

No. 2008-TS-00093

**IN THE SUPREME COURT OF
MISSISSIPPI**

**BRENT PENDLETON AND KIM PENDLETON,
Appellants,**

v.

**JAMES ANTHONY LEVEROCK,
Appellee.**

**Appeal from the Chancery Court of
Lamar County, Mississippi**

BRIEF FOR APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

**BRENT PENDLETON and
KIM PENDLETON**

Appellants

v.

NO. 2008-TS-00093

JAMES ANTHONY LEVEROCK

Appellee

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 judges of this Court may evaluate possible disqualification or recusal.

- | | | |
|----|-----------------------------|-------------------------|
| 1. | Brent Pendleton | Appellant |
| 2. | Kim Pendleton | Appellant |
| 3. | James Anthony Leverock | Appellee |
| 4. | Renee McBride Porter, Esq. | Attorney for Appellants |
| 5. | Shirlee Fager Baldwin, Esq. | Attorney for Appellee |
| 6. | Brandon L. Brooks, Esq. | Attorney for Appellee |
| 7. | James D. Johnson, Esq. | Guardian Ad Litem |
| 8. | Hon. James H.C. Thomas, Jr. | Trial Judge |

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ORAL ARGUMENT NOT REQUESTED

The Defendant-appellee, JAMES ANTHONY LEVEROCK, respectfully do not request oral argument.

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STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

This case is an appeal from the ruling of the Chancery Court of Lamar County, Mississippi granting Judgment against the Appellants on November 9, 2007.

B. STATEMENT OF THE CASE

The parties to this case are in dispute over the custody of a Minor Child, Zachary Tyler Leverock, whom was born on May 18, 2003. The Appellee herein, Tony Leverock, is the biological father of the Minor Child. Tony and the Minor Child's mother, Deanna Leverock were married on or about May 24, 2002. Soon thereafter, Tony joined the army, and he and Deanna moved to Fort Bragg North Carolina, where Tony was stationed. Tony was sent to Iraq, and while in Iraq, his son was born. Tony returned from Iraq, Zachary was a few months old. Approximately four to five months later, Tony and Deanna separated, and Deanna decided to move back home to Mississippi, taking Zachary with her. After leaving the army, Tony moved back to Jacksonville, Florida, near his parents.

From approximately January 2005 to May 13, 2006, Deanna stayed with the Appellants herein, Brent and Kim Pendleton, from time to time. During this time, her visits with the Pendletons were often sporadic in that she would move to another location taking Zachary with her. During this time frame, Deanna never had a fixed

address, phone number, or a cell phone. She would typically run off with her friends, and sometimes take Zachary with her, and at times, would leave him with the Pendletons.

Tony and Deanna signed and filed a Joint Complaint for Divorce with a Property Settlement Agreement in approximately January 2006. The no fault divorce was filed in the Chancery Court of Lamar County, Mississippi, on January 24, 2006, and gave primary physical custody of Zachary to Deanna, with Tony having reasonable visitation rights. The matter was never heard by the court, and therefore, no order was ever entered. Tragically, Zachary's mother, Deanna Leverock, was killed in an automobile accident in Laurel, Mississippi on or about May 13, 2006. Upon learning of this tragedy, Tony left Jacksonville, Florida, to come to Mississippi to attend his wife's funeral and obtain Zachary. Zachary was almost three years old at this time.

When the Pendletons realized that Tony was attempting to get his son, they filed a Complaint for Emergency Temporary Custody, Termination of Parental Rights, for Custody and other Relief on May 18, 2006. After an ex parte hearing, the trial court entered a Temporary Order of Custody granting custody to the Pendletons.

Unaware of the actions taken by the Pendletons, Tony attempted to file a Habeas Corpus Petition with the court on or about June 8, 2006. When attempting to file the Petition, it was brought to the attention of Tony's counsel that the

Temporary Order had been granted. On June 12, 2006, Tony filed a Motion to Set Aside the Temporary Order. After a hearing on Tony's Motion to Set Aside, a *guardian ad litem* was appointed, the Honorable James D. Johnson, and the chancellor agreed to let Tony and Zachary visit for the day in the park. Tony had once more traveled to Purvis, Mississippi from Jacksonville, Florida, but the Pendletons were adamant about Tony having no contact with Zachary. The chancellor disagreed, and allowed visitation to begin. An expert, John Patrick Galloway, Ph. D. was appointed by the court to evaluate the parties and the minor child, alongside the appointed *guardian ad litem*.

