

1. The Court was in error for not following the Rules of Civil Procedure and deeming the Request for Admissions duly admitted. Said Requests were duly filed and not answered timely by the Defendant.

2. The Court had ample authority under the law to terminate the parental rights of James Anthony Leverock to Zachary Tyler Leverock and should have so terminated the rights of James Anthony Leverock.

3. The Court found that it was in the best interest of Zachary to be in the custody of Brent Keith Pendleton and Kim Pendleton and finding as such the Court was compelled to vest custody of Zachary in Brent and Kim.

4. The Court had ample authority to grant a stay of execution and the Court's refusal to grant said stay is error and said refusal has caused yet another trauma in the life Zachary as he has been uprooted yet again.

STATEMENT OF CASE

This case concerns custody of Zachary Tyler Leverock, born May 18, 2003.

Appellants herein, Kim Pendleton, age 43, and Brent Pendleton, age 44, have been married for 15 years. They became the foster parents of Deanna Hamby, when she was 17 years of age.

When Deanna was 18, she met and married Tony Leverock on May 24, 2002. She and Tony met in a Job Corps. Deanna and Tony lived on the coast for a while and then moved to Florida.

Tony joined the army, and Deanna moved to join him at his base in North Carolina. Tony was stationed in Fort Bragg, North Carolina. Zachary Tyler Leverock was born there in Fort Bragg, while Tony was in Iraq. Tony was in Iraq until Zachary was four months old. Tony and Deanna lived with Zachary from the time Zachary was four months old until he was seven to seven and one-half months old. Tony then sent Deanna and Zachary back to Mississippi to the Pendletons' home. Deanna and Zachary arrived home on January 3, 2005.

That from January 3, 2005, until May 13, 2006, Zachary lived with the Pendletons and his natural mother, Deanna Hamby Leverock. James Anthony Leverock had no contact with the minor child. That Deanna and Tony signed and executed a no fault divorce filed in the Chancery Court of Lamar County, Mississippi, on January 24, 2006, which provided "the full legal custody, care and control of the minor child, Zachary Leverock, shall be vested in the Wife, and the Husband shall have reasonable visitation with said minor child at such time and places as may be to the best interest of said minor child." The divorce was set for hearing on May 16, 2006. The natural mother of the Minor Child, Deanna Hamby Leverock, died in Laurel, Mississippi on May 13, 2006. That on May 18, 2006, Kim and Brent Pendleton filed a Complaint for Emergency Temporary Custody, Termination of Parental Rights, For Custody, and

Other Relief together with a Certificate by their Attorney. That on May 22, 2006, a Temporary Order Granting Custody to Kim and Brent Pendleton was issued.

That from the time Zachary was seven and one-half months until May 13, 2006, the day of Deanna's funeral Tony did not see Zachary, Tony did not contact Zachary, nor did Tony contribute any support for Zachary. On the day of the funeral Tony saw Zachary at the Pendletons' home and stated that he saw Zachary was where he needed to be and happy. On June 12, 2006, Tony filed a Motion to Set Aside the Emergency Order.

This much contested legal battle thus begun. During the pendency of this action, Tony, never paid child support until he was ordered to do so and refused to take a drug test timely (being ordered to do so from the Court verbally on June 28th and by Order on July 18, 2006 and finally taken the test on August 15th). Tony did not obey the Court orders regarding visitation taking Zachary out of the jurisdiction of the Court and refusing to return him timely.

The Court after a trial ruled that "While the short term security and interests of Zachary may be best served by leaving his custody in Plaintiffs," but found that he should, despite his best interest, be placed in the care and custody of Tony.

That immediately afterwards Kim and Brent filed a motion for the court to reconsider or set aside its ruling. When said motion was denied Kim and Brent appealed.

Kim and Brent then filed a Motion for a Stay of Execution on January 7, 2008. Finally, on August 14, 2008, this motion was heard and at said hearing it was brought forth that the minor child was no longer in the custody of Anthony Leverock and now was in the custody of the child's paternal step grandmother. However, to date no ruling has been made on the request for a stay.

TESTIMONY

At the trial a number of witnesses were called. The following is a brief excerpt from the testimony.

