NO. 2007-CA-02065

IN THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

WILLIAM DANIEL VAUGHN — APPELLANT

-AGAINST-

CONNIE LYNN DAVIS — APPELLEE

ON APPEAL FROM THE
CHANCERY COURT OF RANKIN COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

SUBMITTED BY:
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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WILLIAM DANIEL VAUGHN	APPELLANT
VS.	NO. 2007-CA-02065
CONNIE LYNN DAVIS	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 this court may evaluate possible disqualifications or recusal:

1. William Daniel Vaughn, Appellant;
2. Connie Lynn Davis, Appellee;
3. Honorable Dan H. Fairly, Chancellor;
4. Honorable William P. Featherston, Jr., Attorney for Appellant;
5. Sharon Patterson Thibodeaux, Esq., Attorney for Appellee;

Sharon Patterson Thibodeaux

SHARON PATTERSON THIBODEAUX

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

State Statutes and Rules:

Other Authorities:

SUMMARY OF THE ARGUMENT

The Chancellor was correct in finding that the execution of an Agreed Temporary Order by William Daniel Vaughn (hereinafter "DANIEL"), and entry by a court of competent jurisdiction, wherein DANIEL agreed for temporary custody of his minor child, Danielle Lynn Vaughn (hereinafter "DANIELLE"), be awarded unto her maternal grandmother, Connie Lynn Davis (hereinafter "CONNIE"), was a voluntary relinquishment of custody and by those actions DANIEL forfeited his right to rely on the "natural parent presumption".

This case involves the custody of a little girl, DANIELLE, whose mother, Theresa Davis (hereinafter 'THERESA"), was tragically killed in an automobile accident when DANIELLE was approximately seventeen (17) months of age. (R.E. 12). DANIELLE'S parents were never married and at the time of THERESA'S death, DANIEL, the father of DANIELLE, was 20 or 21 years of age, was in college and working full-time, and was residing in an apartment with three roommates. (T. 57, 80-82). After THERESA'S death, DANIEL and THERESA'S mother, CONNIE, agreed that DANIELLE would remain in CONNIE'S home, as that was the only home that DANIELLE had ever known and because DANIEL'S situation at the time was not conducive to raising an infant. (T. 58-59; 81-82; 106). CONNIE continued to provide the care and support for DANIELLE until such time as CONNIE felt that DANIELLE needed medical attention from a physician that did not take Medicaid. (T. 22). It was at that time that CONNIE contacted DANIEL requesting legal guardianship of DANIELLE in order to obtain health insurance coverage for DANIELLE. DANIEL responded to CONNIE through his attorney that he would not agree for CONNIE to have guardianship. (T. 102-103). However, DANIEL still did nothing to assert his parental

right to custody of DANIELLE and was, basically, unconcerned for her health issues as he was aware that CONNIE could not obtain health insurance coverage for DANIELLE. CONNIE then filed her Petition for Custody and Emergency Temporary Relief on August 18, 2004. (C. P. 3). On the 20th day of August, 2004, the Court did enter its Agreed Order for Emergency Temporary Custody and Other Relief. (R.E. 11).

The Chancellor found that CONNIE stood *in loco parentis* to DANIELLE, as she had had the care, custody and control of DANIELLE since the death of DANIELLE'S mother in March, 2002. After making this determination, the Chancellor thoughtfully considered the *Albright* factors and determined that the best interest of the minor child, DANIELLE, was for her custody to be awarded unto CONNIE. The Chancellor, in his written opinion, weighed the *Albright* factors and made specific findings of fact to support his conclusion.

Chancellor Fairly was correct in his findings of fact and in his conclusions of law and should be affirmed.

ARGUMENT

1. The Court did not err in awarding custody of the minor child of William Daniel Vaughn, Appellant, to the maternal grandmother of the minor child, Connie Lynn Davis, Appellee.

"This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his or her discretion, was manifestly wrong, clearly erroneous, or applied an erroneous legal standard." *Sanderson v. Sanderson,* 824 So.2d 623, 625-26 (Miss. 2002).

