IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-02065

WILLIAM DANIEL VAUGHN — APPELLANT

VS.

CONNIE LYNN DAVIS — APPELLEE

APPEAL FROM THE CHANCERY COURT OF RANKIN COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

SUBMITTED BY:

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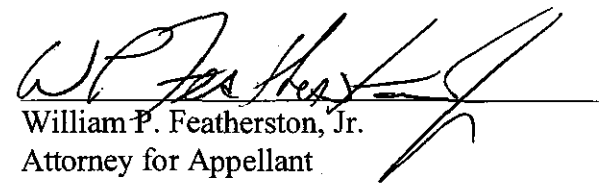
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant certifies that the persons having an interest in the outcome of this case are those listed below:

1. William Daniel Vaughn
2. Connie Lynn Davis
3. William P. Featherston, Jr., Attorney for Appellant
4. Sharon P. Thibodeaux, Attorney for Appellee
5. Prentiss M. Grant, Guardian *Ad Litem*

This Certificate is made so that the Judges of the Court may evaluate possible disqualification or recusal.



William P. Featherston, Jr.
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STATEMENT OF THE CASE

1. Nature of the Case

William Daniel Vaughn (hereinafter "Daniel"), Appellant herein, appeals from an adverse decision of the Rankin County Chancery Court awarding custody of his minor daughter, Danielle Lynn Vaughn, a female child born October 9, 2000, to the minor child's maternal grandmother, Connie Lynn Davis (hereinafter "Connie"), Appellee herein.

2. Course of Proceedings and Disposition in the Court below

Connie filed a Petition for Custody and Emergency Temporary Relief, individually and as maternal grandmother and next friend of Danielle Lynn Vaughn, (hereinafter "Danielle") against Daniel on August 18, 2004, in the Chancery Court of Rankin County, Mississippi. The Temporary Hearing was set for August 20, 2004, two days after the Petition was filed and Daniel was served with process.

Connie alleged that she was the maternal grandmother of Danielle who was born to the daughter of Connie, Theresa Lynn Davis, on October 9, 2000, and that Theresa Lynn Davis died of injuries sustained in a car accident on March 12, 2002. Connie further alleged that Daniel was listed on the birth certificate of Danielle as her natural father. Connie alleged that Daniel, if shown to be the natural father of Danielle, is an unfit person to have the primary care, custody and control of Danielle. Connie requested an emergency temporary custody order awarding the temporary care, custody and control of Danielle to Connie for the purpose of providing health insurance coverage for Danielle on Connie's health insurance policy. Connie further requested child support from Daniel and that Daniel be required to obtain a life insurance policy on his life naming Danielle as beneficiary.

An Agreed Order for Emergency Temporary Custody and Other Relief was entered in the Court below on August 20, 2004, whereby Connie and Daniel agreed that Connie should have temporary custody of Danielle subject to visitation rights of Daniel pending a trial on the merits, which was set for February 16, 2005.

The Court appointed a Guardian *Ad Litem* and following a hearing entered its Final Judgment on October 18, 2007, finding that Daniel had voluntarily relinquished custody of his daughter, Danielle, to Connie by entering into an Agreed Order for Emergency Temporary Custody and Other Relief pending a hearing on the merits, and that, therefore, the natural parent presumption did not apply in this case and that based upon a consideration of the Albright Factors, the physical care, custody and control of Danielle should be awarded to Connie subject to visitation rights of Daniel. The Court below further ordered that Daniel pay child support to Connie and that Daniel maintain a policy of life insurance with Danielle designated as the sole beneficiary.

Daniel then perfected his appeal to this Court.

3. **Statement of Facts**

References to the trial record are cited as "RE [page]."

References to the trial transcript are cited as "[Volume] TR [page]."

