IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ADAM LUCAS	APPELLANT
VS.	NO. 2011-CA-00015
JEANNIE H. HENDRIX and JOHN E. HENDRIX	APPELLEES

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

APPEAL FROM THE
CHANCERY COURT OF LOWNDES COUNTY
CAUSE NO. 2010-0538-C

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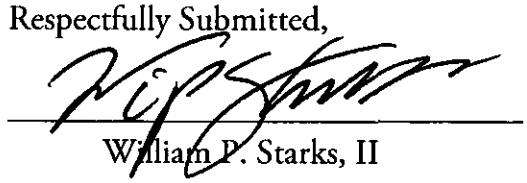
CERTIFICATE OF INTERESTED PERSONS

Pursuant to M.R.A.P. 28(a)(1), the undersigned counsel hereby certifies that the following listed persons may have an interest in the outcome of this case:

1. Jeannie H. Hendrix and John E. Hendrix, *Appellees*
2. William P. Starks, II, *Trial and Appellate Counsel for Appellees*
3. Carrie A. Jourdan, *Former Trial Counsel for Appellees*
4. Tyler Lucas and Cody Lucas, *Minor Children of Appellant*
5. Adam Lucas, *Appellant*
6. Heather Lucase, *Appellant's Wife*
7. David Neil McCarty, *Appellate Counsel for Appellant*
8. Charles D. Easley, *Trial & Appellate Counsel for Appellant*
9. Honorable Dorothy W. Colom, *Chancellor – Fourteenth Chancery Court District, Chancery Court of Lowndes County, Mississippi*

SO CERTIFIED this the 3rd day of October, 2011.

Respectfully Submitted,



William P. Starks, II
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Attorney for Appellees

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STATEMENT OF THE CASE

1. Nature of the Case

This case involves the appeal by Adam Lucas, Appellant, of the award of custody of two male children, Cody Lucas (now aged 12)("Cody") and Tyler Lucas (now aged 10)("Tyler") to the maternal grandparents, John and Jeannie Hendrix ("the Hendrixes"), Appellees herein. Thus, this case involves the question of a custodial change from a natural parent to a third party.

2. Course of Proceedings Below

A Petition for Custody was filed by John and Jeannie Hendrix against Adam Lucas ("Lucas") on August 6, 2010. R.E. 1, R. at 4. The Chancery Court originally set this matter for hearing on September 23, 2010. R. at 10. Mr. Lucas was personally served with the Petition for Custody on August 24, 2010. R.E. 1. On September 21, 2010, Mr. Lucas filed a Motion for Continuance. R. at 11. An Order resetting the hearing was set for November 4, 2010. R. at 12. On November 3, 2010, Mr. Lucas filed an Objection to the Petition for Custody. R. 14-15. After a hearing on November 5, 2011, and November 19,

2011, the Lowndes County Chancery Court issued a bench opinion awarding custody of Cody and Tyler to the Hendrixes and providing visitation with the natural father, Lucas. R.E. 16, Tr. 268. On December 3, 2010, a written Judgment was issued by the Court granting custody to the Hendrixes and visitation to Lucas. R.E. 5-7. R. 20-22. The Court then issued an Opinion and Final Judgment on January 6, 2011, outlining the specific factual findings of the Court in granting custody to the Hendrixes. R.E. 8-15. R. 32-39.

Lucas perfected this appeal to this Court on December 30, 2010. R. 23

3. Statement of Facts

Adam Lucas is the natural father and Shannon Elizabeth Moore[1], Deceased, is the natural mother of the two boys. R. 5; Tr. 23, 43. Ms. Jeannie Hendrix, the maternal grandmother lives in Ethelsville, Alabama, with her husband of ten years, John Hendrix (not Shannon's father). R. 4; Tr. 23, 42-43, 69. John Hendrix has stable employment with Dyncorp at Columbus Air Force Base and makes $4,300.00 per month. Trial Exhibit P-5, Tr. 41-42. John Hendrix has a good relationship with the boys and takes part in activities such as playing baseball with them and helping them with homework and other school projects. Tr. 42. Lucas testified that he has no concerns about the parenting skills of the Hendrixes. Tr. 189-190.

The natural mother, Shannon Moore had custody of the boys from their birth until her death on October 10, 2005. Tr. 39-40, 139. Prior to her daughter's death, the boys

[1] Adam's brief refers to her as Shannon Hendrix, but her name is Shannon Elizabeth Moore. R.E. 8. n.1., R. 4.

lived with their mother and their grandmother, Jeannie Hendrix for approximately two years. Tr. 39-40. After the death of Shannon, the two boys lived with the natural father, Lucas, but were frequent visitors with the Hendrixes, seeing them just about every weekend and a lot in the summer. Tr. 34, 36, 40. Ms. Hendrix has been in the lives of the boys ever since they were born. Tr. 36. She and her husband have also provided financially for the boys by providing among other things school clothes, school fees, medical bills baseball uniforms, and registration fees. Tr. 36-38, 46.

