IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ADAM LUCAS — **APPELLANT**

v. — **No. 2011-CA-00015**

JEANNIE H. HENDRIX and JOHN E. HENDRIX — **APPELLEES**

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

On Appeal from the
Chancery Court of Lowndes County, Miss.
No. 2010-0538

Charles D. Easley
Miss. Bar No. [redacted]
EASLEY LAW FIRM, LLC
Post Office Box 1742
Columbus, Miss. 39703-1472
T: 662.327.1000
F: 662.327.1309

David Neil McCarty
Miss. Bar No. [redacted]
DAVID NEIL MCCARTY LAW FIRM, PLLC
416 East Amite Street
Jackson, Miss. 39201
T: 601.874.0721
E: dnmlaw@gmail.com
W: McCartyAppeals.com

Attorneys for Appellant

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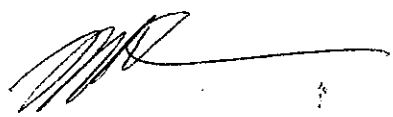
CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), 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 disqualification or recusal.

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

So CERTIFIED, this the 21st day of November, 2011.

Respectfully submitted,



David Neil McCarty
Miss. Bar No [redacted]
Attorney for Appellant

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This is a case where third parties gained custody of two children over their natural parent, their father. The Chancery Court of Lowndes County granted custody of the two sons of Adam Lucas to their grandparents, Jeannie and John Hendrix. For four major reasons that order must be reversed.

The first reason is for a clear error of law. Mississippi precedent requires that a trial court conduct a two-part test before removing a child from a natural parent in favor of a third party. The trial court failed to apply the *Albright* factors as the second step—which both the trial court and the Appellee have acknowledged.

The second error is also based on a misapplication of prevailing law. To overcome the natural parent presumption, the trial court is required to examine only the actions of the natural parent. In this case it improperly weighed the alleged actions of the wife of the natural parent, distorting the standard and prejudicing the natural parent.

Third, the third parties failed prove by clear and convincing evidence that the natural parent was immoral, mentally unfit, or otherwise unfit.

Last, this case must be reversed because a natural parent should never lose custody of children absent an affirmative act of the Legislature.

STANDARD OF REVIEW

There are clear questions of law raised in this appeal, centered around the failure of the trial court to apply the *Albright* factors pursuant to well-established Mississippi law. As a result, this Court should examine [the] case de novo . . . when it is clear that the chancery court's decision resulted from a misunderstanding of the controlling law or was based on a substantially erroneous view of the law." *In re Dissolution of Marriage of Leverock and Hamby*, 23 So.3d 424, 427-28 (Miss. 2009) (internal quotations omitted).

Further, the trial court taxed Mr. Lucas with the actions of his wife, a violation of the standard for determining if the natural parent presumption was overcome.

The Hendrixes urge that only the abuse of discretion standard is required. Because there are legal issues implicated in this case, the higher de novo standard must be employed in review.

I. The Failure to Apply the *Albright* Factors Mandates Reversal.

Because the trial court did not apply the *Albright* factors in this case, it must be immediately reversed. Futher, the *Albright* analysis cannot be inferred when there is no on-the-record analysis and where the chancellor states that *Albright* does not apply.

A. The Trial Court's Admitted Failure to Apply *Albright* Requires Immediate Reversal.

In cases where the natural parent presumption has been overcome, a trial court must then apply the *Albright* factors, as in any custody case. Here the trial court failed to apply the factors, and as a result this case must be reversed and remanded for an on-the-record determination of *Albright*.

Although it is rare, Mississippi does allow a third party to gain custody of the child of a natural parent. See *In Re Dissolution of Marriage of Leverock and Hamby*, 23 So.3d 424, 431 (Miss. 2009). However, there is a two part test that a party must first pass. "In a custody case involving a natural parent and third party, the court must first determine whether through abandonment, desertion, or other acts demonstrating unfitness to raise a child, as shown by clear and convincing evidence, the natural parent has relinquished his right to claim the benefit of the natural-parent presumption." *Id.*

If the non-parent can hurdle that obstacle there is a second step. "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." *Id.* (emphasis added) (citing to *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss.1983), which lists multiple factors to be considered before custody is granted).