The facts in this case are undisputed. Danielle Lynn Vaughn (Danielle) was born on October 9, 2000. Her mother was Theresa Lynn Davis who died of injuries sustained in a car accident on March 12, 2002. Danielle's father is William Daniel Vaughn (Daniel) who was listed on the birth certificate of Danielle and whose paternity was established by a DNA test which was filed in the Court below on October 28, 2005. (RE 3, 4, 25 through 30)

Danielle was fifteen months old when her mother, Theresa Davis, was killed in a car wreck. Daniel and Theresa were not married at the time of Theresa's death. Theresa and Danielle were living with Connie at the time of Theresa's death and Daniel was living with two roommates in an apartment, was attending school and working full time. After Theresa's death, Connie and Daniel discussed physical custody arrangements for Danielle and Daniel told Connie that he could assume physical custody of Danielle. Connie persuaded Daniel to let her continue the physical custody of Danielle because Daniel was living with two male roommates, working full time, and trying to go to school. Connie told Daniel not to worry about Danielle and to finish school and get on his feet because she did not want Daniel to try to juggle Danielle and take care of her when he had no means to do so. Connie told Daniel to finish school and get on his feet. Connie testified that Daniel did not abandon Danielle and that he visited with her although not as frequently as Connie thought that he should. At some point, Connie decided that she needed to petition the Court for guardianship so that she could get Danielle on her health insurance. (TR 57 through 60)

At the time of the hearing in the Court below on August 1, 2007, Daniel was married to Melissa Vaughn and had a two year old son with Melissa. Daniel was employed full time at Kroger. Connie testified that she had seen the home in which Daniel and Melissa were living and that she did not find anything wrong with it. She testified that Danielle had her own bedroom. Connie testified that Daniel loved Danielle and Danielle loved Daniel. Danielle also considered Daniel her father. (TR 67, 68)

The Court in its ruling awarding custody of Danielle to Connie made no finding that Daniel was mentally or morally unfit to have custody of Danielle nor did the Court find that Daniel had abandoned Danielle. The Court based its ruling on the case of *Grant v. Martin*, 757

So. 2d 264 (Miss. 2000) and held that Daniel was not entitled to the presumption that the best interest of the child would be preserved by it remaining with its parents or parent as opposed to third parties, whether grandparents or others. The Court found that because Daniel agreed to the temporary placement of custody of Danielle with Connie pending a hearing on the merits of Connie's request for custody, that Daniel had forfeited his natural parent presumption that he is entitled to custody as opposed to Connie, the grandmother. (TR 190 through 217)

When counsel for Daniel inquired of the Court concerning the Court's finding as to whether or not the Court found that Daniel was either mentally or morally unfit to have custody of the child or had abandoned the child, the Court made a finding that it did not find Daniel was morally or mentally unfit. As to abandonment, the Court found no facts from the testimony or action on Daniel's part which would constitute abandonment. The Court stated that the only abandonment it could construe would be Daniel's signing off on the Agreed Order saying Connie had temporary custody. The Court further stated "and for what it's worth - for what it's worth, so anybody later reading this record will know, that were the natural presumption - if it applied in this case, I would - my decision would be to grant Mr. Vaughn (Daniel) custody. I think I would be compelled to." (TR 215, 216)

SUMMARY OF THE ARGUMENT

Daniel respectfully submits that the Chancellor in the Court below erred by ruling that Daniel was not entitled to the natural parent presumption that the best interest of the child would be preserved by being in the custody of the natural parent for the reason that Daniel agreed to the temporary custody of Danielle with Connie pending a hearing on the merits of Connie's request for permanent custody.

It is Daniel's contention that the Agreed Temporary Order he entered into upon advice of counsel pending a hearing on the merits on Connie's request for permanent custody was not a voluntary relinquishment of custody through a court of competent jurisdiction as contemplated by this Court in the case of *Grant v. Martin*, 757 So. 2d 264 (Miss. 2000).

Daniel contends that he did not voluntarily relinquish custody of Danielle through a court of competent jurisdiction by entering into the Agreed Temporary Order pending a hearing on the merits of Connie's request to be granted permanent custody of Danielle and that the Court made an incorrect ruling of law in so finding.