Because of their concern for their grandchildren, the Hendrixes filed this suit for custody alleging that Lucas's lifestyle was unstable, his employment history erratic, and that he engaged in inappropriate and immoral conduct detrimental to the children. R. at 4-8. Further, the Hendrixes alleged that the children were doing poorly in school, and were not properly cared for or fed. Id.

Condition of Adam Lucas's Home

At the time of the hearing in November, 2010, Adam had custody of the boys and was living on Ben Christopher Road in Columbus, Mississippi. Tr. 23. Adam lived with the boys, his wife Heather, and her three children from a prior marriage, Taylor, Cory and Cole in a 14 x 70 three bedroom trailer. Tr. 24-25, 177. Adam and his wife, Heather, had their own room. Tr. 25. Heather's daughters, Cory and Taylor, had their own room, and the three boys, Cole, Cody and Tyler shared a small bedroom. *Id.* In addition to the seven people cramped into this small home, Adam had five pit bulls and puppies in the home. Tr.

25-26, 177. Tyler Lucas testified four pit bulls lived at home. Tr. 126. He was even bit by one which broke the skin. Id. In September, 2010, Ms. Hendrix testified she went into the home and observed the following:

> . . . Anyway, the house, it was two dogs in a very small kindle (sic), they couldn't even move. Two more dogs running around, dog mess like they had an upset stomach all down the bathroom, it was just piles of it. And the stinch (sic) was terrible. The boys room, clothes were laying in the floor, dog poop all over them, vomit on the sheets, it was terrible. The smell was terrible. . .

Tr. 27. Ms. Hendrix's testimony was corroborated by the testimony of Tyler Lucas and photographs introduced into evidence, taken in the middle of September, 2010, showed dog feces on the floor and on the boys clothes. Tr. 27-28, 131, Exh. P-1. Ms. Hendrix further described the smell of Adam's home as follows: " . . . puke, ammonia smell. It was disgusting. I even have smelt that smell on the boys." Tr. 30. In contrast, Ms. Hendrix and her husband , John, have a clean and tidy, 1600 square foot home, 2 acres of land, four bedrooms, and each boy has access to his own bedroom. Tr. 40-41.

Lack of Food in Adam Lucas' Home

On at least 11 occasions, including May 2, 16 and 24, June 8, 14, 19, July 20, August 18, 25, 31, and September 16, 2010, Jeannie Hendrix took sandwiches, ham sandwiches, chips and drinks to the boys after receiving telephone calls from the boys and observed them eat rapidly "like they hadn't had a meal in who knows when." Tr. 31-33. The boys indicated to her that "we don't have food in the house." Tr. 31. Tyler, the eleven year old

son of Adam Lucas, also testified to the boys going without food and their father being the only one who got anything to eat because there was not any more food. Tr. 136-139.

Lack of Adequate Medical Care

Ms. Hendrix recounted having to take both boys to the doctor in May 2008, when both boys had an untreated staph infection, where there were sores oozing pus on their legs, back and arms. Tr. 45-46. After the condition went untreated for two weeks and Adam failed to take the boys to the doctor because he had no insurance, Ms. Hendrix took the boys to the doctor. Id.

Lack of Appropriate Supervision

On at least one occasion, the two boys were left unsupervised at home by any adult, and they walked about 2 miles from their home down a busy main road in the New Hope Community. Tr. 50. The boys called Ms. Hendrix to pick them up and take them home. Id.

Alcohol/Drug Problems of the Natural Father

Adam admitted to having a history of drinking and being an alcoholic, but gave conflicting testimony about his current drinking. Despite admitting that he goes to Community Counseling every Thursday and to Alcoholics Anonymous "about once every two weeks now," he first stated "I don't do nothing no more," but then admitted he continues to drink. Tr. 187 When asked on November 5th, he stated he had quit drinking but would "occasionally relapse" and conceded, "Yes, I drink in front of my kids." Tr. 187-

188. However, his wife, Heather, testified, he still drank "on the weekends." Tr. 155. On direct on November 19th, he admitted he drinks around the boys "a little bit," but just "on the weekends." Tr. 229.

Adam's sister-in-law, Rachel Lucas testified "I don't think his priorities are in order. I think some of the things that he puts - - maybe some of his wants - - before the boys." Tr. 74. Ms. Lucas recounted one example that the boys weren't allowed to go trick or treating because they did not have costumes and Adam did not have money to by costumes for them. Id. However, when Rachel went to Adam's house later, she saw that he had money to get beer. Tr. 75. When asked about this incident, Adam Lucas agreed he bought cigarettes and beer and that the money could have been used to buy costumes for the kids. Tr. 179 Rachel Lucas further described that Adam "drinks a lot" and that it has gotten worse since his father died in 2005. Id.