1. Anthony Leverock (hereinafter Tony) did not even know how old his son was when he first saw his son. (“He was only a couple months old.” Record page 9, line 28). When questioned about the first time he saw Zachary, Tony stated he was only a couple of months old and later admitted he was four months old. (“Yes, ma’am ” Record page 10, line 2) 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). Tony admitted that after Zachary was seven and half months old he saw him for one minute in 2004 and not again until May 13, 2006. (“Yes, ma’am.” Record page 13, line 16). Tony admitted that he knew where the Pendletons lived, having been there a few times. (“A couple of times.” Record page 14, line 11 “I have been there; I never knew where they lived.” Tony admitted that he signed divorce papers in 2004 and never came to Mississippi to exercise his visitation. (“No.” Record page 18, line 21). Tony admitted 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). Tony admitted that after his less than honorable discharge he moved in with Jennifer (his now wife) months after Deanna and Zachary returned to Mississippi. (“Jennifer, her mother and her stepfather, Jerry.” Record page 22, line 15). Tony further admitted that less than year later and on May 24, 2005, he and Jennifer had a child. (“May 24, 2005.” Record page 23, line 29). Tony

admitted that he had not lived on his own but since January of 2007 after Zachary's birth living with his father, his girlfriend's parents . ("Yes, ma'am." Record page 28, line 24). Tony admitted that he was ordered to take a hair follicle drug test by this Court on July 18, 2006, and did not do so until August 17. ("The date that it took -- it took about three days for the test to come back, which was August 17th, so about three days before that -- August 15th, two days. Record page 37, line 18-21). Tony admitted that he had taken Zachary when he had visitation during day time hours only on a big truck run for work and did not return Zachary properly ("I had forced dispatch; I had to work. I'm sure I could have denied it, but that is risking my job." Record page 42-43) . Tony further admitted that he married Jennifer after this action begun. ("December 2, 2006", Record page 44, line 22). Tony admitted that for Zachary's first birthday and second birthday and first and second Christmas he did not get him a gift or send a card. ("No, ma'am," Record page 46).

2. Jessica Leverock, Tony's own sister testified that she showed Tony pictures of Zachary and told him where Zachary was living. ("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. I guess he said that he didn't want to see any of us. But Zach followed her. He went out there. He ended up seeing Zach." Record page 82, lines 14-19).

3. Janelle Richardson, Tony's mother testified in this matter for the Pendletons and testified that

she was upset with her son's behavior. (Record page 98).

4. Curtis Hayward, Zachary's counselor testified that Zachary viewed Kim and Brent as his mother and father. ("He loves them. As far as he is concerned, they are his mother and father from what I can tell. He is obedient to them. He seems to be happy with them when we are together in sessions. "Record page 157, line 19-22).

5. Billy Martin testified that he observed Deanna being upset when Tony would not come see the baby. ("She was in fairly good spirits. She was upset because Tony would not come and see the baby. That is what she told me." Record page 168).

6. Theresa Wedgeworth testified that she has seen Zachary on a continual basis at church with the Pendletons for over four years. ("Continuously. I mean, I see her three or four times a week. Record Page 73, Lines 4-7). Theresa states about the Pendletons's bond with Zach. ("They love him very much, and he loves them. They pray together; they do everything together. They spend time together. I mean, I don't know how to explain it. There is so much love there. I cannot put it into words." Record page 178, lines 2-6). Theresa tells what a good mother Kim is to Zach and what good parents the Pendletons are to Zach. "They are closer; that is for sure. She gets him in the morning. They kneel down and pray beside the bed; they pray for everybody; they even pray for Tony. She makes him include him in their prayers. They interact; they go places together; they do everything together; they spend time together.(Record page 186, line 6-8).

Theresa testified that Tony is not the best parent for Zach and Zach does not care to be with Tony ("He is not making himself known to his own son because children are very observant and they know who want them and who don't. They can sense things. I do with this man. He even says he is mean to me." Record page 186, lines 13- 9).

SUMMARY OF THE ARGUMENT

This Court was in error for four reasons:

1. The Court was in error because Requests for Admissions were timely propounded, but not responded to in thirty days, and never was a request made to allow the time for responding to remain open or increase. The Court refused to deem the Requests admitted, which is contrary to Mississippi law.

2. Mississippi law provides a way and a method to terminate the parental rights of someone who has not seen their child since the child was seven and one-half months old until the child was almost three. The procedure was followed by the Pendletons. The father, Tony Leverorck, admitted that he had not seen his child, not supported his child, nor had he made any contact with the child. The grounds to terminate parental rights were proven and the rights should have been terminated.