In other words, the trial court must then treat the case at it would any other custody case, and apply *Albright* to determine custody.

In March of 2011 the Supreme Court underscored the two-part nature of the test—specifically, that the *Albright* analysis must be performed. The Court quoted the above passage from *Leverock* 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." *D.M. v. D.R.*, 62 So.3d 920, 924 (Miss. 2011) (internal citations and quotations omitted).[1]

The application of *Albright* in natural parent cases was established well over a decade ago. In 1998, the Court examined overcoming the natural parent presumption, and held that "[o]nce such a showing is made, the chancellor must consider, as with other custody determinations," the *Albright* factors (which were quoted in entirety in that case). *Logan v. Logan*, 730 So.2d 1124, 1127 (Miss. 1998). Since then, multiple cases have applied the two-part test, and required both components. See *In re Custody of M.A.G.*, 859 So.2d 1001, 1004 (Miss. 2003) ("Clearly, however, 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"); *K.D.F. v. J.L.H.*, 933 So.2d 971, 981 (Miss. 2006) (quoting *M.A.G.* that *Albright* is performed only after the natural parent presumption is first examined); *In re Custody of Brown*, 66 So.3d 726, 728 (Miss. Ct. App. 2011) ("it is not proper for a chancery court to use the *Albright* factors alone when determining whether to take a child away from a natural parent").

[1] At the time of the Principal Brief submitted by Mr. Lucas, the *D.M.* case was unreported. Since then the mandate has issued and it has become law.

In this case the Judgment of the trial court contains no reference to the *Albright* factors. R.E. 5-7. Nor does the Opinion and Final Judgment of the Court contain any reference or weighing of the *Albright* factors. R.E. 8-15. Nor is there any "on-the-record analysis of the *Albright* factors" as required by the *Leverock* case or other Mississippi case law. This error of law mandates reversal.

Nor was this an oversight, but a conscious action on behalf of the trial court, which expressly ruled that *Albright* did not apply. In ruling from the bench, the trial court held 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 . . . .*" R.E. 17, Tr. at 269 (emphasis added). This is an error of law as established by *Leverock*, *Logan*, *M.A.G.*, *K.D.F.*, and *Brown*. These five cases draw a clear blueprint that *Albright* must be applied, and the trial court's disregard of precedent requires reversal.

The Hendrixes do not argue that the trial court actually applied the correct legal standard. Instead, they reject years of precedent, and argue that "this alleged requirement 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." Response Brief at 16.

First, there is no reason that years of case law should be overturned. The *Albright* analysis ensures that our trial courts properly weigh the extraordinarily important relationships between parent and child. It follows the basic requirements to determine custody familiar to the trial courts since the adoption of that case in 1983. The Hendrixes argue that once the natural parent presumption is hurdled the analysis should be over, yet that is not even the law when custody is being contested between two *natural parents*. We should not lower the burden when a parent's custody of their child is at risk from a *third party*—a stranger in the eyes of the law.

For even if the natural parent presumption is overcome, it still might not be in the best interests of the child to be placed in the custody of a third party.

A damning hypothesis of the Hendrixes' proposed rule is easy to construct. Imagine a natural parent with a severe addiction to illegal narcotics, a history of violence, and unemployed. It might be fairly easy for a third party to overcome the natural parent presumption in such a scenario. Yet that third party might herself be addicted to illegal narcotics, have a history of violence, and be unemployed. *Albright* performs the valuable function of determining whether a child should not only remain with the current custodial parent, but whether the *possible* custodian is fit as well.

Nor can this Court ignore those cases as the Hendrixes suggest, for the cases requiring the application of *Albright* were authored by the Mississippi Supreme Court. With all due respect to this grand body, "[t]his Court, sitting as an intermediate appellate court, is bound by established precedent as set out by the Mississippi Supreme Court," and as a result it "do[es] not have the authority to overrule the decisions of that court." *Bevis v. Linkous Const. Co., Inc.*, 856 So.2d 535, 541 (Miss. Ct. App. 2003).

