THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2011-CA-01472

JIMMY RAY CHISM — APPELLANT

V.

ABBEY GALE MORRIS (CHISM) BRIGHT — APPELLEE

APPEAL FROM THE CHANCERY COURT OF LEE COUNTY, MISSISSIPPI

LEE COUNTY CHANCERY CAUSE NO. 2006-0549-73-MM

BRIEF OF APPELLEE, ABBEY GALE MORRIS (CHISM) BRIGHT

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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 disqualifications or recusal.

1. **Jimmy Ray Chism, Jr.,** Appellant;
2. **Abby Gale Morris chism Bright,** Appellee;
3. **Hon. Michael Malski,** Chancellor, Union County, Chancellor in the instant matter;
4. **Jak M. Smith and Gregory M. Hunsucker**, Attorneys for Jimmy Ray Chism, Jr.;
5. **J. Mark Shelton and Jana L. Dawson,** Attorneys for Abby Chism Bright;
6. **Jonathan Martin,** Attorney and Guardian Ad Litem;
7. **Dr. Samuel E. Fleming**, testifying neuropsychiatrist;
8. **Dr. Jimmy Chism and Mrs. Terri Chism**, grandparents of the minor child; and
9. **Charles J. (C.J.) Bright**, step-father of the minor child.

RESPECTFULLY SUBMITTED, this the 5th day of September, 2012.

J. MARK SHELTON, MS[redacted]
Attorney for Abbey Gale Morris (Chism) Bright

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MOTION TO STRIKE

Before getting into the substance of the brief, Appellee is compelled to ask that certain portions of the Appellant's brief be stricken. The attorneys of record for Appellant in this appeal are both highly experienced attorneys and it is improbable that they would have inadvertently allowed improper material to be included within the brief. Matters that are not contained within the record should not appear for the first time on appeal. This is simply unfair to the responding party who wishes to "play by the rules." In any event, this improper material which is not contained within the record should not have been included, and should be stricken from the Appellant's brief and not considered by this Honorable Court:

1. Redacted Portions of an Exhibit: On page 8 of the Appellant's brief, Jim quotes from a written report that was introduced into evidence **subject to certain objectionable parts being redacted**. The Appellant, while acknowledging in the brief that the Court ordered a certain portion to be redacted, includes the redacted portion and actually puts the language in bold to stress its importance. When Dr. Sam Flemming was tendered as an expert, counsel for Abby called to the Court's attention that there were portions of the written report which were outside the scope of his expertise. [TR.401, lines 6-12] As Dr. Flemming was later questioned by Jim's attorneys to render opinions which were felt by Abby's attorneys to be outside of Dr. Flemming's area of expertise, an objection was once again made. [TR.418 line 28 – p.419 line

7] When the written report was offered into evidence, another objection was made. [TR.424, lines 2-7] The Court admitted the written report subject to the objectionable portions being redacted. [TR. 424, lines 8-14, p.426 lines 13-16] In fact, no argument was made by Jim's attorneys that the questionable portion of the report should be admitted into evidence.

As stated earlier, Jim's attorneys were well aware of the portion of the report which was not admitted into evidence, and that which was ordered to be redacted. Furthermore, there was no attempt by counsel for Jim to make an offer of proof as to the portion of the report that was redacted. Notwithstanding, the objectionable portion was recited in the Appellant's brief as substantive evidence. Surely it is elementary law that items which are not allowed into evidence during the trial should not be cited and relied upon in the appellate process unless a proper offer of proof was made. In this case, no offer of proof was attempted. This redacted information should be stricken from the Appellant's brief, and not considered by this Court.

2. **Statements of present circumstances which are not part of the record**: Once again, counsel for Appellant seem unwilling to limit their brief to material that is properly contained within the record of the trial proceedings. In footnote 7.which is found on page 7, counsel for Jim include information that is totally outside of the record of this case. [Appellant's Brief, p.7] Additionally, Jim states on p.26 "Jim, though he has slipped a couple of times, has progressed in his rehabilitation efforts, and is indeed free and successfully participating in the Union Country Drug Court program." [Appellant's Brief, p.26] In both instances, Jim includes factual items pertaining to his life which, even if true, would have all occurred after the conclusion of the trial.

> [C]ases on appeal must be decided on the facts contained in the record, not on assertions made in the briefs. The burden falls on the appellant to ensure there is sufficient evidence in the record to support an assertion of error."