3. Kim and Brent Pendleton had been the caretakers of Zach since Zach was seven and one-half months old. The Court found that they had been good providers and caretakers. The Court found the Pendletons were doing a good job. The Court should have granted custody to the Pendletons.

4. The Court had ample authority to grant a stay of execution and in the alternative visitation between the Pendletons and Zach.

Due to this Court's ruling a young boy has lost the only parents he knew from the time he was seven and one-half months old until he was almost three. This is not proper and must be reversed.

ARGUMENT

1. The Court was in error for not following the Rules of Civil Procedure and deeming the Request for Admissions duly admitted. Said Requests were duly filed and not answered timely by the Defendant.

On September 21, 2006, Plaintiffs signed Request for Admissions, Request for Production of Documents and Interrogatories on Defendant and same was filed on September 25, 2006. Responses to discovery were not timely. Responses were signed by Defendant on November 7, 2006 and filed on November 10, 2006, approximately six weeks after discovery was propounded and not in compliance with the thirty days allowed by the Mississippi Rules of Civil Procedure. Defendant failed to make any Motion to postpone the untimely responses. Despite Plaintiff's request that the Court not deem the responses admitted, same were deemed admitted.

Pursuant to Miss. R Civil Procedure 36(a), "Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow".

A number of courts allow untimely Answers to Requests for Admissions, when to do so would aid in the presentation of the merits of the action and no prejudice would ensue to the party who made the request. Other courts allow untimely answers to a request for admissions when there has been excusable neglect or compelling circumstances. In 571 So. 2d 254, Martin V. Margaret Rogers Simmons, Debra Gail Simmons Hall, Margaret Louise Simmons Mayo, Dianna Lynn Simmons, Bobby Jean Blount and Phyllis P. Blount. 89-CA-0452 Supreme Court of Mississippi, the Court found that "The problems encountered by the Martins in this case could

easily have been eliminated if a motion to withdraw or amend the answers had been filed pursuant to Rule 36(b) and if there were justifiable excuse. However, we need not reach the issue whether withdrawal [**8] or amendment may be allowed when there is no excusable neglect but a party is not prejudiced because the chancellor was not called upon to exercise his discretion to allow the withdrawal of the amendment of the answers to the admissions under Rule 36(b)". In the instant case, no Motion for extra time was made and no excuses or compelling circumstances were offered for the untimely responses. Therefore the Court should have deemed the Requests for Admissions admitted.

2. The Court had ample authority under the law to terminate the parental rights of James Anthony Leverock to Zachary Tyler Leverock and should have so terminated the rights of James Anthony Leverock.

Mississippi law provides a procedure to follow to terminate the rights of parents.

Mississippi law § 93-15-103 provides:

“(1) When a child has been removed from the home of its natural parents and cannot be returned to the home of his natural parents within a reasonable length of time because returning to the home would be damaging to the child or the parent is unable or unwilling to care for the child, relatives are not appropriate or are unavailable, and when adoption is in the best interest of the child, taking into account whether the adoption is needed to secure a stable placement for the child and the strength of the child's bonds to his natural parents and the effect of future contacts between them, the grounds listed in subsections (2) and (3) of this section shall be considered as grounds for the termination of parental rights. The grounds may apply singly or in combination in any given case.

(2) The rights of a parent with reference to a child, including parental rights to control or withhold consent to an adoption, and the right to receive notice of a hearing on a petition for adoption, may be relinquished and the relationship of the parent and child terminated by the execution of a written voluntary release, signed by the parent, regardless of the age of the parent.

(3) Grounds for termination of parental rights shall be based on one or

more of the following factors:

(a) A parent has deserted without means of identification or abandoned a child as defined in Section 97-5-1, or

(b) A parent has made no contact with a child under the age of three (3) for six (6) months or a child three (3) years of age or older for a period of one (1) year; or

(c) A parent has been responsible for a series of abusive incidents concerning one or more children; or

(d) When the child has been in the care and custody of a licensed child caring agency or the Department of Human Services for at least one (1) year, that agency or the department has made diligent efforts to develop and implement a plan for return of the child to its parents, and:

(i) The parent has failed to exercise reasonable available visitation with the child; or