ARGUMENT AND AUTHORITIES

STANDARD OF REVIEW

The Mississippi Supreme Court and Court of Appeals reviews decisions of a Chancellor on questions of law under a *de novo* standard. *Broome v. Broome*, 832 So. 2d 1247 (Miss. Ct. App. 2002), *Zeman v. Stanford*, 789 So. 2d 798 (Miss. 2001)

As this appeal is from the ruling of the Chancellor below awarding custody of Danielle to Connie based upon the Chancellor's interpretation of the case of *Grant v. Martin*, 757 So. 2d 264 (Miss. 2000) as to whether Daniel voluntarily relinquished custody of Danielle through a court of competent jurisdiction and thereby forfeited his presumption that the best interest of Danielle would be preserved by her remaining with Daniel presents an issue of law, the standard of review in this case is *de novo*.

ISSUE

WHETHER THE CHANCERY COURT OF RANKIN COUNTY, MISSISSIPPI, ERRED BY AWARDING CUSTODY OF THE MINOR CHILD OF WILLIAM DANIEL VAUGHN, APPELLANT, TO THE MATERNAL GRANDMOTHER OF THE MINOR CHILD, CONNIE LYNN DAVIS, APPELLEE.

This case is a custody battle between Daniel, the natural father of Danielle, his daughter, who was born October 9, 2000, and the maternal grandmother of Danielle, Connie. The natural mother of Danielle, Theresa Lynn Davis, died in a car accident on March 12, 2002. The natural father, Daniel, and the natural mother, Theresa Lynn Davis (hereinafter "Theresa") never married and Daniel was listed as the father on the birth certificate of Danielle. A paternity test conclusively established Daniel as the father of Danielle. Theresa and Danielle were living with Theresa's mother and Danielle's grandmother, Connie, at the time of Theresa's death in 2002. At that time, Daniel was twenty years old, was a student in college and lived in an apartment with three male roommates. Daniel and Connie discussed the physical custody of Danielle after Theresa's death and both decided it was in Danielle's best interest to allow Danielle to remain in Connie's home until Daniel could finish school and "get on his feet" to be in a position to assume custody of Danielle. Daniel maintained a relationship with Danielle during the time Danielle was in the physical custody of Connie. On August 18, 2004, Connie filed a petition against Daniel seeking custody of Danielle. Connie alleged that Daniel was an unfit parent and, therefore, should not be awarded custody of Danielle. Connie alleged in her petition for custody that she was entitled to emergency relief and requested a temporary hearing on her request for temporary relief to request temporary custody of Daniel for the purpose of placing Danielle on Connie's health insurance so that Danielle would be provided health insurance coverage. Danielle had no health issues at the time and the emergency basis of Connie's petition is questionable at best. However, upon the advice of his attorney, Daniel entered into an Agreed Temporary Order on the date of the temporary hearing agreeing that Connie have temporary custody of Danielle pending a hearing on the merits of Connie's Petition for Permanent Custody which was scheduled in the temporary order for February 16, 2005. Danielle was four years old

at the time. The hearing on Connie's Petition for Permanent Custody was continued several times for the purpose of the appointment of a guardian *ad litem* and the examination of Danielle by a court-appointed expert psychologist. Several orders of visitation were entered in the interim granting liberal visitation to Daniel. The Court below finally heard Connie's Petition for Custody on August 1, 2007, and entered its Final Judgment awarding custody to Connie on October 18, 2007. Danielle was seven years old at the time of the entry of the Final Judgment by the Court below and had been in the legal custody of Connie pursuant to the Agreed Temporary Order entered into between Connie and Daniel entered on August 20, 2004. Daniel regularly exercised his visitation with Danielle during the interim between the entry of the Agreed Temporary Custody Order and the entry of the Final Judgment awarding custody of Danielle to Connie. Also during the aforesaid interim period of time, Daniel married and he and his wife, Melissa, gave birth to a son; Daniel obtained full time employment at Kroger; and Daniel and Melissa purchased a home with adequate accommodations for Danielle and their new son.

The basis of the decision of the Court below to award custody of Danielle to Connie, the maternal grandmother of Danielle, rather than Daniel, the natural father of Danielle, was that Daniel by entering into the Agreed Temporary Order for Custody was no longer entitled to the presumption that the best interest of Danielle would be preserved by custody being awarded to the natural parent.

