2008-CA-00037 t

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMIE RENEE BUCHANAN (Now McCraw) **APPELLANT**

VERSUS **CAUSE NO. 2008-TS-00037**

ERIC BUCHANAN **APPELLEES**

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. Jamie Renee Buchanan (Now McCraw) — Appellant

2. Eric Buchanan
   Elizabeth "Liz" Thornhill — Appellee

3. Joseph L. Turney
   716 Main Street
   Columbia, MS 39429 — Attorney for Appellant

4. Renee McBride Porter
   Porter Law Firm, P.A.
   P.O. Box 982
   915 Main Street
   Columbia, Mississippi 39429 — Attorney for Appellee

5. Honorable Judge Sebe Dale, Jr.
   Chancellor, 10th Chancery District
   P.O. Box 1248
   Columbia, Mississippi 39429 — Lower Court Judge

Respectfully submitted, on this the 17th day of April, 2008.

Joseph L. Turney, MSB [redacted]

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VERSUS	**CAUSE NO. 2008-TS-00037**
ERIC BUCHANAN	**APPPELLEES**

STATEMENT OF THE ISSUES

1. **Whether the lower Court erred in failing to follow the recommendation of the Guardian Ad Litem by granting paramount physical custody of the minor child with a third party rather than the natural parent when no determination of current unfitness of the natural parent has been made and where the natural parent has not voluntarily relinquished her custody to a third party?**

2. **Whether the lower court erred in failing to award attorney's fees and cost from grandparent, allow the Guardian Ad Litem to be paid from the funds held for the benefit of the minor child, and then assessing the Guardian Ad Litem's fees equally against the parties without regard to the financial ability of the parties?**

STATEMENT OF CASE

On December 4, 2007, the lower court entered a Final Judgment, having found a material change in circumstances had occurred, and vested joint legal custody of Ashton Renee Buchanan, in Mary Elizabeth "Liz" Thornhill and Jamie Renee Buchanan McCraw with primary physical custody being vested in Mary Elizabeth "Liz" Thornhill.

The Appellant, Jamie Renee Buchanan McCraw (hereinafter "natural mother"), is the natural mother of Ashton Renee Buchanan, who is ten years old having been born on October 21, 1997. The Appellee, Mary Elizabeth "Liz" Thornhill (hereinafter "paternal grandmother"), is the paternal grandmother of Ashton and Eric Buchanan's mother. Eric Buchanan is Ashton's natural father, but is out of the picture due to his indictment, conviction and incarceration in the Mississippi Department of Corrections on a drug offense and never served nor joined in this cause of action.

An agreement was reached on July 26, 2006, which placed paramount physical custody in the natural mother with joint legal custody in the natural mother and paternal grandmother and the paternal grandmother receiving visitation. On September 28, 2006, the instant matter ensued. The paternal grandmother filed suit for numerous allegations of contempt and for further modification of the custody arrangement seeking once again full custody of Ashton. The natural mother answered asking for attorney's fees and cost as a defense and counter-claimed for full custody. A Guardian Ad Litem was appointed and a hearing was held in September 2007.

The natural mother contends that the rights of the natural parent to custody of a minor child supercede the rights of the paternal grandparent where there has been no finding of current unfitness, neglect, or abandonment and where she, as the natural parent,

has not voluntarily relinquished her custodial rights. The natural mother also contends that the lower court erred by not ordering her attorney's fees and cost be paid by the paternal grandmother based upon undue financial hardship, the fees associated with the work of the Guardian Ad Litem should have been ordered paid from the estate of the minor child, and that the lower court further erred in not taking into consideration the financial ability of the parties to pay.

SUMMARY OF THE ARGUMENT

The issues presented here are simple. Appellant, the natural mother, is the mother of the minor child, Ashton Renee Buchanan, and as such, she is entitled to retain custody of her daughter. The natural parent presumption is still alive and well in Mississippi and should be adhered to in this case. At no point during the life of this child has the natural mother voluntarily relinquished physical custody to a third party and, therefore, the natural parent presumption rules in this case. Additionally, the court appointed Guardian Ad Litem recognized that the natural parent presumption was valid and noted that clear and convincing evidence was not present to warrant custody be taken from the natural mother. Other than determining the natural mother is financially poor and not highly educated, at no time did the lower court determine that the natural mother was currently unfit or that she had abandoned the child, which is necessary in order to defeat the natural parent presumption.