"It is presumed that the best interests of the child will be preserved by it remaining with its 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." *Grant v. Martin,* 757 So.2d 264 (Miss. 2000) citing *McKee v. Flynt,* 630 So.2d 44, 47 (Miss. 1993); *Carter v. Taylor,* 611 So.2d 874,876 (Miss. 1992); *Rodgers v. Rodgers,* 274 So.2d 671, 672 (Miss. 1973). "The Mississippi appellate courts have created two exceptions to the traditional rule to provide chancellors with some discretion under these circumstances. First, a parent's long absence from a child's daily life may be considered constructive abandonment. Second, a parent's voluntary relinquishment of legal custody makes the natural parent presumption inapplicable." Deborah H. Bell, *Bell on Mississippi Family Law* §5.06[3] 1st ed. 2005).

In the case at bar, we have both exceptions noted above – DANIEL'S long absence (two plus years) from DANIELLE'S daily life and DANIEL'S voluntary relinquishment of legal custody to CONNIE.

"A court may award custody to a third party over a parent if third party custody is in the child's best interests and (1) the parent is unfit; (2) the parent has actually abandoned the child; (3) the parent has constructively abandoned the child; or (4) the parent has relinquished legal custody of the child. *Bell* §5.06[2].

Chancellor Fairly correctly found that CONNIE stood *in loco parentis* to DANIELLE. "A person acting *in loco parentis* is one who has assumed the status and obligations of a parent without a formal adoption." *Thornhill v. Van Dan,* 918 So.2d 725, 732 (Miss. 2005) citing *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)). This Court found in *Governale v. Haley,* 87 So.2d 686 (Miss. 1956):

> The attachment which such other person may have acquired for the child will not be permitted to outweigh the natural right of the parent to its custody. In a particular case, however, when the parent, by agreement or otherwise, has relinquished or surrendered the custody of the child to third persons and has permitted the child to remain in their custody for a long period of time during which the parent has contributed little or nothing to the support of the child and has evinced no special interest in the child, the court may refuse to allow the parent to reclaim the child from those to whom it has been surrendered; and this is especially true in a case that where the forces of environment may be so strong that the condition of affairs cannot be disturbed by a forced separation **without risking the happiness and welfare of the child.** (Emphasis added)...The desire of the child to remain where it is may also have the same effect. *Forbes v. Warren, supra.*

The *Governale* Court went on to say:

> The matters of chief importance at this time are the best interests and welfare of the child-the right of the child not to be disturbed by a forced separation from the aunt, who has nurtured and cared for her since she was a mere infant, the right to remain in the home of that aunt, where she has found love and companionship, and in the community where she is surrounded by her friends and playmates.

The case of *Hill v. Mitchell,* 818 So.2d 1221 (Miss. Ct. App. 2002), established the doctrine of "constructive abandonment". Under the doctrine of constructive abandonment, the natural parent presumption does not apply. The *Hill* Court defined constructive abandonment as the voluntary abandonment of **parental responsibilities**. The Court, citing *Governale,* stated that a parent can relinquish the custody of a child to another by "agreement or otherwise".

> Abandonment would be found in certain limited circumstances. [The parent has been] contributing nothing to its support, taking no interest in it, and permitting it to remain continuously in the custody of other, substituting such others in his own place so that they stand *in loco parentis* to the child, and continuing this condition of affairs for so long a time that the affections of the child and of the foster parents (grandparents in the case at bar) have become mutually engaged to the extent that a severance of this relationship would surely result in destroying the best interest of the child.

CONNIE would show that in order for Chancellor Fairly to find that she stood *in loco parentis* he had to find that DANIEL had constructively abandoned DANIELLE.

The record is replete with evidence of DANIEL'S abandonment both prior to the entry of the Agreed Order for Emergency Temporary Custody and Other Relief and afterward. The Evaluation of DANIELLE by John Norton M.D., Assistant Professor of Neurology and Psychiatry at University of Mississippi College of Medicine stated, "The biological father has been inconsistent in his interaction with the child. This is evidenced by long periods in which he would not contact her and periods in which she is not with him in which he does not call or write her." (C.P. 56). Dr. Norton further stated, "I feel that if the biological father can demonstrate a consistent commitment to the child as evidenced by daily phone calls, letters on occasion, and productive, interactive positive contacts during their visits, that custody could be revisited in a year to see if the situation had changed." (C.P. 57). However, even after this

recommendation by Dr. Norton, DANIEL did none of the suggested actions. Further, DANIEL was not able to produce even one receipt to indicate that he had ever offered CONNIE a dime of support from the time of Theresa's death until the filing of CONNIE'S Petition. (T. 122). DANIEL did not attend any parent-teacher conferences or any school-related activities whatsoever until well after CONNIE filed her Petition and DANIEL relinquished custody of DANIELLE to CONNIE. (T. 118-119). It was further determined that DANIEL was not providing health insurance coverage for DANIELLE, although he had testified that he was on November 16, 2005. (T. 92-93). Most notably, DANIEL had named his live-in girlfriend as the beneficiary of his life insurance policy, not his daughter, DANIELLE. (T. 72-73).