The issue for this Court to decide is whether an agreed temporary order awarding temporary custody of a child to a third party pending a hearing on the merits of the third party's Petition for Permanent Custody constitutes a voluntary relinquishment of custody of a minor child through a court of competent jurisdiction which thereby forfeits the right of the natural parent to rely on the existing natural parent presumption.

This Court decided the case of *Grant v. Martin*, 757 So. 2d 264 on April 13, 2000, several months before the birth of Danielle. In *Grant v. Martin, supra*, this Court set forth the existing law pertaining to the legal standard concerning a custody dispute between a third party and a natural parent. As stated by the Court:

> The Chancellor found that Robin [Grant] had "wholly failed to prove a material change in circumstance which adversely effects the welfare of the minor children", thus applying the legal standard ordinarily applied to a request for modification of child custody as between parents. See *Thomas v. Purvis*, 384 So. 2d 610, 612 (Miss. 1980). However, prior to today, this Court has consistently applied a different standard in deciding a custody dispute between a natural parent and a third party such as a grandparent, as follows:
>
> It is presumed that the best interest 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.
>
> *McKee v. Flynt*, 630 So. 2d 44, 47 (Miss. 1993); *Carter v. Taylor*, 611 So. 2d 874, 876 (Miss. 1992); *Rogers v. Rogers*, 274 So. 2d 671, 672 (Miss. 1973). Absent clear proof of one of the above circumstances, the natural parent is entitled to custody of his or her child. *McKee*, 630 So. 2d at 47 (citing *Rutland v. Pridgen*, 493 So. 2d 952, 954 (Miss. 1986)).

After citing the well established natural parent presumption, this Court in *Grant v. Martin, supra,* adopted a new legal standard in custody disputes between natural parents and third parties where the natural parent has voluntarily relinquished custody to the third party by a court of competent jurisdiction as follows:

> Second, we take this opportunity to consider the proper standard to be applied in a request for modification where the moving natural parent, or parents, have previously relinquished custody. Our law clearly has a strong presumption that a natural parent's right to custody is superior to that of third parties, whether grandparents or others. This is as it should be. However, this Court has never before been asked to rule on whether the natural parents' consent

> to and joinder in court proceedings granting custody to such third parties should alter that presumption. Because stability in the lives of children is of such great importance, we have carefully weighed the impact of establishing an exception, or a new standard, for such instances. While we do not want to discourage the voluntary relinquishment of custody in dire circumstances where a parent, for whatever reason, is truly unable to provide the care and stability a child needs, neither do we want to encourage an irresponsible parent to relinquish their child's custody to another for convenience sake, and then be able to come back into the child's life years later and simply claim the natural parents' presumption as it stands today.
>
> 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 is 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 submits that the facts of *Grant v. Martin* are distinguishable from the present case. In *Grant v. Martin*, Robin Martin and Scott Martin, the natural parents of their three young children, divorced on the ground of irreconcilable differences and in the settlement agreement which was incorporated into their final judgment of divorce, agreed that custody of their three minor children should remain with the paternal grandparents subject to reasonable visitation rights. Robin Martin remarried Prentiss Grant (ironically the guardian *ad litem* in the present case) and two years after voluntarily relinquishing custody of her three minor children to her ex-husband's parents, Larry Martin and Peggy Martin, Robin Grant petitioned the Chancery Court for modification of the previous custody order entered at the time of her divorce for dissolution of the guardianship and the return of her three children relying on the natural parent presumption

as set forth *infra*. The Chancery Court dismissed the petition of Robin Grant for custody at the close of testimony by Robin Grant and her husband, thus leaving the children in the custody of their grandparents. The Chancellor found that Robin Grant had "wholly failed to prove a material change in circumstances which adversely effects the welfare of the minor children," thus applying the legal standard ordinarily applied to a request for modification of child custody as between parents.