Franklin v. Winter, 936 So.2d 429, 432 (¶ 10) (Miss.App.2006) (quoting *McDerment v. Miss. Real Estate Comm'n*, 748 So.2d 114, 120(¶ 19) (Miss.1999) For Jim to include so self-flattering remarks with no such proof in the record is improper. It is just as improper as it would be had Abby chosen to include in her brief factual statements of negative behaviors on the part of Jim which have occurred since the conclusion of the trial. These factual recitations, contained in footnote 7.on page 7 and within the body of page 26, should be stricken from Appellant's brief, and not considered by this Court.

In addition to the request that such objectionable language be stricken from Jim's brief, and not considered by this Court on appeal, Abby further requests this Court to grant and award any and all other such other remedies which would be proper under the circumstances.

SUMMARY OF THE ARGUMENT

With all due respect to this Honorable Court, and to all parties involved, this appeal is nothing more than yet another manifestation in a long series wherein Jim, and members of his affluent family, believe that he is above the law. Jim portrays himself as a victim of an improper court opinion in his Appellant's brief. That is a consistent pattern for Jim. He is always a victim, never one to accept blame. Unfortunately, Jim has been raised and surrounded by individuals who are unable or unwilling to tell him the truth. Jim, and those around him, wish to avoid the reality that Jim's life has been marred and tattered by a self-indulgent, ego-driven lifestyle of alcohol, drugs and criminal activity.

All throughout Jim's life, with its long tortured history of alcohol dependency and abuse, Jim and his family members have done everything to shield him from any repercussions of his (often illegal) actions. Time and time again, Jim would escape the harsh consequences (and often escape all consequences) of repeated immoral and criminal activity. Unfortunately for Jim, as is almost always the case in life, eventually one's luck in avoiding consequences runs out and so did Jim's in this termination case. Yet even in this appeal, Jim and those around him continue to seek for a "loop-hole" or "easy way out" rather than face the consequences that Jim's actions, and Jim's alone, resulted in the loss of his parental rights to his son.

It is conceded at the outset that this is a sad case. Jim had every opportunity imaginable to be a productive member of society. The son of a physician, Jim never lacked for anything.....except those things which gold and silver cannot buy, such as discipline and "tough love" from his parents and loved ones. This lack of discipline, and lack of having to face consequences for bad behavior, set Jim up on a course that ultimately caused him to lose his rights as a parent to his child. One cannot predict with certainty what Jim will ultimately do with

the rest of his life. However, the record is clear that Jim has squandered the first thirty years with booze, drugs and criminal behavior.

The record establishes the following facts to be true:

1. Jim admitted that **he is an addict [TR.80, lines 16-17] who has been to three (3) rehabilitation facilities and yet continued to use each time after his release;**

2. **Jim admitted that during the last ten years, he hasn't gone more than "about six months" without using alcohol. [TR.97 lines 1-6]**; The reality of this is that because of Jim's alcohol and drug abuse, Jim has never been a consistent part of his son's life;

3. Jim testified on October 18, 2010, only a few short weeks after having been discharged from the Fairland Rehabilitation facility[1]. At the time, Jim was planning on pleading "guilty" to pending criminal charges (burglary) and attend the RID program. While on the witness stand, Jim was confident that his addiction problems were under control. [TR.43 lines 8-14] **Yet within thirty (30) days after testifying, even while knowing that he was in the middle of the trial for the termination of his parental rights, Jim once again abused alcohol and drugs, and committed burglary of a dwelling.[TR.139 line 16 – p.140 line 27]**

4. Although by the time of trial, Jim's story had changed, during his deposition taken in March 2010, Jim admitted that Johnny[2] had observed him as "what I would describe, as drunk, where [you] was having trouble standing or holding [your] food."[3] [TR.90 lines 7-12] Jim also admitted in that deposition that Johnny had spoken with him and his parents about Jim's becoming inebriated. [TR.90 lines 13-17]

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[1]This was Jim's third such facility, all of which have obviously proven to be unsuccessful.
[2]Throughout the Appellant's brief, the minor child is referred to by the alias of "Johnny." For consistency of the record and to avoid confusion, Appellee will likewise refer to the child by such alias.
[3]At trial, Jim testified that Johnny had not seen him inebriated to that extent [TR.90 line 29 – p.91 line 4].