(ii) The parent, having agreed to a plan to effect placement of the child with the parent, fails to implement the plan so that the child caring agency is unable to return the child to said parent; or

(e) The parent exhibits ongoing behavior which would make it impossible to return the child to the parent's care and custody:

(i) Because the parent has a diagnosable condition unlikely to change within a reasonable time such as alcohol or drug addiction, severe mental deficiencies or mental illness, or extreme physical incapacitation, which condition makes the parent unable to assume minimally, acceptable care of the child; or

(ii) Because the parent fails to eliminate behavior, identified by the child caring agency or the court, which prevents placement of said child with the parent in spite of diligent efforts of the child caring agency to assist the parent; or

(f) When there is an extreme and deep-seated antipathy by the child toward the parent or when there is some other substantial erosion of the relationship between the parent and child which was caused at least in part by the parent's serious neglect, abuse, prolonged and unreasonable absence, unreasonable failure to visit or communicate, or prolonged imprisonment; or

(g) When a parent has been convicted of any of the following offenses against any child: (i) rape of a child under the provisions of Section 97-3-65, (ii) sexual battery of a child under the provisions of Section 97-3-95 (c), (iii) touching a child for lustful purposes under the provisions of Section 97-5-23, (iv) exploitation of a child under the provisions of Section 97-5-31, (v) felonious abuse or battery of a child under the provisions of Section 97-5-39 (2), (vi) carnal knowledge of a step or adopted child or a child of a cohabitating partner under the provisions of Section 97-5-41, or (vii) murder of another child of such

parent, voluntary manslaughter of another child of such parent, aided or abetted, attempted, conspired or solicited to commit such murder or voluntary manslaughter, or a felony assault that results in the serious bodily injury to the surviving child or another child of such parent; or

(h) The child has been adjudicated to have been abused or neglected and custody has been transferred from the child's parent(s) for placement pursuant to Section 43-15-13, and a court of competent jurisdiction has determined that reunification shall not be in the child's best interest.

(4) Legal custody and guardianship by persons other than the parent as well as other permanent alternatives which end the supervision by the Department of Human Services should be considered as alternatives to the termination of parental rights, and these alternatives should be selected when, in the best interest of the child, parental contacts are desirable and it is possible to secure such placement without termination of parental rights.

(5) When a parent has been convicted of rape of a child under the provisions of Section 97-3-65, sexual battery of a child under the provisions of Section 97-3-95 (c), touching a child for lustful purposes under the provisions of Section 97-5-23, exploitation of a child under the provisions of Section 97-5-3 1, felonious abuse or battery of a child under the provisions of Section 97-5-39 (2), or carnal knowledge of a step or adopted child or a child of a cohabitating partner under the provisions of Section 97-5-41, notice of the conviction shall be forwarded by the circuit clerk of the county in which the conviction occurred to

the Mississippi Department of Human Services, Division of Social Services.

(6) In any case where a child has been removed from the parent's home due to sexual abuse or serious bodily injury to the child, the court shall treat such case for termination of parental rights as a preference case to be determined with all reasonable expedition.”

The law provides that when a child has been removed from the home because one parent is unwilling to care for the minor child, then grounds for termination of parental rights shall be based upon one or more of the factors: 1. A parent has made no contact with a child under the age of three (3) for six (6) months or a child three (3) years of age or older for a period of one (1) year; or ... 2. The parent has failed to exercise reasonable available visitation with the child.”

In the case at bar, Tony was unwilling or refused to take care of Zachary from the time Zachary was seven and one-half months old until days before his third birthday. Tony did not see Zachary or provide for his support. Therefore, under the law Termination of rights is proper.

The case of W.A.S. v. A.L.G., 949 So.2d 31 (Miss. 2007), is on point with the case at bar. In W.A.S., Andy Simpson argues that the trial court did not apply the proper law when it terminated his parental rights. Specifically, Andy asserts that the trial court is required to use the "totality of the circumstances" test when determining whether to sever Andy Simpson's parental rights. On the other hand, Lois and Alex Garner (the prospective adoptive parents) contended that under Miss. Code Ann. § 93-15-103(3) (Rev. 2004), "grounds for termination of parental rights shall be based on one or more of the following factors," and that a single factor may thus be outcome-determinative.

The Supreme Court found that from the testimony that Andy had no intention of seeking visitation or paying support until his life was on track.