This court in *Grant v. Martin, supra*, found that it was error for the Court of Appeals to reverse and render the Chancellor when there had not been a full hearing on the merits of the case. The only testimony heard in the trial court in *Grant v. Martin* was from the natural mother and her husband. This Court held that by reversing the Chancellor's decision granting a motion to dismiss at the close of the parent's proof, the Court of Appeals placed the case in a procedural posture where it was appropriate for the grandparents to go forward with their proof. The case should have been remanded for that purpose rather than rendered.

In the present case, Daniel did not finally relinquish custody of his daughter, Danielle, to Connie through a court of competent jurisdiction. He merely agreed to allow Danielle to remain in the physical custody of Connie temporarily pending a hearing on the merits of her Petition for Custody. No previous custody order concerning Danielle had been entered by any court of competent jurisdiction as was the case in *Grant v. Martin, supra*. As set forth in the recitation of facts above, Daniel was not in a position to assume custody of Danielle at the time of Theresa's death and agreed to allow Danielle to remain in the physical custody of Connie until he could get on his feet and assume custody. No court order was ever entered until Connie filed her Petition for Custody and Daniel agreed to temporary custody of Danielle with Connie pending a hearing on the merits of Connie's Petition for Custody upon advice of his counsel at the time.

Unlike *Grant v. Martin*, this is not a case involving a request for modification of a previous custody order entered by a court of competent jurisdiction. This is an initial custody action by the maternal grandmother seeking custody of her maternal granddaughter against the natural father. The Court below in its ruling also relied on the case of *Hill v. Mitchell*, 818 So. 2d 1221, (Miss. App. 2002) in which a Chancellor entered an emergency order finding a child to be in immediate danger and granting temporary physical custody of the child to the child's grandparents subject to visitation rights of the natural mother. Eleven years later, the natural mother sought to regain custody and the court denied the mother's request for relief based upon the decision in *Grant v. Martin, supra*. The Court in *Hill v. Mitchell, supra*, stated "The substantial passage of time, both before the entry of the temporary order and certainly between 1988 and 1999, was an acceptance by Hill of the present custody arrangement." The Court further stated in *Hill v. Mitchell, supra*, that "the Chancellor found that Hill's course of conduct over the past eleven years amounted to constructive abandonment. Hill's conduct matches the definition of "abandonment" as used by the Supreme Court in *Governale* in what was described as an "uninvolved parent" in *Grant*."

Hill v. Mitchell, supra, is distinguishable from the facts of the present case in that Daniel did not constructively abandon Danielle and following entry of the Agreed Temporary Order granting Connie custody of Danielle, Daniel continued to fight for her custody. He also exercised regular visitation with Danielle pending a hearing on the merits of this matter which was finally held on August 1, 2007. The delays in the hearing on the merits was due to an appointment of a guardian *ad litem* who was ordered by the Court to conduct an investigation and by the Court ordered appointment of a psychologist to conduct an evaluation of the parties and the minor child. Following completion of the investigation by the GAL and the evaluation

by the Court appointed psychologist, the matter was set for hearing and the Court issued its ruling denying Daniel custody and awarding custody of Danielle to Connie. None of the delays were the fault of Daniel. Prior to the Chancellor issuing his custody ruling, the previous Chancellor in the Court below awarded Daniel visitation with Danielle on a one week-on and a one week-off basis, which was essentially an award of joint custody. The Amended Order for Visitation granting Daniel and Connie one week alternating periods of visitation was entered on December 29, 2006, and continued until the Court issued its ruling on October 18, 2007. (RE 69) The Amended Order for Visitation was recommended by the Court appointed expert psychologist, Dr. Lisa Yazdani and the court-appointed guardian *ad litem*. The joint custodial arrangement was working between the parties with no problems until the Court issued its final ruling awarding sole physical custody to Connie with visitation of every other weekend to Daniel.