There is ample case law setting out the procedure for overcoming the natural parent presumption, and that *Albright* must be applied by the trial court in such circumstances. The trial court admitted that *Albright* was not applied, and indeed announced from the bench that the analysis was not required. The Hendrixes do not argue otherwise. The trial court failed to apply *Albright*, and this is clear legal error.

As a result, the ruling granting custody to the Hendrixes must be reversed, and this case remanded for a determination of the *Albright* factors.

B. An *Albright* Determination Cannot Be Inferred from This Record.

This case must be reversed because the trial court did not perform an on-the-record analysis of *Albright*.

As discussed above, in cases involving the natural parent presumption, a two-part test must be met. *Leverock*, 23 So. 3d at 431. At the second step the trial court is required to perform specific finding with regard to custody: "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." *Id.* (emphasis).

In this case the trial court announced from the bench that performing an *Albright* analysis was not required. Nonetheless, the Hendrixes spend the majority of their brief arguing that such an analysis can be inferred from the record. *See* Response Brief at 17-25. The Hendrixes attempt to save the trial court's error from reversal by weighing *Albright* themselves. They even argue that "it is clear that [the trial court] analyzed the material *Albright* factors prior to making the decision to change custody." At 18. Yet the trial court held otherwise, ruling 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* . . . ." R.E. 17, Tr. at 269 (emphasis added).

The trial court's concession that *Albright* was not followed ultimately distinguishes this case from two the Hendrixes suggest we follow. In one 2000 case, the Court of Appeals affirmed a custody determination even when "the chancellor did not recite each *Albright* factor; however, he did expressly address several of the factors and stated in his opinion that he had re-read the *Albright* factors as they related to the facts." *Mitchell v. Mitchell*, 820 So.2d 714, 722 (Miss. Ct. App. 2000).

In this case, the trial court did not address any of the factors, and expressly did not apply *Albright*. Nor is there any reference to *Albright* in the Judgment of the trial court or its Opinion and Final Judgment. Any presumption that the trial court followed *Albright* is demolished by the trial court's explicit ruling that *Albright* did not apply.

Nor does a 2001 case where a chancellor failed to make precise findings bolster the Hendrixes' argument. *Murphy v. Murphy*, 797 So.2d 325, 330 (Miss. Ct. App. 2001). In *Murphy*, "the chancellor stated that she analyzed the custody issue based on *Albright* and concluded that the child's best interest would be served by the mother's custody." *Id.* at 330. The Court held that this failure "is not especially significant if we can with confidence state that she considered the proper factors," and since in that case the trial court provided a "lengthy recitation of the evidence that she found relevant to each factor, we have such confidence." *Id.*

There is no such confidence in this case. The trial court expressly ruled the opposite of the chancellor in *Murphy*—specifically, that *Albright* did not apply. As a result, there is no "lengthy recitation of the evidence" because the trial court did not believe one was necessary. Neither *Murphy* nor *Mitchell* provide solace for the Hendrixes, for the trial court openly ruled that *Albright* did not apply. This error of law is inescapable.

This Court is well aware of the "fundamental liberty interests involved whenever the State interferes with the relationship between parent and child." *D.M.*, 62 So. 3d 923. It should not lightly interfere with a family, and only do so when the proof is absolutely rock solid. Recent Supreme Court cases such as *Leverock* and over a decade of precedent require an "on-the-record analysis" of *Albright* to safeguard this fundamental liberty interest. In this case the trial court did not believe that *Albright* applied and therefore did not perform an on-the-record analysis. In a case where a parent's right to his children is at stake, the Court should not sift

through a record to try and save a ruling which failed to apply the law. Any application of Albright must be done on-the-record with specific findings made by the trial court.

This case must be reversed and remanded to conduct that specific on-the-record finding.

II. The Hendrixes Do Not Contest That the Trial Court Misapplied the Legal Standard of Proof.

Because the trial court used the wrong legal standard in determining the actions of the natural parent, the order granting custody to the Hendrixes must be reversed. Specifically, the trial court improperly weighed the actions or alleged actions of Mr. Lucas' wife against him in contravention of Mississippi case law. Precedent allows only his own actions to be weighed by the trial court. The Hendrixes apparently do not contest this point.