5. This present litigation has its origin with events that occurred in the early morning hours of July 5, 2008; This was the proverbial "last straw" which prompted Abby to take legal action against Jim to protect Johnny. Jim had spent the night of July 4 drinking alcohol to the point where he passed out (or feel asleep if you believe his version) in his boat. Inexplicably, that morning around 6:00 or 7:00, **Jim got Johnny out of the safety of the bed in which he was sleeping with Jim's parents and placed him in a vehicle. Jim then drove to a McDonald's drive-thru. Jim passed out (or feel asleep if you believe his version[4]) behind the steering wheel while the car was parked in the drive-thru lane, while little Johnny sat in the car. The police were called and Jim was arrested for public drunk. [TR.7 line 3 –p.12 line 7]**

6. Throughout Jim's adult life, he has been arrested nine times. [TR.114 lines 18-19]

7. Jim admitted that his addiction problems have kept him from being a stable person, and from being around his son. [TR.102 line 1-29]

8. During the course of this litigation, Jim has entered two separate rehabilitation facilities. The first of these two facilities was Haven House in Oxford (which Jim had already gone to once in years past) and the second being Fairland. Yet within weeks after being released from each facility, Jim would begin using drugs and alcohol once again. [TR. p. 67, lines 5-8; TR 67; lines 13-16; TR 69, lines 15-26]

9. Jim has had a dismal employment history. He has never worked for any employer for longer than a year [TR.101 lines 7-29] and essentially lives off of his wealthy parents;

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[4]Throughout the trial, Jim maintained that he was "too tired" to drive and had only fallen asleep behind the wheel of the parked car rather than passing out. However, Jim admitted that the officer who arrested him for public drunk indicated in his report that Jim smelled like alcohol and showed signs of being intoxicated. [TR.81, lines 5-17] Jim also pled guilty to the crime of public drunk and paid the fine. [TR.p11, lines 14-17]

10. Jim has never written a single child support payment for his son. Every single child support payment has been written and paid by Jim's parents. [TR.87 line 24 – p.88 line 19]

11. **Dr. Sam Flemming was retained unilaterally by Jim to testify at trial, and he was accepted as an expert as a licensed neuropsychologist. Jim's own expert testified on cross-examination that the best predictor of future behavior is past behavior. [TR.442 lines 18-20] Given Jim's past behavior, Dr. Flemming admitted that "statistically, [Jim] has a very poor prognosis for not using alcohol or drugs again." [TR.443 lines 2-5]**

12. Honorable Jonathan Martin, the Court-appointed *GAL,* testified on the last day of trial. Mr. Martin stated: "I recommend to the court that the statutory requirements for termination of parent rights have been met and it is in the best interest of the minor child to terminate the parent rights of [Jim], and the minor child, [Trace.]" [TR.479 lines 2-8]

13. Rather than being a victim, as Jim suggests in his brief, Jim has been given every opportunity imaginable to avoid the ultimate fate that was his. During the first day of trial, before Jim relapsed yet again and committed crimes yet again, the Court had this exchange:

> THE COURT: Well, you love him to death, but on the 16th day of August, 2008, this Court entered an order. Mr. Smith asked about whether the Department of Human Services had done an investigation. My recollection back on the 15th of August, 2008, was that the Department of Human Services, one, recommend that you go to treatment. Two, that after you get out of treatment, you have some period of at least being monitored.
>
> There was a number of recommendations that I recall that were made in August after the incident at McDonald's. And this Court went out on a limb, I might add, and held all of those recommendations in abeyance - - and I might say, neither one of these two attorneys were involved in the case at that time. I went out on a limb and held all of those recommendations of the Department of Human Services in abeyance so that you could go to Fort Benning. And not only that, provided an opportunity for you to see your son until you went to Fort Benning. And further provided that if you didn't get into Fort Benning, as you said you were going to get into, that all you had to do to get your visitation back was to follow the recommendation of the Department of Human Sevices. Now, that's my recollection.

And for 14 months, you didn't do anything, I'm sorry, you didn't do anything except stay drunk. That' s the bottom line, isn't it?

THE WITNESS: Yes, sir.

THE COURT: And now what you want to do - - and you've got a very good attorney, and your former wife has a very good attorney. The Court is supposed to look over all of these past behaviors. At what point does it get to where the Court is supposed to say, enough is enough?

THE WITNESS: I'm not sure.

[TR.127 line 11 – p.128 line 20] (emphasis mine) Apparently "enough became enough" when Jim continued to abuse drugs and alcohol and commit crimes even while the case was pending, and even after all of the chances that he had been given by the Court.