The issue to decide in this case is whether Daniel, by entering into the Agreed Temporary Order granting Connie temporary custody pending a final hearing on her Petition for Custody constitutes a voluntary relinquishment of custody as contemplated by this Court in *Grant v. Martin, supra*. This Court pronounced a new rule involving custody disputes between a third party and a natural parent in *Grant v. Martin, supra*, but did not delineate what type of voluntary relinquishment of custody of a minor child through a court of competent jurisdiction constitutes a forfeiture of the existing natural parent presumption. If Daniel had been advised by his attorney that *Grant v. Martin, supra*, would apply to a temporary order, it is doubtful that counsel for Daniel at the time the Agreed Order for Temporary Custody was entered into by Daniel would have advised Daniel to agree to the arrangement. Even if Daniel had not agreed to the temporary custodial arrangement pending a hearing on the merits of Connie's petition for full custody of

Danielle, the question remains would a temporary order issued by a court in a custody dispute following a temporary hearing constitute a voluntary relinquishment of custody. Certainly the family law bar of this State needs clearer guidance from this Court on what to advise parties involved in custody disputes to prevent the natural parent from forfeiting its natural parent presumption in a pending custody dispute. As this Court stated in *Grant v. Martin, supra*, "While we do not want to discourage the voluntary relinquishment of custody in dire circumstances where a parent, for whatever reason, is truly unable to provide the care and stability a child needs, neither do we want to encourage an irresponsible parent to relinquish their child's custody to another for convenience sake, and then be able to come back into the child's life years later and simply claim the natural parents' presumption as it stands today." *Grant v. Martin,* 757 So. 2d 264, 266 (Miss. 2000). 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. Following entry of the Temporary Agreed Order, Daniel obtained full time employment with a stable company (Kroger); got married; and had a child with his new wife; and purchased a home with his new wife with adequate accommodations for Danielle. Daniel never intended to relinquish permanent custody of Danielle but only did so on a temporary basis pending a hearing on the merits of Connie's Petition for Custody. For *Grant v. Martin, supra*, to apply to the facts in this case, the Court below should have been required to find that Daniel was able to provide for the care of Danielle at the time he entered into the Temporary Order and that he chose to agree to the temporary custody arrangement due to his irresponsibility and for his convenience.

Daniel submits that the natural parent presumption should apply in this case and as stated by this Court in numerous cases, in order to overcome the natural parent 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. *McKee v. Flynt, supra*; *Carter v. Taylor, supra*; *Rogers v. Rogers, supra*; and *Sellers v. Sellers,* 638 So. 2d 481 (Miss. 1994).

The Court below made an affirmative finding that Daniel had not abandoned his daughter and was neither mentally or morally unfit to have custody of Danielle and made no finding that any conduct of Daniel was so immoral as to be detrimental to the child. (TT 215, 216) The Court also made an affirmative finding that had the Court not interpreted *Grant v. Martin, supra*, to apply in the present case and having found that the Temporary Custody Order constituted a forfeiture of the natural parent presumption, the Court would have been compelled to grant Daniel custody of his daughter, Danielle. (TT 216)

Numerous decisions by this Court have emphasized the right and responsibility of a natural parent to raise their own children as opposed to a third-party, such as a grandparent. This right and responsibility should be protected by the Court's of this State. A forfeiture of that right should be under extreme and limited circumstances. Daniel submits that the agreement to allow temporary custody of his daughter, Danielle, to remain with the maternal grandmother of his daughter pending a hearing on the merits of her Petition for Permanent Custody, which was strenuously contested by Daniel, should not constitute a forfeiture of his natural parent presumption that the best interest of his daughter would be served by being raised by the natural father as opposed to the grandmother.

CONCLUSION

Daniel submits that the Court below incorrectly applied the case of *Grant v. Martin, supra*, to the facts of this case and requests that this Court reverse the decision of the Court

below granting custody of Danielle to Connie and render a decision awarding the permanent care, custody and control of Danielle to her natural father, Daniel.

Respectfully submitted, this the 21st day of July, 2008.

WILLIAM DANIEL VAUGHN, Appellant

By: _____
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CERTIFICATE

I, William P. Featherston, Jr., of counsel for William Daniel Vaughn, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing pleading to:

Honorable Daniel H. Fairly, Chancellor
P. O. Box 1437
Brandon, MS 39043

Sharon Thibodeaux, Esq.
P. O. Box 5367
Brandon, MS 39047

THIS, the 21st day of July, 2008.

_____
William P. Featherston, Jr.