Adam Lucas also received a DUI in February 2007 while "fishing and drinking." Tr. 181-182. The month prior, in January 2007, he received a different DUI while "I was sitting in my car in the parking lot and got a DUI." Tr. 181-182, 240. Besides alcohol, Adam Lucas was also charged with possession of cocaine and completed drug court so it would not be on his record. Tr. 181. His wife, Heather, also had a pending charge for possession, sale or use of a controlled substance at a correctional facility in July 2010. Tr. 148-149, 153.

Drinking and Driving with the Boys In the Car / Giving Alcohol to Boys

Adam has driven the boys to the home of Ms. Hendrix, and smelled of alcohol when he exited the vehicle. Tr. 50-51. Adam has also partaken of drinking beer while at Cody's T-Ball practice at a local park. Tr. 51. On an occasion right after Shannon's death, Adam showed up at Ms. Hendrix's house smelling of marijuana. Tr. 54, 257. Ms. Rachel Lucas, sister in law to Adam Lucas, specifically recalled seeing Lucas and his wife Heather in a state of intoxication on July 4, 2009, and then observed both of them get into their vehicle and drive with the boys. Tr. 76. Ms. Lucas also observed Adam using alcohol at home with the kids around. Tr. 78.

Tyler provided additional testimony that Adam drinks "too much" and has given Tyler alcohol, vodka with orange juice and beer on another occasion. Tr. 129. Tyler also recounted Adam Lucas driving home from the Auburn-Miss. State football game after drinking "a couple of beers". Tr. 130.

Drug Selling Activity

One of the most significant points of testimony was Tyler's testimony when asked if his parents did anything else that he didn't like, Tyler testified:

> **"Well, like one day I saw Heather, somebody came in and gave her money and I think she gave – well, she gave him pills."**

Tr. 127. When asked if his father did anything he shouldn't do, Tyler then admitted **"Well, he did sell some pills too."** Tr. 129. At one point, Adam called his brother, Lonnie Lucas, and requested some Lortab pills. Tr. 86. When Lonnie was

questioned about what Adam was going to do with them, he gave the following comment: "He didn't say what he was going to do with them, but I have heard that people sell them." Id.

Unsavory Activities/Associates

Adam has a history of violence and being involved in altercations. Adam had to have hand surgery because another man's "tooth hit my knuckles and it got gangrene and infected. . ." Tr. 196. In December 2006, Adam Lucas was in an altercation where he got into a fight and his head got bloodied. Tr. 181. He also admitted he was with a friend who got into an altercation in January 2007 at a bar called Daddy's Money. Tr. 183, 240. In April 2010, Lucas again was present for a fight that broke out at the Loft, a bar and grill. Tr. 183-184.

Unstable Employment History

Despite being 35 years of age and healthy, Lucas has not had a stable work history. Tr. 174-176, 225. Lucas stated that he started a job on the Monday before the November 5, 2010, hearing as a maintenance man for Danny Cameron (for McCarty Real Estate) at the rate of $10.00 per hour for forty hours per week. Tr. 174-176, 224, 268. Lucas indicated he was employed for about six months with Dent Masters prior to starting that job on November 1, 2010. Tr. 175. Before that, he testified he worked for Danny Cameron for about 2 years one time and then stated it was "like 7 months." Tr. 175, 267. Other jobs Lucas has worked since 2005 include Brislin (a mechanical contractor) for 1 ½ years,

Kerr McGee for two months and helping his brother part time at Lucas Electric for two months. Tr. 267. He also worked for U.S. Grounds Maintenance at the Columbus Air Force Base during the summers cutting grass and other landscaping work from "1994 to 2000 something." Tr. 175-176. During the winters, he collected unemployment. Tr. 176. Lucas left formal schooling in 9th grade. Tr. 174-176, 266-267.

Unstable Residential History

In 2005, when he first got custody of the boys after Shannon's death, Adam lived with his mother. Tr. 265. Adam and the boys lived there for 3-4 months. Tr. 266. They then lived with Christy, whom he had a "little fling" with, for 4-5 months in 2006. Id. After Lucas met Heather, he moved into an apartment with her and her children for 2 years. Id. They then moved in 2008 to the trailer where they live today on Ben Christopher. Id.