In its *Memorandum Opinion and Judgment* the Court stated:

> The Court finds that Jimmy Ray Chism, Jr. exhibits ongoing behavior which would make it impossible to return the minor child to his care and custody because he has a diagnosable condition, specifically alcohol and drug addiction, unlikely to change within a reasonable time, which makes him unable to assume minimally, acceptable care of the child and constituting grounds for termination of his parental rights pursuant to Mississippi Code §93-15-103(3)(e)(i).

[R194-215] Certainly the facts of this case support the Chancellor's finding by "clear and convincing evidence." This Court should affirm the Chancellor's decision.

ARGUMENT

1. Scope of Review: As stated in Appellant's brief, the standard of review is the "manifest error/substantial credible evidence test."

> "On an appeal of termination of parental rights, the standard of review is limited. *S.N.C. v. J.R.D.*, 755 So.2d 1077, 1080 (Miss.2000). "The chancellor's findings of facts are viewed under the manifest error/substantial credible evidence test." Id. (citations omitted). This Court "ask[s] not how we would have decided the case ab initio but whether there be credible proof from which a rational trier of fact may have found abandonment by clear and convincing evidence." Id. (citation omitted).

Gunter v. Gray, 876 So.2d 315, 319 ¶18 (Miss.2004)

"When reviewing the termination of parental rights to a minor child, we look for "whether credible proof exists to support the chancellor's finding of fact by clear and convincing evidence," *In re K.D.G. II*,68 So.3d 748, 752 ¶18 (Miss.Ct.App.2011) (quoting *W.A.S. v. A.L.G.*, 949 So.2d 31, 34 (¶ 7) (Miss.2007) See also *K.D.F.v. J.L.H.*, 933 So.2d 971, 975 (¶ 14) (Miss.2006) "As long as there is credible evidence to support the chancellor's findings of fact, we must affirm the decision." *J.J. v. Smith*, 31 So.3d 1271, 1273 ¶9 (Miss.Ct.App.2010) see also*K.D.F. v. J.L.H.*, 933 So.2d 971, 976–77 (¶ 20) (Miss.2006).

2. Abby Not Required to Prove the Parent-Child Relationship Had "Substantially Eroded:" Jim spends a great amount of time in his brief in an effort to establish that Abby failed to prove Jim's relationship with the child had "substantially eroded." The Chancellor in this case relied upon Mississippi Code Annotated §93-15-103(3)(e)(i) that states:

> (e) The parent exhibits ongoing behavior which would make it impossible to return the child to the parent's care and custody:
>
> > (i) Because the parent has a diagnosable condition unlikely to change within a reasonable time such as alcohol or drug addiction, severe mental deficiencies or

> mental illness, or extreme physical incapacitation, which condition makes the parent unable to assume minimally, acceptable care of the child;

In his brief, Jim states that Abby failed to prove that the relationship between Jim and Johnny had "substantially eroded." [Appellant Brief p.16] However, Jim and his attorneys apparently fail to understand such proof is not required under the statute section relied upon by the Chancellor. "According to the language of section 93–15–103(3), any one factor can justify the termination of parental rights. L.O. v. G.V., 37 So.3d 1248, 1253 (¶18) (Miss.Ct.App.2010) see also*M.H. v. D.A.*, 17 So.3d 610, 616–17 (¶20) (Miss.Ct.App.2009).

The sub-section under which the Chancellor terminated Jim's parental rights does not require a showing of a "substantial erosion" in the parent-child relationship. Thus this argument is totally without merit.

> The distinction between V.M.S. and the case at bar is the fact that R.F.'s parental rights were not terminated pursuant to section 93–15–103(3)(f). Rather, they were terminated pursuant to section 93–15–103(3)(d)(i) and section 93–15–103(3)(e)(i). Therefore, it was not necessary for the county court to have found that T.D.F. harbored a deep-seated antipathy toward R.F., as that is only one ground for termination. This issue is without merit.

R.F. v. Lowndes County Dept. of Human Services, 17 So.3d 1133, 1138 (¶16)(Miss.Ct..App.2009) Just as "deep-seated antipathy" is not required under this sub-section, neither is a substantial erosion of parent rights. The grounds for termination of parental rights are created by statute. Jim is trying to cause this Court to include an element that is not expressly required by the statute. Simply put, proof that the parent-child relationship has suffered a "substantial erosion" is not required under the subsection relied upon by the Chancellor. This issue is without merit.