With that background in mind, the chancellor determined that Andy missed out on probably two of the most important years of Sam's life and this caused a substantial erosion in Andy's relationship with Sam.

The Supreme Court found in the above case that the parental rights should be terminated. In the present case, Tony did not seek custody or visitation nor did he pay child support during the first years of Zach's life (from the time Zachary was seven and one-half months old, approximately December, 2003, until Zachary was three or May 13, 2006). This

certainly caused a substantial erosion in the relationship. Clearly, Tony's parental rights should be terminated.

In order to sever a natural parent's parental rights, a two-prong test outlined in Petit v. Holifield, 443 So.2d 874, 877 (Miss. 1984), must be satisfied. First, the petitioner must establish by "clear and convincing evidence that the objecting parent has either abandoned or deserted the child or is mentally or morally or otherwise unfit to rear or train the child." *Id.* Once the first prong has been satisfied, the court must consider the second prong: the best interest of the child. *Id.* "The best interest of the child is a polestar consideration in the granting of any adoption," and "this Court has never allowed termination of parental rights only because others may be better parents." In re V.M.S., 938 So.2d 829, 835-36 (Miss. 2006) (citing M.L.B. v. S.L.J., 806 So.2d 1023, 1029 (Miss. 2000) (quoting In re Adoption of J.J.G., 736 So.2d 1037, 1038 (Miss. 1999))).

In the case of W.A.S. v. A.L.G., 949 So.2d 31 (Miss. 2007), the Chancellor determined that Alex and Lois Garner proved by clear and convincing evidence the first prong of *Petit*. Andy Simpson's continued absence from Sam's life for a period of at least two years, as testified to by Andy, not only satisfied by clear and convincing evidence the provisions of § 93-15-103(3)(b), but the Chancellor also determined that § 93-15-103(3)(f) was met. The legislature enacted § 93-15-103(3) as guidance for the courts to consider several grounds in making a determination as to whether to terminate parental rights. The clear language of the statute also demonstrates to us that **only one** of the enumerated grounds need to be satisfied in order to justify terminating a natural parent's rights. Although, "under Mississippi law a strong presumption exists that the natural parent should retain his or her parental rights, we are of the

firm opinion based on the record before us that the chancellor did not commit manifest error by terminating the parental rights of Andy Simpson.” In re V.M.S., 938 So.2d 829, 834-35 (Miss. 2006).

If the Court in the In re V.M.S. case found that abandonment had occurred and terminated parental rights, then the Court in this case must find abandonment. Note that Tony admitted his absence from Zachary’s life for over two years. Tony admitted that he did not see Zachary, pay support for Zachary or even send Zachary a card for over two years.

The next test is best interest of the child. In the case of In re V. M. S. the Court in finding that the best interest of the child was served by allowing Alex to adopt Sam found that Alex, a mature man at forty years of age at the time of the trial, has graciously cared for Sam as his own son for the past two years. He spent time with Sam by taking him hunting and fishing. Additionally, Alex fed, clothed, and cared for Sam. Alex demonstrated that he is an excellent father figure, and there is every indication that he intends to always "be there" for Sam.

In the case at hand the Pendleton’s have been there for Zachary completely taking care of him. It is clearly in Zachary’s best interest to be adopted as the Pendletons have demonstrated that they intend to always be there for Zach as the In Re V.M.S. case suggest.

Thus this Court had ample authority under Mississippi law to terminate the rights of Anthony Leverock.

3. The Court found that it was in the best interest of Zachary to be in the custody of Brent Keith Pendleton and Kim Pendleton and finding as such the Court was compelled to vest custody of Zachary in Brent and Kim.

If this Court does not find a termination is proper then the Court has ample authority to vest custody in Kim and Brent Pendleton. The Mississippi Court of Appeals has held, "In a custody dispute between a natural parent and third parties, such as grandparents, it is presumed that the best interests of the child will be preserved by custody remaining with the parents or parent. In order to overcome this presumption there must be a clear showing that the parent has (1) abandoned the child, or (2) the conduct of the parent is so immoral as to be detrimental to the child, or (3) the parent is unfit mentally or otherwise to have the custody of his or her child." E.J.M. v. A.J.M., 846 So.2d 289, 294 (Miss. Ct App. 2003), citing Rodgers v. Rodgers, 274 So.2d 671, 673 (Miss. 1973). Stated differently, "The correct application of the law as between grandparents ... and parents is [that] the parent is entitled to custody unless he/she has abandoned the child or is unfit to have custody, keeping in mind the best interest of the child." Schonewitz v. Pack, 913 So.2d 416, 420-21 (Miss. Ct. App. 2005).