"In a custody case involving a natural parent and third party, the court must first determine whether through abandonment, desertion, or other acts demonstrating unfitness to raise a child, as shown by clear and convincing evidence, *the natural parent has relinquished his right* to claim the benefit of the natural-parent presumption." *Leverock*, 23 So.3d at 431 (emphasis added). As the Court of Appeals has phrased it, the trial court determines if "the conduct of the *parent* is so immoral as to be detrimental to the child, or . . . the *parent* is mentally or otherwise unfit to have custody of the child." *Schonewitz v. Pack*, 913 So.2d 416, 421 (Miss. Ct. App. 2005) (emphasis added). In other words, it is *only* the actions of the natural parent that are at issue in the analysis before the trial court—not the actions of any other person.

It is clear from the record that the trial court taxed the actions of Mr. Lucas' wife Heather against him. This is a misapplication of the law which prejudiced Mr. Lucas.

It is paramount to note that the Hendrixes apparently do not contest Mr. Lucas' argument that the trial court failed to apply the correct legal standard. The Hendrixes' Response Brief contains two major argument sections. The first is centered around vouching for the trial court's failure to apply *Albright*, and spans pages 13-25. The second addresses an alleged procedural

waiver of Mr. Lucas' subject matter jurisdiction argument, and spans pages 25-26. Mr. Lucas argued in his Principal Brief at pages 8-9 that the trial court incorrectly applied precedent.

As a result of this failure to brief their argument, the Hendrixes they have waived any opposition. *See Grey v. Grey*, 638 So.2d 488, 491 (Miss. 1994) ("failure to cite any authority in support of the first three assignments of error precludes" review); *U.S. v. Upton*, 91 F.3d 677, 684 (5th Cir. 1996) (Fifth Circuit refused to consider arguments "because claims made without citation to authority or references to the record are considered abandoned on appeal"); *U.S. v. Martinez*, 263 F.3d 436, 438 (5th Cir.2001) ("A defendant waives an issue if he fails to adequately brief it"); MRAP 28(a)(6) ("The argument shall contain the contentions of appellant . . . with citations to the authorities, statutes, and parts of the record relied on").

This case must be reversed and remanded for a determination pursuant to the correct legal standard.

III. The Hendrixes Do Not Contest Mr. Lucas' Fitness as a Parent.

Because the Hendrixes failed in proving by clear and convincing evidence that Mr. Lucas was immoral, mentally unfit, or otherwise unfit, the order of the trial court must be reversed. Further, they have failed to argue on appeal that he was unfit.

The standard of proof in natural parent cases is set out in *Leverock* and recited above. For the purposes of this brief, it is paramount to note that the Hendrixes apparently do not contest Mr. Lucas' argument that they failed to prove he was immoral, mentally unfit, or otherwise unfit. The Hendrixes' Response Brief contains two major argument sections. The first is centered around vouching for the trial court's failure to apply *Albright*, and spans pages 13-25. The second addresses an alleged procedural waiver of Mr. Lucas' subject matter jurisdiction argument, and spans pages 25-26.

At no point do the Hendrixes oppose Mr. Lucas' reasoned arguments that he is a fit parent, which appear on pages 10-13 of his Principal Brief. As a result, the Hendrixes have waived their opposition to this argument, and confessed the error. See *Grey*, 638 So.2d at 491 ("failure to cite any authority in support of the first three assignments of error precludes" review); *Upton*, 91 F.3d at 684 (Fifth Circuit refused to consider arguments "because claims made without citation to authority or references to the record are considered abandoned on appeal"); *Martinez*, 263 F.3d at 438 ("A defendant waives an issue if he fails to adequately brief it"); MRAP 28(a)(6) ("The argument shall contain the contentions of appellant . . . with citations to the authorities, statutes, and parts of the record relied on").

As a result, the order granting custody to the Hendrixes must be reversed.