Notwithstanding the fact that it there was no burden to prove such a "substantial erosion" Abby feels compelled to point out that the contact between the father and child since the divorce has been extremely limited. These parties were divorced in March 2008. From the proof presented, Jim exercised visitation with the child regularly between then and the fateful "July 5" McDonald's arrest. At the time of the arrest, the minor child would have been just over four (4) years of age.[5] After the arrest, Jim went 14 months with no contact with the minor child. On cross-examination, Jim admits during this 14-month period he was using "lots of alcohol." [T.79, lines 4-18] This is more of Jim's testimony:

> Q. .... [Y]ou had zero contact with the child for that 14-month period, correct?
>
> A. I never – no. That's what the Court ordered me to do, and that's what I did until I went to treatment, or - -
>
> Q. Yes, sir.
>
> A. Right.
>
> Q. And the only person who can be blamed for that 14-month period for you not having any visitation rights - -
>
> A. Is me.
>
> Q. - - is you, right?
>
> A. Yes, sir.
>
> Q. Because you could have taken the steps along that 14-month period to get yourself find a position of legal standing to ask for that visitation, correct?
>
> A. Yes.

[T.92 lines 3-18] The Court asked Jim questions concerning this 14-month period:

[5]The child's date of birth is March 17th, 2004. [TR.4 line 3]

THE COURT: . . . **And for 14 months, you didn't do anything. I'm sorry, you didn't do anything except stay drunk. That's the bottom line, isn't it?**

THE WITNESS:**Yes, sir.**

[T.128 lines 10-13](emphasis mine)

The simple truth is that Jim essentially "dropped out" of Johnny's life when Johnny was just four years old. Jim saw Johnny under supervised conditions in August 2008. [R 96-98] Other than that, Jim has had been able to spend approximately "50 minutes" under the supervision of Abby during Christmas 2010. [TR.27 line 25 – p.27 line2] Thus, from the time Johnny was just over four (4) years of age, Jim has spent less than an hour with him, and even this short amount of time was under supervised conditions. As is often the case with Jim, he may wish to blame Abby for his lack of contact with Johnny during this period of time. However, the record is clear, as will be discussed in more detail below, that the vast majority of this time has been spent in and out of rehabs and jails, or drunk.

Perhaps Jim's characterization of his relationship to the child as "good" may not be inaccurate from the stand-point that he hasn't been around enough for it to become "bad." But it certainly cannot possibly be suggested that a father's almost total absence from the life of a child for three (3) (very formative) years has no negative impact on the relationship. Logic and reason dictate otherwise. During the three (3) intervening years, Jim's contact of less than an hour cannot possibly be reasonably argued to have had no negative impact on his relationship with his child. With all due respect to Jim and his counsel, this is an illogical argument that any child raised by a single mother could cast aside in few words.

3. There Is No Question That Abby Met her Burden of Establishing The Elements Under §93-15-103(3)(e)(i):

These will be addressed separately, as denoted:

(e) The parent exhibits ongoing behavior[A] which would make it impossible[B] to return the child to the parent's care and custody [C]:

(i) Because the parent has a diagnosable condition[D] unlikely to change within a reasonable time[E] such as alcohol or drug addiction, severe mental deficiencies or mental illness, or extreme physical incapacitation, which condition makes the parent unable to assume minimally, acceptable care of the child[F];

A. "Ongoing Behavior" There appears no dispute in Jim's brief that the behavior complained of by Abby, e.g. alcohol and drug abuse, with criminal activity, was an "ongoing behavior" even at the time of trial. The "ongoing behavior" occurred not only recently prior to trial, but continued all throughout the trial proceedings. Jim's inability to remain sober for more than six months is true despite attending three (3) drug/alcohol rehabilitation centers, meeting with counselors, getting arrested numerous times, and having his visitation rights suspended by the Court and being sued for the termination of his parental rights. During these ten years, Jim has used marijuana, cocaine, crystal meth, and used Xanax and sleeping pills for which he did not have prescriptions. [TR.97 lines 7-26] The only time that Jim can point to where he has had sobriety for a period in excess of six (6) months has been while he was incarcerated.

Jim's criminal activity was a consistent element in his life as well. Since becoming a legal adult, Jim has been arrested nine times. [TR.114 lines 18-19] The testimony at trial presented a clear picture of a man who has spent his adult life using drugs, abusing alcohol and getting arrested. This behavior was obviously "ongoing." Unfortunately, this behavior didn't stop after Jim became a father. Nor did this criminal behavior stop after Jim had his visitation rights suspended by the Court in August 2008. Nor did this criminal behavior stop when Jim was sued to have his parental rights terminated.