During this much contested litigation which lasted over a year and a half, Tony was awarded visitation which started out as supervised visitation for a few hours every other weekend in Purvis, Mississippi, Tony traveled from Florida to Mississippi in order to exercise his visitation, which was at first restricted to Mississippi. Gradually Tony was able to exercise his visitation with Zachary for two weeks at a time in Jacksonville, Florida.

After a trial on the merits, with evidence and testimony being presented, the trial court awarded legal custody and primary physical custody of Zachary to Tony to be effective on November 11, 2007. On November 11, 2007, Tony traveled from Jacksonville, Florida, to obtain his son. The Pendletons, however, refused to abide by the court's order and did not allow Tony to get Zachary. As a result, Tony filed

a Petition which was served upon the Pendletons. After a hearing, the chancellor granted the writ of Habeas Corpus on November 14, 2007, and Tony was finally able to obtain his son.

SUMMARY OF THE ARGUMENT

In order for the Pendletons to terminate Tony's parental rights, the Pendletons must show by clear and convincing evidence that Tony had abandoned or deserted his son, Zachary or that there was a substantial erosion in the relationship between Tony and Zachary which would warrant the termination of parental rights. Also, the court was correct in placing custody of Zachary with Tony, his biological father.

ARGUMENT

I. APPELLANTS CANNOT MEET THE BURDEN TO TERMINATE TONY'S PARENTAL RIGHTS

A. The Trial Court Was Correct in its Decision That Tony Had Not Abandoned Zachary

Appellant review in a case to terminate parental rights is limited to reviewing the chancellor's findings under the manifest error/substantial credible evidence test. *S.N.C. v. J.R.D.*, 755 So.2d 1077, 1081 (Miss. 2000) (citing *Vance v. Lincoln County Dep't of Pub. Welfare*, 582 So.2d 414, 417 (Miss. 1911)). On appeal, the court will ask whether there was "credible proof sufficient for the trier of fact to find abandonment by apparent based on clear and convincing evidence." *Id.* (citing *Ethredge v. Yawn*, 605 So.2d 761, 764 (Miss. 1992)). However, it is proper to

proceed de novo where the trial has misapplied controlling rule of law. *Id.*

The grounds for involuntary termination of parental rights are provided for in Mississippi Code §93-15-103. The statute provides in part:

(1) When a child has been removed from the home of its natural parents 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 an unavailable.....

(3) Grounds for termination of parental rights shall be based on one or more of the following factors: (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 (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.**

When seeking to serve the rights of a natural parent, the burden is placed on the party seeking the termination to show by clear and convincing evidence that the natural parent has either abandoned or deserted the child or is mentally or morally unfit to raise the child. If this burden can be met, then the best interest of the child will be considered. *Petit v. Holifield*, 443 So.2d 874, 877 (Miss. 1984). See also *Ford v. Litton*, 211 So.2d 871 (Miss. 1968).

In the case at bar, Tony has never shown that he wished to relinquish his parental claims to Zachary, which would constitute an abandonment of his son.

Tony testified that he was not aware of Deanna's living arrangements (Record page 13, line 24-28), and that he made attempts to call Deanna to discover her location (Record page 14-16). This Court has noted that abandonment has to do with the relinquishment of a right or claim, and that desertion deals with the avoidance of a duty or obligation. *Ainsworth v. Natural Father*, 414 So.2d 417 (Miss. 1982).

The Pendletons argue that Tony had abandoned and deserted Zachary because he never sent child support payments for Zachary. However, the Property Settlement Agreement was not even filed until approximately January 2006, and further, Tony and Ronald Leverock testified that they did not have an address or location in which to send any child support payments for Zachary.