In re Guardianship of Brown v. Wiley, 902 So.2d 604 (Miss. Ct. App. 2005), the court stated, "In overcoming this presumption, especially when making the determination on miscellaneous grounds, a court should look for factors that indicate a natural parent's absence of a meaningful relationship with his child or behavior of the parent that is clearly detrimental to his child."

Sellers v. Sellers, 638 So.2d 481, is a leading case in Mississippi, and makes the following comment: "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.

This abandonment issue must be looked at in terms of Smith v. Watson, 425 So.2d 1030, a 1983 Mississippi Supreme Court case. "Abandonment under the circumstances must be defined in that case showing an intent to shirk or evade the duty, trouble, or expense of rearing it or callous indifference to its wants or reckless disregard for its welfare where he or she is guilty of such abandonment of it as to bar his or her right thereafter to reclaim its custody from any person who may have administered to and protected it during such period of desertion."

"Our courts have been called upon in several cases to pass upon the question of what constitutes an abandonment. In the case of McShan v. McShan, 56 Miss. 413, the father deserted the mother and one of the children and left them destitute and for the space of three years the father contributed nothing to the support of his wife or children and did not return to see his wife or children during that time. This is clearly a case of abandonment." McAdams v. McFerron, 178 So.333 (1938).

The Court, in McAdams opines "[w]e agree that the life of a child is too sacred a thing to be the subject of contract or of barter. We insist, too, that the life of a child is too sacred a thing to be bandied about the by the whims and caprices of an indifferent parent who, though able to support, cherish and develop it, abandons it to the care, the love, and the tender mercies of others."

Further, in McAdams, Justice Anderson stated "[i]t is undisputed that the

[grandparents] are good people, though in moderate circumstances, and are fit and suitable persons to have the care and custody of the child. That through these years a warm, deep and affectionate attachment, such as exists between parent and child, has been formed between [the minor child] and his grandparents, and both [the minor child] and the grandparents desire to remain together in the ties of affection which time has made permanent and bonding. With these facts before me this court will not separate this child from its grandparents. To do so would not only be cruel and unjust but it would be contrary to the law in Mississippi.”

In this case from the time Zachary was seven and one-half months old until May 13, 2006, or Zachary was almost, days away from being three, the Pendletons and Deanna cared for Zach. Tony clearly abandoned Zachary putting him on a plane and then later leaving Fort Bragg himself and moving in with another woman. Tony had another child. Tony knew his mother and sister were seeing Zachary but made no effort to see or care for Zach for over two years. That clearly is abandonment. To now separate Zachary from the Pendletons’, the only parents he knew, is cruel as the McAdams case refers to herein above.

Lastly, Grant v. Martin, 757 So.2d 264 (Miss 2000), provides that stability in the lives of children is important and because of that stability the Court found that when a parent relinquishes their child’s custody to another for convenience sake, that parent loses the right to reclaim the natural parents’ presumption. In Grant, the parents relinquished custody for a four-year period. The Court did not award custody to the parents.

In the case at hand when Zachary was seven and one-half months old it was convenient for Tony to abandon Zach to his mother and the Pendletons to care for. To now try to

claim custody when it was earlier convenient for Zach to be cared for by his mother and the Pendleton's should not be well taken.

In the case at hand to simply terminate Zach's relationship with his only caretakers since he was seven and on-half month old and place him with someone who had seen him for only a short three and one-half months during this life. This conduct being without proper excuse or justification is clearly against the best interest of Zach and clear against the law as above set forth.

4. The Court had ample authority to grant a stay of execution and the Court's refusal to grant said stay is error and said refusal has caused yet another trauma in the life Zachary as he has been uprooted yet again.

The Pendletons after the ruling moved this for a stay on the execution of this Judgment and as of the filing of this brief said Motion had not been granted or denied despite the same being on filed since January 7, 2008.

The Judgment was given in this Cause on November 9, 2007 and gave legal and primary physical custody of Zachary Leverock, a minor, to the natural father, James Anthony Leverock effective on the 11th day of November 2007. The Judgment did not provide for visitation with the grandparents and subsequently a Motion for a Stay of Execution has been filed and the case has been appealed to the Mississippi Supreme Court.