At the time Jim testified on the first day of the trial on October 18, 2010, Jim was prepared to enter a plea agreement to a felony burglary charge. [TR.114 lines 20-23] **Jim committed the crime while this case was pending.** This wasn't the end of Jim's criminal activity, however. On November 19th, about a month after testifying in Court[6], Jim went on yet another binge of alcohol and drugs, and committed a crime. [TR.139 line 27 – p.140 line 15] Jim was arrested and charged with burglary of a dwelling. [TR.139 lines 17-23] Yet again like so many times before, Jim's love of alcohol and drugs was far greater than his love for his child. Jim's state of impairment, caused by a near-deadly cocktail of alcohol and Xanax, left Jim in a state virtually comatose after he committed the crime. [TR.141 lines 11-26]

In his brief, Jim seems totally oblivious to the logical repercussions of his criminal activity, and continuing substance abuse, **that occurred even while the case was pending.** Jim seems to suggest that the Court should totally ignore the fact that his "ongoing behavior" and abuse continued even while the case was pending. Knowing the great risks at stake, Jim chose to satisfy his cravings even as his parental rights hung in the balance. Logic and reason dictate that this pattern is almost certainly not going to stop.

B. "Impossible:" Jim places a lot of emphasis on the word "impossible" contained within the statute. In his brief, Jim suggests that the Court must define "impossible" as "a fact or circumstance that cannot occur, exist or be done." [Appellant Brief, p.25] Surely Jim does not really expect the trial court to assume it has extra-sensory perception (ESP). Certainly that doesn't exist and the legislature most certainly did not expect trial courts to be able to predict with absolute certainty future events. Rather, the logical extension of the term should be

[6]During Jim's testimony, he attempted to assure the Court that he had truly changed this time, and that Fairland Rehabilitation center had made a huge impact in his life. Such wasn't the case, however.

implored to such that past behavior predicts that future behavior make it highly improbable that a return of the child to the parents care would be beneficial to the child.

Jim's suggestion of the definition of "impossible" is totally illogical. It would not be "impossible" under Jim's proposed definition for the trial judge to return the child to a father who is sitting in prison. It would not be "impossible" for the trial judge to return to the child to a mother living in a "crack house." Both of those things could possibly occur, with the simple act of a chancellor signing an order directing that. Surely Jim doesn't really think that is the intended definition for "impossible," which the legislature expected reasonable, logical, intelligent courts to implore.

C. "Parent's Care and Custody:" Jim's position as articulated in his brief is somewhat confusing as to this issue. Jim states:

> First, there is no record evidence to support the legal conclusion that it is impossible to return Johnny to Jim in some form of visitation – indeed the record reflects that there were absolutely no problems with Johnny when Jim was permitted visitation. Stated another way, Jim *ipso facto* had to be assuming a minimally acceptable level of care or there would have been a problem.

[Appellant's Brief, p.21] Earlier Jim states in his brief: "Until July 4, 2008, it is undisputed that Jim's visitation with Johnny was without incident." [Appellant Brief, p.4] The inference would be that Jim had exercised visitation without incident for a long period of time, and except for this one incident, the visitation worked well. Yet as is often the case, there is more to the story.

In his appeal, Jim designated as part of the record the pleadings that were filed in this case going back to the time of the divorce. It is interesting to note that in the *Temporary Order* entered by the Court on the 14th day of February, 2007, Jim was granted "supervised visitation in the home of his mother, Teri Chism." [R 44-47] That order remained in effect until the parties agreed to a divorce in March 2008. [R 61-61] Jim's visitation as set forth in the divorce decree

allowed for unsupervised visitation. As will be discussed in great detail below, Jim was arrested for public drunk after he passed out in the drive-thru line at McDonald's with the minor child in the car. Abby, as any loving, concerned mother would do, took prompt action through the Court system to have Jim's visitation rights restricted so as to prevent Johnny from being placed in such dangerous circumstances again.

Abby filed her *Emergency Petition for Modification of Visiation Rights of the Respondent and Other Relief* on the 25th day of July, 2008. [R.64-70] An order was entered on August 18, 2008. [R96-98] That order included the following:

> That Jimmy Ray Chism, Jr. no longer has unsupervised visitations with the minor [child]. All visitation periods shall be strictly supervised by the mother of Jimmy Ray Chism, Jr. and grandmother of [the child], Terri Chism. Terri Chism shall be present at all times during the visitation periods, and [Jim] is not to be left alone with [the child] at any time. The visitation periods shall take place at the residence of Terri Chism in New Albany, Union County, Mississippi.