Even if the court should find that Tony failed to fulfill his obligation of paying child support, this court in *In Re Adoption of a Female Child*, 412 So.2d 1175 (Miss. 1982), stated that a failure to pay child support is insufficient to constitute abandonment. Tony did, however, begin making his monthly child support payments to the Pendletons once they were granted the Emergency Order and continue to do so until the matter came to a conclusion at the trial court level. The trial court was also correct in finding that the Property Settlement Agreement entered into by Tony and Deanna did not reflect any intentions of Tony to abandon his son. Throughout this litigation Tony has exhibited his willingness and desire

to raise his son. Therefore, the trial court was correct in finding that grounds for the termination of parental rights do not exist.

In the case at bar, Tony made several attempts to locate and make contact with Deanna regarding Zachary and his whereabouts, but these attempts were always frustrated because Deanna moved around often and never had a fixed address or phone numbers. Therefore, the trial court was correct in not terminating Tony's parental rights.

The Pendletons argue that Tony had abandoned Zachary. This Court has defined abandonment as any conduct that "evinces a settled purpose to forgo all duties and relinquish all parental claims to the child." *S.N.C. v. J.R.D.*, 755 So. 2d 1077, 1081 (Miss. 2000). There was no evidence to show that Tony ever had a settled purpose to forgo his rights to Zachary. Zachary lived with Tony until Tony and Deanna's separation, which was when Zachary was approximately eight months old. Upon the separation, Deanna left for Mississippi, and Tony remained in Fort Bragg, North Carolina, and was ultimately sent to Iraq. Both Tony and his father, Ronald Leverock, testified that there were attempts by Tony to determine the location of his son. Tony also signed divorce papers that would give him reasonable visitation with his son.

The test for determining abandonment is an objective one, and requires that, "under the totality of the circumstances...the natural parent has manifested [his]

severance of all ties with the child.” *A.C.W. v. J.C.W.*, 957 So.2d 1042 (Miss. 2007) quoting *Gunter v. Gray*, 876 So.2d 315, 320 (Miss. 2004). The trial court was correct in determining that Tony had not severed all ties with his child. He attempted to determine Zachary’s whereabouts, but Deanna and the Pendletons frustrated his attempts.

B. The Trial Court Was Correct in its Decision that There Was No Erosion in the Relationship Between Tony and Zachary.

The Pendletons also claim that a substantial erosion of Zachary and Tony’s relationship had existed, and that this was sufficient to warrant the termination of his parental rights. However, there was no evidence produced to prove such an erosion of the relationship. Two cases where this Court has found such a erosion of the relationship to warrant the termination of parental rights are *May v. Harrison County Dep’t. of Human Servs.*, 883 So.2d 74, 78-79 (Miss. 2004) (mother breached DHS agreement by continuing to see the child’s father who had been convicted of sexual battery of the eleven-year-old girl) and *G.W.A. v. Harrison County Dep’t. of Human Servs.*, 771 So. 2D 331, 337 (Miss. 2000) (the worst case of child abuse ever to come before the chancellor). Dr. Galloway testified there was a relationship between Tony and Zachary and that there was not a substantial erosion of the relationship between Tony and his son, Zachary. The GAL, Jim Johnson also concurred that there was no deep seated antipathy between

Tony and his son, Zachary. The GAL found that Tony had made extreme efforts to comply with the visitation schedule set by the court and that Tony had done all that the court, the GAL, and doctor Galloway had requested of him, in an effort to regain and maintain a relationship with his son.

Under Mississippi law, there is support for a chancellor's decision not to terminate parental rights whose child relationship. *A.C.W.* at 1045. This Court noted in *De La Olivia V. Lowndes County Dep't of Pub. Welfare*, 423 So.2d 1328,1331-32 (Miss. 1982), that it was in error for the chancellor to terminate the parental rights of a mother who tried to maintain a relationship with her children, and there was evidence of third party interference with her relationship with the children. Also, this Court held that it was not error for a father when the mother was part of the reason for the erosion of the relationship. *In re M.L.W.*, 755 So.2d 558, 563 (Miss. Ct. App. 2000). In the case at bar, the Pendletons have attempted everything they could to keep Tony and Zachary apart. They fought every attempt that Tony made to spend additional time with his son. They even had people follow Tony and Zachary on Tony's visits continually trying to find fault with Tony. Even after the trial court awarded custody of Zachary to Tony, the Pendletons refused to turn the child over to his father, forcing Tony to file a Habeas Corpus Petition. Given the fact that the Pendletons continued their attempts to frustrate Tony's visitation, this Court should not terminate Tony's

parental rights.