School Record of Boys

Two teachers from the New Hope School also testified about the problems the boys were having in school while in Adam's custody. The first was Lindsay Price who started teaching Tyler in 6th grade math, in August 2010. She stated that Tyler's "first nine weeks was pretty rough" and Tyler seemed "very uninterested in classwork." Tr. 94. Tyler failed the first nine weeks math class with a 66. Id. During the first nine weeks, he did not correct any work sent home to be corrected even after notifying Tyler's stepmother that he could correct anything he had previously failed. Tr. 96. Ms. Price sent a letter home on

September 9th with a progress report which reported his grades of 55, 62, 24 60, 40, 100 and a 70. Tr. 97 Although failing two classes, neither Adam Lucas nor Heather contacted Ms. Price to discuss the problems Tyler was having. Tr. 97. Ms. Price also noted that Tyler "has been absent, he's been tardy" and these absences have contributed to his problems. Tr. 98. Tyler's school records indicates he was failing two classes and close to failing two others, a disciplinary write up for "pushing and shoving" and numerous unexcused absences, early checkouts and late checkins to school. Tr. 105-109.

Cody's third grade teacher, Emily McGaha, provides a similar experience with Cody at school. Although Cody is passing, Ms. McGaha stated that homework was not being completed "several times a week" and she had called Cody's dad about three times. Tr. 116-117. About two weeks before the hearing, McGaha believed Cody arrived at school without having bathed, because she could smell him. Tr. 117. In Cody's first 9 weeks progress report, he had grades of 70 in English, 84 in Math, 82 in Reading, 33 in Social Studies and 87 in Spelling. Tr. 118. Cody's Social Studies Grade was so low because he did not turn in his family project. Id. Ms. McGaha stated that Adam and Heather never imitated any phone calls and the weekly progress reports she sent home for parents to sign have never been signed and returned. Tr. 120.

Tyler also testified that he was not doing well in school. Tr. 126-127. When asked why, he related that the arguing between Adam and Heather at home affected his concentration at school. Tr. 127.

The overwhelming weight of the evidence and totality of the circumstances is that Adam Lucas is unfit to retain custody of the two boys, Tyler and Cody. Thus, the Chancellor using these facts properly awarded custody to the Hendrixes.

SUMMARY OF ARGUMENT

The Chancellor was correct in finding that custody of Tyler and Cody should be changed from their natural father, Adam Lucas, to the maternal grandparents, Jeannie and John Hendrix. This case involves the custody of two boys, Tyler and Cody, whose mother, Shannon, tragically died in October 2005. After Shannon's death, Adam Lucas, the natural father took custody of the boys. Since that time, Lucas has engaged in immoral behavior detrimental to the children and is otherwise unfit to have custody of the children. The maternal grandparents proved the unfitness of Adam Lucas by clear and convincing evidence, and the Chancellor properly awarded custody to the Hendrixes.

Since the natural father was proven to be unfit by clear and convincing evidence to retain custody, there should be no requirement for the Chancellor to go through each *Albright* factor to determine the best interests of the minor child where there were no questions as to their fitness and no other competing parties for custody. Even if such an analysis is necessary, a review of the Chancellor's decision certainly proves she did consider the material *Albright* factors prior to changing custody.

The natural father's questioning of the constitutionality of the Chancery Court's authority to grant custody to third parties is both unfounded and procedurally barred. The

Mississippi Constitution clearly grants the authority to the Chancery Court and this issue has first been brought up on this appeal. Thus, all relief sought should be denied.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW

The scope of review of a Chancellor's custody determination is limited to whether the Chancellor abused his discretion, was manifestly wrong or applied an incorrect legal standard. *Ivy v. Ivy*, 863 So. 2d 1010, 1012 (Miss. Ct. App. 2004). See also *M.C.M.J. v. C.E.J.*, 715 So.2d 774, 776 (Miss.1998) (quoting *Wright v. Stanley*, 700 So.2d 274, 280 (Miss.1997)(this Court's review is review is "quite limited in that the Chancellor must be manifestly wrong, clearly erroneous, or apply an erroneous legal standard in order for this Court to reverse."). A Chancellor's findings of fact will not be disturbed where they are supported by substantial evidence. *Cooper v. Crabb*, 587 So. 2d 236,239 (Miss. 1991). The Mississippi Court of Appeals has held:

> The resolution of disputed questions of fact is a matter entrusted to the sound discretion of the chancellor. On appeal, we are limited to searching for an abuse of that discretion; otherwise, our duty is to affirm the chancellor. Our job is not to reweigh the evidence to see if, confronted with the same conflicting evidence, we might decide the case differently. Rather, if we determine that there is substantial evidence in the record to support the findings of the chancellor, we ought properly to affirm. The chancellor, by his presence in the courtroom, is best equipped to listen to the witnesses, observe their demeanor, and determine the credibility of the witnesses and what weight ought to be ascribed to the evidence given by those witnesses. It is necessarily the case that, when conflicting testimony on the same issue is presented, the chancellor sitting as trier of fact must determine which version he finds more credible.

Carter v. Carter, 735 So. 2d 1109, 1114 (Miss. Ct. App. 1999). That is, the Appellate Court "does not reevaluate the evidence, retest the credibility of witnesses, nor otherwise act as a second fact-finder." *Bower v. Bower*, 758 So. 2d 405, 412 (Miss. 2000). Rather, the Court has stated "[i]f there is substantial evidence in the record to support the chancellor's findings of fact, no matter what contrary evidence there may also be, we will uphold the chancellor. *Bower*, 758 So. 2d at 412.