[R96] The order was entered in contemplation that Jim was going to report for active duty to Fort Benning, Georgia on September 3, 2008. [R.97] The order went on to state that:

> If [Jim] fails to report to United States Army training facilities in Fort Benning, Georgia on September 3, 2008, all visitation will cease and as a condition for reinstatement [Jim] shall comply with all of the Union County Department of Human Services recommendations . . . [recommendations are included within the order].

[R.97] **The truth is that since the entry of the initial temporary order of February 14, 2007, the only time that Jim has been entitled to unsupervised visitation pursuant to a court order has been from March 20, 2008 until August 18, 2008.** It is conceded that there is not proof presented in the record of the child being exposed to any harm during those three-and-a-half months that Jim was exercising visitation from March 20, 2008 until July 5, 2008. However, three-and-a-half months of visitation "without incident" can hardly be applauded.

With respect to the other almost sixty-one (61)[7] months that have passed since Jim was first awarded visitation in February 2007, it is respectfully submitted by Abby that any visitation that Jim has exercised has been "without incident" only because it has not been"without supervision."

What the record does clearly establish is that July 5, 2008 was the last time that Jim exercised visitation with Johnny that was unsupervised by another adult. After that incident, Abby knew she had to take all reasonable steps to protect their small child from danger posed by Jim and his alcohol problem.

As to the July 4 incident, Jim admitted that he was intoxicated. [TR.9, line 5-6] Jim could not even remember where he slept that night, but believed it was in the boat. [TR.9, line 17-21] Early the next morning, Jim retrieved Johnny from his parents in whose care Abby had left the child for the night. [T.7, line 24 – p.8, line 9] Jim testified that he "felt like [he] was too tired to drive with [Johnny]. . ." [T.10, lines 10-11] (As a side note, this is one example where Jim refuses to acknowledge the full truth. The facts prove that Jim wasn't "too tired" but rather was too drunk to drive.) Jim admitted that the officer who arrested him for public drunk indicated in his report that Jim smelled like alcohol and showed signs of being intoxicated. [TR.81, lines 5-17]

In any event, Jim admitted he should not have driven with the child in the car. Yet he did. Jim was arrested for public drunk while passed out (or asleep if you believe Jim's version) in the McDonald's drive-thru lane with the minor child in the car. [TR.11, lines 8-13] Jim pled guilty to public drunk (not public sleeping) and paid his fine. [TR.p11, lines 14-17] Astonishingly, even throughout the trial, Jim refused to acknowledge that he placed his son in

[7] Abby calculates that there have been a total of 64 months since February 2007.

danger with that fateful drunken (or sleepy if you believe Jim's version) run to McDonald's during the morning hours of July 5th. [TR.78, lines 21-25]

It is important to note that Abby did not originally seek to have Jim's parental rights terminated. Rather, Abby sought merely to have the Court suspend and/or restrict Jim's visitation rights. Despite having his visitation rights effectively stripped away, Jim continued to abuse alcohol for approximately another year. [TR.19, lines 20-25] At that time, Jim voluntarily submitted to alcohol rehabilitation at Haven House in Oxford. [TR.19, lines 26-29] It was only after Jim continued with his consistent pattern of abuse, that Abby finally realized that the best thing for Johnny was to have Jim's rights terminated.

As stated earlier, July 5, 2008 was the last time that Jim ever provided "care and custody" for Johnny. What little amount of contact Jim has had with Johnny since that time has always been under the supervision of Jim's parents. Jim's conclusory argument that he has provided *"ipso facto"* some minimally acceptable care for Johnny is without any basis of fact or logic. Jim may have been present during these very minimal and restrictive visitation periods, but the "care and custody" of Johnny was provided by Jim's parents, consistent with the condition of allowing him any contact at all.

If adopted by this Court, Jim's argument would prevent any father's rights from being terminated under this subsection. So long as the father could somehow be in the physical presence of the minor child, while some other person designated by the Court could provide the "care and custody" of the minor child and protect the child from harm, the father's rights could not be terminated. Jim is not reading the statute correctly. The statute talks about returning the child to the **"parent's** care and custody," not to the grandparents' care and custody while the father looks on.