IV. A Natural Parent Should Never Lose Custody of Children Absent an Act of the Legislature.

In the absence of a legislative pronouncement, the courts should immediately cease granting custody to third parties while a natural parent remains alive. As a result, the order in this case granting custody to third parties over the rights of a natural parent must be reversed.

The Hendrixes offer that this is somehow an argument against "constitutionality." It is not, but rather an argument that the chancery court simply does not have subject matter jurisdiction over depriving a natural parent of their children. This is not simply a matter of custody—which is a separate step apart from the determination of the natural parent presumption.

The Legislature saw fit to elevate the rights of third parties to those of natural parents in certain situations, such as the detailed process of adoption or foster parenting. *See* Miss. Code Ann. § 93-17-5, *et seq.* (adoption process); Miss. Code Ann. § 43-15-13, et seq. (creating foster system). Yet it was the courts who have determined that in certain situations a child may be taken from his or her natural parents and granted to third parties, and set the process—not the

Legislature. See *Leverock*, 23 So.3d at 431. Respectfully, such fundamental determinations should be left to the Legislature.

Nor does the timing of this issue matter, for the issue of subject matter jurisdiction can be raised at any time, even for the first time on appeal. *Derr Plantation, Inc. v. Swarek*, 14 So.3d 711, 716 (Miss. 2009); *Wiggins v. Perry*, 989 So.2d 419, 428 (Miss. Ct. App. 2008); *See* MRCP 12(h)(3). The appellate courts may even determine of their own volition that there is no jurisdiction over a case. See *Rosson v. McFarland*, 933 So.2d 969, 971 (Miss. 2006) (where there was no final order in a case, the Supreme Court ruled "sua sponte" that "it lacks jurisdiction").

For these reasons the order of the trial court must be reversed.

CONCLUSION

For four reasons the order of the trial court terminating the rights of the natural parent must be reversed. First, because the trial court utilized the wrong legal standard when it failed to apply the *Albright* factors. Second, because the trial court improperly weighed the actions of another person against the natural parent. Third, because the Hendrixes did not prove by clear and convincing evidence that Mr. Lucas is immoral, mentally unfit, or otherwise unfit. Last, because a natural parent should never lose custody of children absent an affirmative act of the Legislature.

Additionally, the Hendrixes have confessed that the trial court improperly weighed the actions of Mr. Lucas' wife, and waived their opposition to Mr. Lucas' fitness. Nor can *Albright* be construed from the record in this case, as the trial court explicitly dismissed its applicability and refused to follow its guidelines.

Therefore the order granting legal and physical custody to the Hendrixes must be reversed. In the alterative, and at the very least, this case must be reversed for a new trial in

order to determine the applicability of the *Albright* factors to the custody issue between the natural parent and the Hendrixes.

Filed this the 21st day of November, 2011,

Respectfully Submitted,

Attorneys for Appellant

David Neil McCarty
Miss. Bar No. [redacted]
DAVID NEIL MCCARTY LAW FIRM, PLLC
416 East Amite Street
Jackson, Miss. 39201
T: 601.874.0721
W: McCartyAppeals.com

Charles D. Easley
Miss. Bar No. [redacted]
EASLEY LAW FIRM, LLC
Post Office Box 1742
Columbus, Miss. 39703-1472
T: 662.327.1000
F: 662.327.1309

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have served by United States mail, postage prepaid, or via hand delivery if specified, a true and correct copy of the above and foregoing document, to the following persons at these addresses:

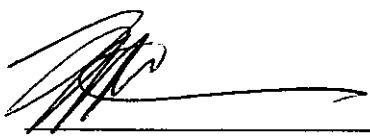
Ms. Kathy Gillis, Clerk
(via Hand Delivery)
MISSISSIPPI SUPREME COURT
P.O. Box 117
Jackson, Miss. 39205

Attorney for Appellees

Honorable William P. Starks, II
P.O. Box 1346
Columbus, Miss. 39703

Honorable Dorothy W. Colom
CHANCELLOR
P.O. Box 684
Columbus, Miss. 39703

THIS, the 21st day of November, 2011.



DAVID NEIL McCARTY, ESQ.