The proper standard of review for this type case was set forth in the case of *In re Custody of M.A.G.*, 859 So.2d 1001, 1004 (¶7)(Miss.,2003), as follows:

> Where the trial court applies the proper legal standard for deciding custody between a natural parent and a third party, i.e., a finding of unfitness is required before a third party can be awarded custody. Thus, our **correct standard of review is abuse of discretion**.

In this case, the Chancellor applied the proper legal analysis, her decision was supported by substantial evidence and the Chancellor in no way abused her discretion. Accordingly, the Court should affirm the Chancellor's custody determination.

II. THE CHANCELLOR DID NOT ERR BY AWARDING THE HENDRIX'S CUSTODY OF THE MINOR CHILDREN.

A. Standard of Proof in Third Party Custody Case

The polestar consideration in making any custody determination must be the best interest of the child. *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). In custody cases involving a natural parent and a third party, there is a presumption that a natural

parent is the proper custodian for their child. *Logan v. Logan*, 730 So.2d 1124, 1125 (Miss.1998); See also *Sellers v. Sellers*, 638 So.2d 481, 484 (Miss.,1994). However, this presumption can be overcome by a clear showing that the parent is unfit. *Id.* (citing *Sellers v. Sellers*, 638 So.2d 481, 485 (Miss.1994)). This Court has ruled unfitness may be shown by (1) abandoning the child; (2) behaving so immorally as to be detrimental to the child; or (3) being unfit mentally or otherwise to have custody of the child. *In re Custody of M.A.G.*, 859 So.2d 1001, 1004 (¶6) (Miss.,2003)

B. The Chancellor Employed the Correct Legal Standard in Determining Custody in This Case.

In her Opinion and Final Judgment, the Chancellor used the following legal standard:

> "The well-settled rule in a child custody case between a natural parent and a third party is that it is presumed that the best interest of the child will be preserved by being in the custody of the natural parent." *Id.*, citing *Sellers* at 486. In order to overcome the presumption there must be a clear showing that (1) the parent has abandoned the child, (2) the conduct of the parent is so immoral as to be detrimental to the child, or (3) the parent is mentally or otherwise fit to have custody of the child. Id. [citing *Rodgers v. Rodgers*, 274 So.2d 671 (Miss. 1973)].

Thus, the Chancellor certainly used the appropriate standard and gave the natural parent the appropriate presumption prior to the Court's finding that "Grandparents have presented clear and convincing proof that Father is unfit as a parent that his conduct is that of a parent so immoral as to be detrimental to the children and/or is mentally or otherwise unfit to have custody of the children." R.E. 13.

1. No Further Inquiry into the *Albright* Factors Should Be Necessary in this Case.

The natural father does not dispute the procedure of the chancellor in giving him the natural parent presumption and of requiring clear and convincing evidence of unfitness of the natural parent, but asserts the Chancellor committed reversible error because she "did not weigh custody via the *Albright* factors". See Brief of Appellant, p. 7. In support of this argument, the natural father cites the case of *In Re Dissolution of Marriage of Leverock and Hamby*[2], 23 So.3d 424, 431 (Miss. 2009) for the proposition that the trial court must proceed to make an "on-the-record analysis of the *Albright* factors" after making a finding of unfitness. *Id.*

> First, the *Leverock* case states verbatim:
>
> If the court finds one of these factors has been proven, then the presumption vanishes, and the court must go further to determine custody based on the best interests of the child through an on-the-record analysis of the *Albright* factors.

Leverock, 23 So.3d at 431 (citing *In re Custody of M.A.G.*, 859 So.2d 1001, 1004 (Miss.2003). The case *Leverock* cites in support of this proposition, *In re Custody of M.A.G.*, does not require an on-the record analysis of the *Albright* factors. Instead, the prior Court held only that it "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." *In re Custody of M.A.G.*, 859 So.2d at 1004. The *M.A.G.* Court

[2] Notably, *Leverock* involved a custody dispute between two non-custodial parties, the natural father and the natural mother's foster parents with whom mother and child live, after the accidental death of the natural mother. *Leverock,* 23 So.3d at 424.

never required an analysis using *Albright*; they merely approved of the method. Ironically, the Appellant in that case makes the opposite argument asserted in this case, arguing that the Chancellor erred by using the *Albright* factors to determine custody in a dispute between a natural parent and a third party. *Id.* at 1003.