The Chancellor had wide discretion to grant a Stay of Execution and to grant temporary custody with the Pendletons while the appeal process is in progress and, in the alternative, the Chancellor had the discretion to grant the Pendletons visitation with the minor child.

I. There is authority for this Court to grant a stay and award custody to the Pendleton pending appeal.

Pursuant to the Mississippi Rules of Appellate Procedure, Rule 8 (b) (1), application for a stay of judgment or the order of a trial court pending appeal or for approval or disapproval of a contested supercedes bond or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal **must ordinarily be made in the first instance to the trial court.** (Emphasis added).

Because grounds for an appeal exist this Court can grant a stay and allow custody to be vested in the Pendleton's. **This is especially proper in light of the fact that it was admitted at the argument of this matter that the child was no longer with his father but now with a step grandmother.** Chancellor Watts was faced with a similar situation wherein an application was made to adopt a child that had been in the care and custody of the proposed adoptive parents for their entire life. The Court did not allow the adoption and placed custody with the father but left custody with the proposed adoptive parents while the case was on appeal. K.D.F. and J.C.F. v. J.L.H. 933 So.2d 971, 2006 Miss.; No. 2004-CA-01320-SCT. The Chancellor found "until the Judgment of . . . is enforceable, or until further order of this Court". This decision was appealed and affirmed. Therefore there is authority to grant a stay and award custody to the Pendletons.

If the Court does not grant the stay then the Pendletons would request visitation. The Pendletons are entitled to visitation Our court has held that persons who have acted in loco parentis have rights. Indeed, in Logan v. Logan, 730 So.2d 1124 (Miss. 1998), we held that the custody of a minor child should be awarded to its stepfather upon the divorce between the stepfather and the

child's biological mother. Id. at 1127. A person acting in loco parentis is one who has assumed the status and obligations of a parent without a formal adoption. Logan v. Logan, 730 So.2d 1124, 1126 (Miss. 1998). "Any person who takes a child of another into his home and treats it as a member of his family, providing parental supervision, support and education, as if it were his own child is said to stand [in loco parentis]." Id. (quoting W.R. Fairchild Constr. Co. v. Owens, 224 So.2d 571, 575 (Miss. 1969)). In Logan, it was further held: "Where a stepfather, as an incident to a new marriage, has agreed to support the children of a previous marriage, or where he does so over a period of time and the mother and the children in good faith rely to their detriment on that support, the best interests of the children require entry of a child support decree against the stepfather. Thus, it follows that if a stepparent can be required to pay child support for a stepchild based on his support of the stepchild over a period of time, where it is in the best interests of the child, he should be allowed to have custody of the stepchild based on the affection for and support of that child over a period of time. With the burden should go the benefit. Under Logan, because Robert supported and cared for the minor child as if she were his own natural child, under state law, he may be required to pay child support for the minor child. **It therefore follows that he may be awarded custody and/or visitation rights with the minor child.** (Emphasis added)

Certainly it is in Zach's best interest to visit with persons who acted as his parents for the formative years of this life. The Pendletons would ask the Court to award visitation in the same manner as the father had during the pendency of this matter.

CONCLUSION

The lower Court stated that this is a difficult case. Zach did not make it difficult. Kim and Brent did not make it difficult. No disagrees and Tony admits that from the time Zachary was seven and one-half months old until he was days away from being three years old Tony had no contact with Zachary, did not support Zachary or communicate with Zachary. Tony abandoned Zachary. The parental rights of Tony should be terminated as Kim and Brent Pendleton have met the standard imposed upon them by the law. However, in the even this Court does not terminate the rights of Tony then custody of Zachary should be place with the Pendletons. This Court should grant a stay upon the lower court's ruling and grant custody until this matter is completed to Kim and Brent Pendleton or in the least some type of visitation. Zachary has been robbed of his mother (by death) and his parents he knew from seven and one-half months old until three years old (by court order). The lower court's ruling only punishes Zach and the Pendletons. Now due to the lower Court's ruling Zach has been moved yet again as his father, again, has abandoned him to the care of yet another person. This is not in the best interest of Zach. Kim and Brent Pendleton ask for this Court to reverse and render and grant them termination of parental rights or in the alternative custody of Zach.

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

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 **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.


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