On July 21, 2006, CONNIE filed her Petition for Modification of Order for Visitation and to Set Case on Trial Docket because she felt the Court was resisting a final ruling in an attempt to allow DANIEL enough time to "fix and/or modify the behavior of the Defendant in an attempt to make him a good parent." (C.P. 49). CONNIE consistently urged the Court to issue a ruling and to stop continuing the matter in order to allow DANIEL time to decide to be a parent to DANIELLE. The Guardian *Ad Litem* even stated in his final report, "But most importantly, I believe that the best interest of Danielle Vaughn will be served by the court rendering a final decision." (C.P. 85). The Guardian *Ad Litem* testified, "And I think there are times and evidence in all the hearings that have shown that he [Daniel] has kind of stepped back and let her [Connie] take this primary role." He stated in his report, "She [Connie] has taken over the primary responsibility of rearing Danielle and providing for her needs. Mr. Vaughn chose to leave Danielle with Ms. Davis and allowed her to make the primary decisions concerning Danielle's life. Ms. Davis has done an excellent job raising Danielle." (C.P. 82).

The Guardian *Ad Litem* further testified that he had stated to the former Chancellor, Judge Zebert, during the course of this matter that he was "pushing for him [Daniel] to take a step forward, take a step forward." (T. 161). He went on to say "Well, I mean, if they're on a level playing field, then he hasn't taken a step forward." (T. 161). The inference of the Guardian *Ad Litem's* statement was that he was constantly waiting for DANIEL to assert his parental rights and be a father to DANIELLE.

In the case of *Griffith v. Pell*, 881 So. 2d 184 (Miss. 2004), our Supreme Court looked to the case of *A.J. v. I.J.*, 270 Wis.2d 384, 677 N.W.2d 630 (2004), in which that Court noted that the biological father "did not support [the minor child} emotionally or financially; that occasionally buying formula and diapers was insufficient to show his assumption of parental responsibility, as was his failure to assert parental rights ...at her birth." The *Griffith* Court also stated, "However, parental status that rises to the level of a constitutionally protected liberty interest does not rest solely on biological factors, but rather, is dependent upon an actual relationship with the child where the parent assumes responsibility for the child's emotional and financial needs." "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." In the case at bar, DANIEL would be hard-pressed to meet the requirements of "parenthood" set forth in these cases. The *Griffith* Court suggests that legal recognition of the biological father does not necessarily require that he be accorded visitation or custody rights with regard to the child.

The case at bar is also similar to the case of *Loomis v. Bugg*, 872 So. 2d 694 (Miss. App. 2004). In the *Loomis* case, the minor child was born out-of-wedlock. Subsequently, the biological father died. A custody dispute arose between the natural mother and one of the paternal grandmothers and aunts. The Court found that the child's mother had led an unstable

life, including use of illegal narcotics, for an extended period of time and that her attention to the welfare of her child appeared to be of secondary interest to her. *Rather, she was content to leave the day-to-day care of the child to relatives for over half the time since the death of the child's father.* DANIEL left the day-to-day care of DANIELLE to CONNIE the **ENTIRE** time from THERESA'S death until after CONNIE filed her Petition and after DANIEL'S voluntary relinquishment of custody to CONNIE.

As a result of CONNIE'S *in loco parentis* status, she stood on equal footing with DANIEL. "The rights, duties, and liabilities of one standing *in loco parentis*, in fact, are the same as those of a natural parent." *Farve v. Medders,* 128 So.2d 877, 879 (Miss. 1961). These rights would include the right of custody. In *Weigand v. Houghton,* 730 So.2d 581 (Miss. 1999) citing *Bryant v. Brown,* 118 So.2d 184; 151 Miss. 398, 400 (Miss. 1928), the Court said "Primarily parents, or those standing *in loco parentis* to minor children, have the constitutional right, under the Fourteenth Amendment, to the custody and control of such minor children, and may give them such education and training as in their judgment may seem best for the welfare of the child and for the good of society...".