Absent some showing that the party seeking custody is unfit, this alleged requrerment of a "second step" analyzing the *Albright* factors is not practical and should be eliminated in cases where affirmative conduct of the custodial natural parent has been deemed detrimental to the child. In this case, the Chancellor made detailed findings of fact based on sufficient evidence that the natural father was shown by clear and convincing evidence to be unfit and that his conduct was detrimental to the children. R.E. 8-15. To require additional analysis of the *Albright* factors begs the question of whether the Chancellor would then be required to put the minor child back in the unfit parent's home that has already been ruled as being detrimental. Certainly, when espousing this rule in *Leverock*, the Court did not intend on such an absurd potential result. Said another way, if the reasons for unfitness make it impossible for the natural parent to obtain or retain custody, there is no realistic purpose for further inquiry absent questions as to the fitness of the party requesting custody. Comparing *Leverock* to this case, the distinguishing factor is that the *non-custodial* parent was found to have merely deserted his children, and not to have been "behaving so immorally as to be detrimental to the child" or "being unfit mentally or otherwise to have custody of the child." Though use of the *Albright* factors may be appropriate to determine the best

custodian between two competing non-custodial parties, in the instant case where the custodial parent was deemed unfit to retain custody, this "second step" seems to be based upon legalistic formalism and mechanical jurisprudence, not common sense and practicality. Thus, the Hendrixes would encourage this Court to distinguish the *Leverock* case from this one and hold as follows: When a natural parent is found by clear and convincing evidence to have been "behaving so immorally as to be detrimental to the child" or "being unfit mentally or otherwise to have custody of the child," no further inquiry is necessary into the *Albright* factors when there is no serious issue raised as to the fitness of the party seeking custody and there are no other competing parties for custody (e.g., paternal v. maternal grandparents v. unfit natural parent).

2. Assuming *Arguendo* that *Albright* Factor Analysis is Necessary, the Chancellor Sufficiently Considered the *Albright* Factors.

In *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss.1983), the Court set forth the following factors to be considered by our chancery courts in determining custody:

> The age of the child ... is but one factor to be considered. Age should carry no greater weight than other factors to be considered, such as: health, and sex of the child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship.

Id. The natural father cites to the Chancellor's statement that "we have what's known as the best interest of the child analysis called the *Albright* factors, but they don't apply when a third party seeks custody . . ." for the proposition that the trial court used an improper legal standard. However, a review of the entire bench opinion shows the trial court was merely recognizing the natural parent presumption, the clear and convincing standard to show unfitness of a natural parent, and the fact analysis would not begin with the *Albright* factors. R.E. 16-19.

Reviewing the Bench Opinion and the written Opinion and Final Judgment of the Chancellor, it is clear that she analyzed the material *Albright* factors prior to making the decision to change custody. First, in the Bench Opinion, the Chancellor cited the 1) unstable employment history of the natural parent, 2) continued present problems with alcohol of the natural parent, 3) past problems with drugs of the natural parent, 4) drinking and driving with the children by the natural parent, 5) the children's problems in school, including among other things, one child coming to 3rd grade without snacks for a whole year and that he was unclean, the other child failing 6th grade, failing to do homework, not signing and returning progress reports. In the *Opinion and Final Judgment*, the Hendrixes concede that the Chancellor did not expressly mention *Albright*, but made a review of the relevant and material factors in her decision. An examination of the *Opinion and Final Judgment* yields the following discussions of the Albright factors:

a. Age of Child

It is undisputed that Tyler Lucas was born April 18, 1999 (11 years of age at the time of the hearing) and Cody Lucas was born January 12, 2001, (9 years of age at hearing). See Exh. D-1, 8.05 Financial Form of Adam Lucas. The Court did not mention the children's ages but it was obvious since both were present for the hearing and their teachers' testified. Since the children were not subject to the tender years doctrine, age is largely an irrelevant consideration.

b. Health and Sex of Child

Again, the sex of the two boys was obvious to everyone and there was no significant issue made by the parties to their sex or their current health at the time of the hearing. The Hendrixes concede that the Court did not specifically mention this factor in the decision.

c. Continuity of Care

The Court noted in its decision that Cody and Tyler lived with their natural father and had live with him since the death of their mother in 2005. R.E. 9, 13.

d. Best Parenting Skills

The Court found the children were "often left unsupervised with no means of communication, and have gone hungry . . ." by their natural father. R.E. 14. The court also took note of the fact that Cody never had a snack at school and of an incident where the two boys made a two mile trek at night and called their Grandparents for help. Id. In contrast to the lack of parenting, the Court found that the Grandparents had brought food

for them on at 11 occasions, and have provided financial and emotional support. R.E. 13, 14. Adam Lucas stated he had no complaints about the parenting skills of the Hendrixes. Although the Court did not explicitly state who this factor favored, it is quite obvious that it would favor the Grandparents.