The other issue presented herein deals with money and the inability of one to pay over another. The lower court ignored the natural mother's pled request for attorney's fees and cost from the paternal grandmother, despite its being aware of undue financial hardship suffered by the natural mother in this cause, and the lower court vehemently

rebuked a later request by the natural mother for attorney's fees and cost made in chambers.

Furthermore, the lower court appointed a GAL in this matter to review the case and make recommendations as to what should be done with custody. The GAL carried out his duties beautifully and now looks to be paid for his services. Additionally, the lower court in this matter had established a Guardianship for the estate of the minor child where proceeds from Social Security checks which the minor child receives are deposited. The natural mother contends that the GAL's fee should be paid out of this account, in that the GAL was hired for the benefit of the minor child and the monies are for her benefit. However, the lower court did not accept this recommendation and assessed the fees against the parties, with each party paying one half of the total fee. Further, the lower court failed to take into account the financial ability of the parties when making its assessment, as required by this Court, and said assessment places an undue burden on the natural mother and her family.

ARGUMENT

1. **Whether the lower court erred in failing to follow the recommendation of the Guardian Ad Litem by granting paramount physical custody of the minor child with a third party rather than the natural parent when no determination of current unfitness of the natural parent has been made and where the natural parent has not voluntarily relinquished her custody to a third party?**

The issue of natural parents presumption is well settled in Mississippi law. As the Court in *Sellers v. Sellers,* 638 So.2d 481, 484 (Miss. 1994) stated:

> In custody battles involving a natural parent and a third party, it is presumed that a child's best interest will be served by placement in the custody of his or her natural parent, as against any third party. In order to overcome this presumption there must be a clear showing that the natural parent has 1) abandoned the child; 2) the conduct of the parent is so immoral as to be detrimental to the child; or 3) that the parent is unfit mentally or otherwise to

have custody. *Id.* at 484 (citing *Keely v. Keely*, 495 So.2d 452 (Miss. 1986)).

Furthermore, the Court in *In re the Custody of M.A.G*, 859 So.2d 1001, 1004 (Miss. 2003) stated that "[c]learly... a finding of unfitness is necessary to award custody to a third party against a natural parent and must be done before any analysis using the *Albright* factors to determine the best interests of the child." *Id.* In the instant case, the lower court made no finding of current unfitness of the natural parent when it decided to vest paramount physical custody of the minor child with the paternal grandmother over the natural mother.

Prior to this ruling, the natural mother was the primary physical custodian of the minor child with the paternal grandmother receiving visitation. The lower court noted in its Memorandum Opinion on Pages 4 - 5 that "[t]his contest is not the usual one between two parents, but rather is essentially one between one parent, Jamie, the mother of the child, and Liz, the paternal grandmother of the child, so that it is not entirely settled that the *Albright factors* totally apply, but certainly enter into the treatment of the issue and to some extent are utilized by the Court." *Id.* The lower court then proceeded in error, despite its ruling otherwise at trial, to review and consider the extensive and irrelevant history between the parties prior to the July 26, 2006, Judgment. *Trial Transcript* page 238. The lower court then arbitrarily weighed the *Albright* factors with preference like consideration against the natural mother for the paternal grandmother concluding that the paternal grandmother should have paramount physical custody. However, at no time did the lower court make a sufficiently supported fact-based determination that the natural mother was currently unfit to parent the minor child or that she had abandoned the child since the July 26, 2006, Agreed Order. The lower court further noted that the Guardian Ad Litem in this case

supported the natural mother as to retaining paramount physical custody, but the lower court decided not to follow the GAL's recommendation, without explanation.

The Mississippi Supreme Court in *Grant v. Martin*, 757 So.2d 264 (Miss. 2000), stated that there is a presumption in Mississippi that it is in the child's best interest to remain with his/her natural parent(s). Where the natural parent has not voluntarily relinquished custody of a child it must be shown that the natural parent has either "(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." *Id.* at 265. In the case at hand, none of those factors are present. Further, in the case of *Thornhill v. Van Dan*, 918 So.2d 725 (Miss. 2005), the Court established a new standard and held "that a natural parent who voluntarily relinquished custody of a minor child through a court of competent jurisdiction has forfeited the right to rely on the existing natural parent presumption." *Id.* at 731 - 732. Those cases can be easily distinguished from the case at hand.