After hearing the testimony from the parties and their witnesses as well as the Guardian *Ad Litem,* Chancellor Fairly correctly found that, based on the Agreed Order for Emergency Temporary Custody and Other Relief entered on August 20, 2004 (R.E. 11), DANIEL had voluntarily relinquished custody of DANIELLE to CONNIE and DANIEL had, therefore, forfeited the right to rely on the natural parent presumption. This Court found in *Grant, supra* at 266:

> Therefore we adopt a new standard and hold that a natural parent who voluntarily relinquishes custody of a minor child, through a court of competent jurisdiction, has forfeited the right to rely on the existing natural parent presumption. A natural parent may reclaim custody of the child only upon

> showing by clear and convincing evidence that the change in custody is in the best interest of the child. This new rule not only reaffirms that the polestar consideration in all child custody cases in the best interest of the child, but also gives the chancellor the authority to make a 'best interest' decision in voluntary relinquishment cases without being fettered by the presumption in favor of natural parents which applies in other child custody cases.

DANIEL argues that he never intended to forfeit his right to rely on the existing natural parent presumption, but only consented to *temporary* custody being awarded unto CONNIE until the matter could be heard on the merits. However, it is important to point out that, although DANIEL did not relinquish custody of DANIELLE in written form until August 20, 2004, he had orally relinquished custody of DANIELLE in March, 2002, immediately after the death of THERESA, and through his constructive abandonment of DANIELLE over the next several years. DANIEL testified that, at the time of THERESA'S death, he spoke with CONNIE and her husband and he (DANIEL) felt is was in DANIELLE'S best interest at that time to "let her stay in the home where she had been and stay with somebody that was capable of taking care of her better than [he] could at the time." (T. 81). DANIEL further testified:

> At the time Teresa (sic) was killed in the car accident, I was living with three other roommates who were all guys in an apartment in north Jackson. I spoke with both Mrs. Davis and Mr. Davis about Danielle staying with them until I was finished school, because I was in school at that time, and had a good job and was on my feet; and to my understanding is Mrs. Davis would help watch over Danielle, because she is a great grandmother and she has always been a great grandmother to Danielle.

(T. 81).

However, upon cross-examination, DANIEL testified that during the two-year period of time from the date of THERESA'S death on March 12, 2002, until the date of the filing of CONNIE'S Petition for Custody and Emergency Temporary Relief (R.E. 3) on August 18, 2004, he had only been in college one semester. (T. 96-97). He further testified that he had

maintained full-time employment at Comp USA for a period of two or two and a half years (T. 97), and was living by himself at the end of his employment with Comp USA (T. 98), but still did not ask for DANIELLE to be returned to him and admitted when questioned by the Chancellor that his time spent with DANIELLE during the time between THERESA'S death and CONNIE'S filing her Petition was "somewhat limited." (T. 134). In fact, upon cross-examination, DANIEL admitted that he never filed any pleading whatsoever in this matter requesting custody of DANIELLE. (T. 103). DANIEL admitted that even after CONNIE requested that she be awarded legal guardianship of DANIELLE in the summer of 2004 and he refused, he still did nothing to assert his parental rights to DANIELLE or to request custody of DANIELLE. He continued to sit back and allow CONNIE to provide for DANIELLE'S daily care, provide for her support, take her to the doctor, pay for her private school, etc. (T. 102-103). Upon direct examination, CONNIE testified:

Q. Now, at any time prior to you filing that petition for custody, did Mr. Vaughn come to you and say, Thanks a lot for all you've done for my child. I'm going to take her with me now?

A. No, he did not.

Q. Ever.

A. Ever.

Q. When was the first time that you even got an inkling that he might want to have custody of his child?

A. When his attorney answered the request for guardianship.

(T. 74).

In his Brief, DANIEL states, "Daniel testified in the Court below that at the time he entered the Agreed Temporary Order allowing Connie to have temporary physical custody of his daughter, Danielle, he was unable to provide the care and stability Danielle needed at the time." CONNIE would show that DANIEL does not cite back to any corroborative testimony in the trial transcript because that testimony simply does not exist. Not only did DANIEL voluntarily relinquish custody of DANIELLE at the time he executed the agreed order, it was apparent to the Chancellor that he had negotiated his visitation with DANIELLE prior to executing the order. (T. 132).