e. Employment of Parent

The decision of the Court has detailed findings about the employment situation of each of the parties. The Court found that Grandfather has a gross income of approximately $4,300.00 per month, has stable employment with Dyncorp International and that Grandmother does not work. R.E. 9. The Court also issued its finding that the natural father has had at least six (6) low-paying jobs for short period of time and was currently employed as a painter making $10.00 per hour. R.E. 10. The Court stated that Heather "is currently employed full-time as a 'sitter' for the elderly and she works nights." Thus, this factor also clearly favors the Grandparents.

f. Physical and Mental Health and Age of Parent

The Court's decision states, "Grandfather is 55 years of age, in good health. . .," "Grandmother is also in good health," "Father is 35 years of age, in good health and has a tenth grade education." R.E. 10. There are no significant issues which would make this factor favor either party.

g. Emotional Ties

In her decision, the Chancellor found that "Shannon and the children lived with the Grandparents for two years in their home located in Ethelsville, AL," that the Grandparents "continued to visit with the children," that "Father would leave the children with the Grandparents every weekend and a lot during the summer," that the children called Grandmother when they were hungry or needed a ride, that the Grandparents provided support, both financially and emotionally, and that the Grandparents "have the best interest of the children at heart." R.E. 10, The Court also found that the "Father clearly loves his children" and that the children love him. R.E. 13, 19. This factor is one which would likely be neutral since both are close, but the Court clearly considered it.

h. Moral Fitness of the Parents

This factor was heavily considered in the determination of custody. The Court' excerpts on this issue are as follows:

1. Legal Problems of Father - "Father has had his share of legal problems since 2005. In 2007, he received a DUI, in 2008, he was charged with possession of cocaine, and on at least two other occasions he was involved in altercations that resulted in criminal charges, the most recent being April 2010." R.E. 10.

2. Alcohol - "Tyler testified that Father drinks too much. Father admitted that he drinks everyday but denied having a problem. In fact, Tyler stated that Father has given him beer and vodka to drink. It appears on two separate occasions, July 4, 2010, and when Father took the children to a Mississippi State football game in the fall of 2010, Father was

drinking and driving with the children in the vehicle." R.E. 12. The Court had "no doubt that Father has an alcohol problem that he refuses to address" and "[o]f even more concern, is the fact that Father has allowed his minor children to partake in illegal activities by allowing them to drink alcohol and smoke cigarettes." R.E. 14. Also, the Court found that "he has received a DUI, drinks everyday, is unable to hold a job for a significant period of time, has been publically (sic) drunk and seen driving while intoxicated with the children in his vehicle." R.E. 14.

3. Drugs – "This Court was very much impressed with the credibility of Tyler's testimony. He testified . . . he has witnessed Heather and Father selling pills." R.E. 12. The Court noted Heather, the natural father's wife, had been recently charged with sale, possession and use of drugs in a correctional facility while visiting her brother at the Lowndes County Correctional Facility. R.E. 10. Although, the natural father claims that Heather's indiscretions should not be considered, the natural father did not cite any authority that states that the stepmother's conduct in the home and in the boys' presence should not be considered. Also, such objection was never made during the trial and should not be allowed now. Further, the stepmother's actions which were held against the natural father were minor components in a long list of problems with the natural father retaining custody.

There were no questions as to the moral fitness of Grandparents. Thus, this factor clearly favors Grandparents.

i. Home, School and Community Record of Child

Home – The Court specifically found that Grandparents "live in a clean, 160 square foot home that has four (4) bedrooms." R.E. 9. "Cody and Tyler are currently living with Father in a three (3) bedroom, two (2) bath trailer located in the New Hope community" with Heather, Father's wife, and three other children from a prior marriage. R.E. 9. The Court noted that Cody and Tyler share a room with Heather's son and that the electricity had been turned off on two occasions. R.E. 10. The Court found that at the time of the hearing "two adult pit bulls and four puppies were living in the trailer with seven people." After hearing the testimony of Grandmother about dog "poop" throughout the home as well as the smell of "puke," the Court found that the "trailer that the children live in is both overcrowded, unsanitary and dangerous." R.E. 10-11, 14. Thus, this factor clearly favors the Grandparents.

School Records - "Both children are underperforming in school. Tyler is currently failing two classes. Based on Tyler's testimony, the Court finds that he is suffering in school due in large part to the problems Father and Heather are having at home. . . Both of the boys' teachers' were consistent in their testimony that Father and/or Heather appeared to be little help in making sure that the boys completed their homework or projects. In fact, Father never contacted Tyler's teacher or signed any of Cody's papers." R.E. 14. In addition, "Tyler has been tardy and has four unexcused absences. Tyler has also got in

trouble for fighting on the bus." R.E. 11. Further, Tyler's teacher indicated he is not a happy child in the classroom and just sits there. Id.