In *Grant* the parents had given full custody of the minor child to the paternal grandparents and had shown no interest in the activities or life of that minor child until the natural mother re-married and decided to seek custody back from the grandparents. That is not the case at bar. Prior to the order from which the natural mother appeals, she and the paternal grandmother shared legal custody of the minor child with the natural mother retaining full physical custody of the minor and the paternal grandmother having scheduled visitation. Then in late 2006, the natural father, apparently while incarcerated, and paternal grandmother began to seek full permanent and legal custody of the child. The natural mother has been and continues to be an active part of the minor child's life, and until the

most recent ruling of the lower court, was the primary custodian. While, it is true that the natural mother allowed the paternal grandmother to share legal custody of the minor child and to have visitation, this was done to allow the child the opportunity to be a part of her father's family in that her father was and continues to be incarcerated on a drug related conviction and is unavailable to parent himself. At no point during the life of the minor child did the natural mother intend or agree to relinquish her parental rights.

Additionally, in response to the allegations brought by the paternal grandmother, the lower court appointed a Guardian Ad Litem to represent the minor child. The recommendation of the GAL was as follows:

> The undersigned respectfully requests and recommends that His Honor give consideration to the point outline in this Report, as well as his Preliminary Report of August 31, 2007, and from which the following conclusions and expressions are presented, which directly apply to the placement, custody and visitation issues of Ashton, namely:
>
> *That paramount, physical custody of Ashton remain with her mother, Jamie, with liberal, structured visitation be afforded to Liz Thornhill, so long as Ashton continues professional counseling through Pine Belt Mental Healthcare Resources, and that the recommendations of said professionals be strictly followed by the Thornhills and Buchanans. In that Ashton enjoys Church, frequent Sunday visitation with Liz Thornhill be strongly encouraged.* (Emphasis original.)
>
> This recommendation is made primarily in that clear and convincing evidence was not presented to support the fact that a parent's right to raise her child is superior to others, unless to not modify custody would be detrimental to the child's welfare. Given that the complaints about Jamie and her parenting history are based on innuendo and conjecture, and denied by Ashton at most every turn, coupled with the weight of such items, the GAL is not comfortable recommending that Ashton be removed by Court Order at this time. *Final Report of Guardian Ad Litem*, Paragraph Titled Recommendations of GAL, Page 10.

And while the Chancellor notes that the Guardian Ad Litem recommended that the minor child remain with the natural mother, he opted not to follow that recommendation without

explanation. In *Potter v. Greene,* 2008 MSCA 2006-CA-01009 - 011508, (January 15, 2008), this court noted that "[w]hile a chancellor is in no way bound by a guardian's recommendations, a summary of these recommendations in addition to his reasons for not adopting the recommendations is required in the chancellor's findings of fact and conclusions of law." *Id.* Paragraph 10 (citing *Floyd v. Floyd,* 949 So.2d 26,29 (¶8) (Miss. 2007).

It is apparent from the reports submitted by the GAL that he has spent significant time with the parties and has heard all of the allegations, which he then investigated, and from his own independent investigation has determined that not only does the natural mother have a paramount right to custody, but it is not in the best interest of the child that she be removed from the home at this time.

2. **Whether the lower Court erred in failing to award attorney's fees and cost from grandparent, allow the Guardian Ad Litem to be paid from the funds held for the benefit of the minor child, and then assessing the Guardian Ad Litem's fees equally against the parties, without regard to the financial ability of the parties?**

With the filing of a lawsuit by a grandparent against a parent and an appointment of a Guardian Ad Litem come the extensive costs associated with the work performed. In the case at hand, the paternal grandmother, Appellee, filed a large number of unfounded claims which resulted in extensive attorney's fees and cost for the natural mother, Appellant, to defend against. However, from the beginning the lower court unequivocally would not consider the natural mother's request.

Furthermore, in this case at hand the Guardian Ad Litem submitted a total bill in the amount of $4500.00, of which $1000 had previously been paid by the paternal grandmother and $400.00 had been paid by the natural mother, leaving a balance of

$3100.00 due and payable. At the time of submitting the final report the GAL asked the Court to order the natural mother to pay an additional $600.00 to make the payments of the two parties equal and then have the balance of $2500.00 paid from the estate of the minor child. The lower Court makes no mention of the request of the GAL regarding the outstanding balance owed, but rules instead that "[t]he remaining balance owed to Mr. Johnson is to be paid as follows: Liz Thornhill is assessed and shall remit the sum of $1,250.00 to Mr. Johnson and Jamie Renee Buchanan (now McCraw) is assessed and shall remit the sum of $1,850.00 to Mr. Johnson." Final Judgment, Page 4, Paragraph VII. Since the assessment by the lower court, the GAL has proceeded with a contempt action against the natural mother despite her unequivocal inability to pay.