II IT IS IN ZACHARY'S BEST INTEREST TO BE RAISED BY HIS BIOLOGICAL FATHER.

It is undisputed that the natural parent of a child has a primary interest in the welfare of their child. *Ethredge v. Yawn*, 605 So.2d 761 (Miss. 1992). *See also White v. Thompson*, 569 So.2d 1181, 1183 (Miss. 1990); *Simpson v. Rast*, 258 So.2d 233, 236 (Miss. 1992). Such a primary interest rises to a level of a legal presumption that custody is to remain with the natural parent. As the biological father of Zachary, such a presumption belongs to Tony. Upon the death of a natural parent, the surviving parent has a superior right to the custody of their children unless there has been an abandonment of the child, or forfeiture by their immoral or unacceptable conduct. *Rutland v. Pridgen*, 493 So.2d 952 (Miss. 1986). Natural parents enjoy such a superior position to their children, and it will prevail against the natural grandparents of the child, much less unrelated third parties such as the Pendletons. *Hayes v. Rounds*, 658 So.2d 863 (Miss. 1995).

In the case at bar, the custody of Zachary is being contested by Tony, Zachary's natural father, and the Pendletons, unrelated third parties. It is well settled that in contested cases like this, as between natural parents and third parties, it is presumed that the best interest of the child would be preserved with custody being placed with the natural parents. *Hale v. Hood*, 313 So. 2d 18 (Miss.

1975); *Mckee v. Flynt*, 630 So. 2d 44 (Miss. 1993); *White v. Thompson*, 569 So.2d 1181 (Miss. 1990). This court and the United States Supreme Court has stated that it is not only a preference, but a fundamental right that a parent be allowed to raise its own child. *Troxel v. Granville*, 530 U.S. 57 (2000); *Vance v. Lincoln County Dept. of Public Welfare by Weathers*, 582 So.2d 414, 417 (Miss. 1991). It is Tony's fundamental right to raise Zachary, and the Pendletons enjoy no such rights as they are third parties in this action, with no biological ties to Zachary whatsoever.

The initial presumption in favor of the natural parents being granted custody can only be overcome by a showing of clear and convincing evidence that the best interest of the child may be served by custody being placed in the third party. In addition, there must be a showing that the natural parent has either abandoned its child, or that the natural parent exhibits immoral conduct which is detrimental to the child's best interest and welfare, or that the child cannot be placed with the biological parent. *Carson v. Natchez Children's Home*, 580 So.2d 1248 (Miss. 1991). The Pendletons were unable to show such clear and convincing evidence. The testimony of Dr. Galloway and the GAL along with the testimonial evidence presented by Tony Leverock clearly shows that the court was correct in not finding abandonment by Tony or terminating the parental rights of Tony. The trial court further noted that Tony was fit and suitable to have custody of his son Zachary.

Tony is a young man with no health problems. He lives in his own home with his wife, Jennifer Leverock. He is employed as a truck driver, and is able to provide for his family. As noted by both the *guardian ad litem* and the court appointed expert witness, John Patrick Galloway, Ph.D., Tony is a suitable parent, and therefore, should be entitled to the custody of his son.

CONCLUSION

That it is in Zachary's best interest for him to remain in the custody of his natural father, Tony Leverock. Tony is a fit and suitable parent and has never relinquished his rights to Zachary. The Judgment of the trial court should be upheld. For all the forgoing reason, Tony respectfully urges this court to affirm the trial court's decision.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, BRANDON L. BROOKS, certify that today, January 27, 2009, a copy of the brief for appellant, a copy of the record excerpts, and the official record in this case, consisting of one volumes of the pleadings, one volume of transcript, and one volume of supplemental record, were served upon Hon. Judge James Thomas, Jr. Chancery Court Judge, P.O. Box 807, Hattiesburg, MS 39403 and Hon. Renee Porter, Attorney at Law, P.O. Box 982, Columbia, MS 39429.

A handwritten signature in black ink, appearing to read 'BL Brooks', written over a horizontal line.

BRANDON L. BROOKS