Based on the Chancellor's factual findings, it is apparent that the home situation and school records favor the Grandparents.

j. Preference of the Child

Both children were under the age of 12 at the time of the hearing, so this factor was inapplicable.

k. Stability of Home Environment

Of note, the Chancellor found that the children were negatively impacted by the arguing of Father and Heather, the difficulties with paying their utility bills and the excessive drinking which takes place at their Father's home. R.E. 14. The Chancellor's decision certainly indicates this factor would also go in the Grandparents favor since "Grandparents can offer a clean, stable environment" where the children can "feel secure and protected." R.E. 15.

Based on a thorough examination of the decision, all of the material *Albright* factors were discussed, and the Chancellor found that the facts set forth in the Opinion and Final Judgment were "determinative in this case after judging the credibility of each witness and determining the weight to be given to all trial testimony." R.E. 9. Although the Court does not list each factor and go through expressly discussing each, it is evident that the Court considered these factors and that the superfluous endeavor of writing an analysis of each

would favor the Grandparents. In *Murphy v. Murphy*, 797 So.2d 325, 330 (¶19)(Miss.App.,2001), the Court of Appeals stated:

> The chancellor's failure to make precise findings is not especially significant if we can with confidence state that she considered the proper factors. Given the chancellor's lengthy recitation of the evidence that she found relevant to each factor, we have such confidence. Finding no threshold reversible error in the manner in which the decision was expressed, though noting that it would be far preferable for precise findings to appear in the chancellor's opinion . . .

Id. See also *Mitchell v. Mitchell*, 820 So.2d 714 (Miss.App.,2000) (affirmed trial court where Chancellor did not recite each *Albright* factor, but expressly addressed several factors). The Court's decision in this case is quite detailed, amply supported by sufficient evidence, and lists all of the significant issues contained in the *Albright* factors; thus, the Chancellor's decision should be affirmed.

III. THE NATURAL FATHER'S CHALLENGE OF THE CONSTITUTIONALITY OF THE CHANGE IN CUSTODY IS UNFOUNDED AND PROCEDURALLY BARRED.

First, the chancery court's jurisdiction is set by the Mississippi Constitution, and cannot be diminished by statute. See Miss. Const. art. VI, § 159 which provides:

> The chancery court shall have full jurisdiction in the following matters and cases, viz.:
>
> (a) All matters in equity;
> (b) Divorce and alimony;
> (c) Matters testamentary and of administration;
> (d) Minor's business;
> (e) Cases of idiocy, lunacy, and persons of unsound mind;
> (f) All cases of which the said court had jurisdiction under the laws in force when this Constitution is put in operation.

The Chancery Court has broad jurisdiction over all matter in equity. "Child custody is a matter of equity . . ." *Divers v. Divers*, 856 So.2d 370, 376(¶27) (Miss.Ct.App.2003). Thus, the Chancery Court actually has constitutionally granted jurisdiction to decide custody of any and all child custody determinations.

Further, the natural father failed to raise the issue of constitutionality at the trial court level. "This Court's general policy is that 'errors raised for the first time on appeal will not be considered, especially where constitutional questions are concerned.' " *Powers v. Tiebauer*, 939 So.2d 749, 752 (Miss.2005)(citing *Stockstill v. State*, 854 So.2d 1017, 1023 (Miss.2003)). Therefore, the natural father is procedurally barred from raising the issue now.

CONCLUSION

In this custody dispute, it was shown by clear and convincing evidence that Adam Lucas was unfit to retain custody. The Chancellor based her decision upon more than sufficient evidence and used the proper legal standard in determining that custody should be granted to a third party, the maternal grandparents. Any consideration of the *Albright* factors, which was not even necessary, by the Chancellor weighed almost exclusively in favor of the Hendrixes. Additionally, the attempt to question the constitutionality of third party custody is unfounded and procedurally barred. Thus, all relief requested by Appellants should be denied and the Chancellor's decision affirmed.

Respectfully submitted, this the 3rd day of October, 2011,

JEANNIE H. HENDRIX and
JOHN HENDRIX, ***Appellees***

BY: 

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CERTIFICATE OF SERVICE AND FILING

I, the undersigned, William P. Starks II, Attorney for Appellants, do hereby certify that I have this day delivered via overnight delivery service the original and three (3) copies of the Brief of Appellees, along with an electronic diskette to the following:

Ms. Kathy Gillis, Supreme Court Clerk
Mississippi Supreme Court
Carroll Gartin Justice Building
450 High Street
Jackson, Mississippi 39201

and I further certify that I have on this day mailed, via United States First Class Mail, postage prepaid, a true and correct copy of the Brief of Appellees (paper only) to the following:

Honorable Dorothy W. Colom
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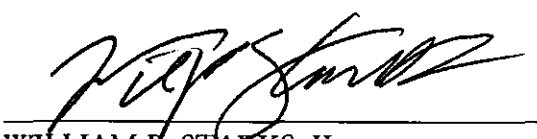
SO CERTIFIED, this the 3rd day of October, 2011.



WILLIAM P. STARKS, II