This Court has held on numerous occasions that it is within the discretion of the lower court as to the assessment of fees and cost. Yet the Court continues to hold that "[t]he chancery court is charged to give adequate consideration to the "financial abilities" of the parties to pay any assessed fees, and then how should same be apportioned, if any." *In the Matter of the Adoption of K.M.J. and E.S.J., Minor Childrend, Mississippi Department of Human Services v. W.A., T.A., D.J.J. and A.J.A.J.*, 758 So.2d 402 (Miss. 2000) at 404. Furthermore, the statute regarding the appointment of guardians indicates that fees should be paid from the estate of the guardian. See, M.C.A. § 93-13-1, et.seq.

In the case at bar, the natural mother is of limited means which was made a significant issue in this cause of action. She has two other small children and is a low wage earner. The paternal grandmother is more established and capable of paying reasonable attorney's fees and cost, including the full amount owed to the GAL. Furthermore, the minor child receives a monthly check from Social Security, which is

deposited into an account for her benefit. The natural mother would state that the appointment of the GAL was for the benefit of the minor child and that the GAL fees should be paid from said account rather than place a burden on either of the parties, especially the natural mother when she has no means whereby to pay the assessed amount. The GAL notes in his report that the natural mother is less educated and less financially capable of paying the sums owed to the GAL.

CONCLUSION

The mother, Appellant, contends that the lower court erred in this matter, when without a finding of current unfitness, it removed the minor child from the paramount physical custody of the mother. Further, the lower court erred in failing to follow the recommendation of the GAL or at the very least to explain its reasoning for its decision. The GAL has spent more time and energy on this matter and is more familiar with the parties than the lower court, who only sees what is presented to it in court and as such, the GAL is in a much better position to determine the best interest of the minor child. The court gives no explanation as to why it chose not to follow the GAL recommendations, but merely states in its Memorandum Opinion that it "declines to follow the ultimate recommendation as to custody offered by the Guardian Ad Litem." See *Memorandum Opinion*, Page 8, Paragraph 13.

Additionally, the mother contends that her attorney's fees and cost should be paid by the paternal grandmother and the remaining GAL fees should be paid out of the estate of the minor child. Said monies are for the benefit of the minor child and should be used for such. The lower court herein makes no mention of the recommendation of the GAL to have some of the fees paid from the estate of the minor, nor does it consider the "financial

abilities" of the parties to pay the fees, as required by this Court, when assessing said fees. The mother would contend that the paternal grandmother is in a much stronger financial position than herself and that payment of the assessed fees would create an additional undue hardship on her and her family. Further, the mother would contend that the money is readily available in the estate of the minor child and that the GAL was employed to protect the best interest of the minor and therefore should be paid from said funds.

RESPECTFULLY SUBMITTED, this the 17th day of April, 2008.

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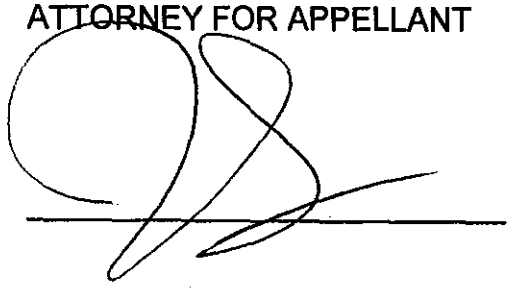

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JAMIE RENEE BUCHANAN (Now McCraw) **APPELLANT**

VERSUS **CAUSE NO. 2008-TS-00037**

ERIC BUCHANAN **APPELLEES**

CERTIFICATE OF SERVICE

This is to certify that I, Joseph L. Turney, on the 17th day of April, 2008, furnished a true and correct copy of the above and foregoing

BRIEF OF APPELLANT

to Renee McBride Porter, Esquire, attorney for Appellee, by placing same in the United States Mail, postage prepaid, and mailing it to her usual office address of Post Office Box 982, Columbia, Mississippi 39429.

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ERIC BUCHANAN	**APPELLEES**

CERTIFICATE OF SERVICE

This is to certify that I, Joseph L. Turney, Esq., on the 17th day of April, 2008, furnished a true and correct copy of the above and foregoing

BRIEF OF APPELLANT

to the Honorable Judge Sebe Dale, Jr., Chancellor of the 10th Chancery District, by placing same in the United States Mail, postage prepaid, and mailing it to his usual office address of Post Office Box 1248, Columbia, Mississippi 39429.

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