CONNIE would show unto this Court that the doctrine of estoppel by laches is applicable in the case at bar. *Black's Law Dictionary,* 787 (5th ed. 1979) defines estoppel by laches as "a failure to do something which should be done or to claim or enforce a right at a proper time." It goes on to state, "Delay in enforcement of rights until condition of other party has become so changed that he cannot be restored to his former state." Chancellor Fairly found "... if nothing else, the affections of the child have become so engaged to Mrs. Davis that a severance of that relationship would result in destroying the best interest of the child." (T. 201). DANIEL sat back, failed to enforce his right to raise his child, allowed CONNIE to do so, and to do so very well according to his own testimony, for such a long period of time that the relationship between CONNIE and DANIELLE became as a mother/daughter relationship. In fact, Chancellor Fairly stated in his ruling "...you're replacing your daughter" talking about CONNIE replacing THERESA as the mother to DANIELLE. (T. 207). The Guardian *Ad Litem* testified that "And I think the reason [Danielle] misses Mrs. Davis because probably her whole life she's lived there. That's her stability. That's home." (T. 162).

Removing a seven-year-old child from the only home she had ever known would clearly have a huge and detrimental impact on the child.

Upon the determination that DANIEL had voluntarily relinquished custody of DANIELLE to CONNIE, the burden or proof shifts to DANIEL to prove "by clear and convincing evidence" that a change of custody would be in the best interests of DANIELLE. *Hill* at 1225 citing *Grant, supra*. There is no testimony to support a finding that such a change would be in DANIELLE'S best interests.

After considering the totality of all of the aforementioned testimony, Chancellor Fairly then applied the *Albright* factors to make a final determination of the best interest of DANIELLE. Chancellor Fairly applied the *Albright* factors and concluded as follows:

	CONNIE	DANIEL	EVEN
Age of child			X
Health and sex of the child	X		
Continuity of care prior to separation	X		
Best parenting skills	X		
Employment of parent	X		
Physical and mental health and age of parent			X
Emotional ties of parent and child	X		
Moral fitness of the parents	X		
Home, school and community record of child	X		
Preference of the child			N/A
Stability of home environment and employment of spouse			X

(T. 201-207)

"The welfare of the child or children is the matter of chief importance; and the consideration of their welfare will prevail over any mere preponderance of legal right in one or the other party." *Forbes v. Warren,* 186 So. 325, 326 (Miss. 1939). Clearly, the best interest of DANIELLE would be served by her custody remaining with CONNIE.

CONCLUSION

"This Court will not overturn the decision of a chancellor in domestic cases when those findings are supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, or applied an erroneous legal standard." *Kennedy v. Kennedy*, 650 So. 2d 1362, 1366 (Miss. 1995). Chancellor Fairly supported his findings with the overwhelming evidence presented to him, never abused his discretion, did not apply an erroneous legal standard, and was manifestly correct. This Court should affirm the decision of the lower court.

The evidence, both oral and documentary, provided to Chancellor Fairly clearly supports the findings of fact and conclusions of law made by the Chancellor. This Court should not, and cannot, reverse but for manifest error, abuse of discretion, or application of an erroneous legal standard. No such errors exist in the case at bar. Chancellor Fairly was imminently correct in his decision and should be affirmed.

Appellee respectfully moves this Court to affirm Chancellor Fairly's decision and to assess all costs and attorney fees to the Appellant pursuant to Miss. R. App. P. 36.

This the 3rd day of November, 2008.

Respectfully Submitted,

CONNIE LYNN DAVIS

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CERTIFICATE OF SERVICE

I, Sharon Patterson Thibodeaux, Attorney for Connie Lynn Davis, hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of the Appellee to the Honorable Dan Fairly, Trial Judge, at his usual mailing address of P. O. Box 1437, Brandon, Mississippi 39043 and to the Honorable William P. Featherston, Jr., Attorney for the Appellant, at his usual mailing address of Post Office Box 1105, Ridgeland, Mississippi 39158-1105.

This the 3rd day of November, 2008.

Sharon Patterson Thibodeaux
SHARON PATTERSON THIBODEAUX