The record is replete with reasons and support for the Chancellor's finding that the child could not have been placed in Jim's "care and custody" from July 5th forward. During this time, Jim was essentially drunk, stoned, in rehab or in jail. Those few minutes that Jim was able to be in the physical presence of Johnny under the supervision of an adult certainly does not support Jim's argument that he was capable, "*ipso facto*" or otherwise, or providing "care and custody" of this small child.

D. "Diagnosable Condition:"It is somewhat difficult to understand exactly what Jim's position is with respect to this element required by the statute. It is clear that Jim himself acknowledges that he is an alcoholic and an addict. [TR.393 lines 14-26; see also TR.99 lines 6-8]Jim states: "I've considered myself an alcoholic for quite a while. You have asked a lot of people how long have I been an alcoholic, I think I was born an alcoholic." [TR.389 line 5 – p.394 line 1] Yet in his brief, Jim states that he is not "qualified to make such a medical diagnosis." [Appellant's Brief, p.26] Interestingly, Jim never explains why he has spent so much time in rehabilitation facilities (unsuccessfully) if he is not an alcoholic or addict. It appears that Jim would have the Chancellor and this Court turn a blind eye to the obvious facts of addiction and abuse despite the abundance of proof, and despite Jim's own admissions of addiction.

Jim's family and hired experts apparently disagree with Jim's own assessment of his addictions. Jim's hired expert, Dr. Sam Flemming, testified that he "wouldn't call it an addition. . . ." [TR.412 line 24] Jim's father testified during the latter part of the trial, after Jim had been arrested twice for burglary even while the trial was pending. Despite all that had taken place, Dr. Chism[8] continued to be in denial that his son is an alcoholic. [TR.311 line 16-17]

[8]Jim's father is Jimmy Chism, Sr., and will be referred to as "Dr. Chism" throughout.

Sadly, Dr. Chism may be at least partly to blame for Jim's problems, as the following incredible exchange reveals:

> Q. My last final question is now you swore under oath, [Dr. Chism], that you have not smoked dope, marijuana, in the presence of your son [Jim]. You just swore that under oath when [the *GAL*] questioned you, didn't you?
>
> A. Yes.
>
> Q. You weren't telling the truth then, were you?
>
> A. No. I have done it. I have. I'm sorry. I was wrong. I was just emotional. I have a long time ago. Years ago.
>
> Q. You were wrong or you were lying when you told the court - -
>
> A. Well, I misspoke and told a lie, yes.

[TR.319 line 18 – 29]

When asked further questions about Dr. Chism engaging in this criminal act of smoking marijuana with his son, Jim, he testified that he had "no idea" about the number of occasions this occurred. [TR.320 lines 20-27]

Despite the contradictory positions taken by Dr. Flemming and Dr. Chism, Jim's own testimony established that he suffered from such a condition. Frankly, even had Jim failed to admit that he suffered from alcohol and drug addiction, the proof clearly established that he does. The fact that Jim could not stay clean and sober and out of jail, even while this case was pending, shouts out to any logical person that Jim is addicted to these substances. Whether the fact that Jim's own father smoked marijuana with him a number of times contributed to Jim's addiction problems cannot be known for sure. Whatever the cause, the proof was "clear and convincing" that Jim suffered from addiction to alcohol and drugs.

E. "Unlikely to Change Within a Reasonable Time:" There is simply no credible proof to suggest that Jim's struggle with drugs and alcohol is likely to change. Neither jail nor rehab has proven sufficient to allow Jim to conquer his addiction problems. Jim admits that his criminal history of alcohol-related arrests date back to at least 1999, when he was arrested for possessing beer as a minor. [TR.54, lines 18-20] In 2001, Jim was arrested for public drunk. [TR.55, lines 21-29] Another public drunk arrest came in 2003. [TR.56, lines 9-12] Two arrests for public drunk in 2004. [TR.56, lines 17-22] In 2005, Jim was arrested for DUI. [TR.56, lines 21-29] Jim was arrested for DUI and possession of marijuana in Alabama in 2006. [TR.57, lines 14-26] Jim was arrested for public drunk in New Albany on July 5, 2008. [TR.p11, lines 14-17]

It is interesting to explore how Jim and his parents dealt with these criminal charges. By 2006, Jim had had multiple arrests related to alcohol use. "Tough love" by Jim's parents might have required that he suffer consequences related to this DUI. Perhaps that could have given Jim the chance to avoid the events of July 5th 2008. Instead, Jim and his parents sought to spare Jim the consequences of that DUI. In order to avoid prosecution for the charges, Jim reached an agreement with the prosecution to enter the United States Army. [TR.59, lines 14-29] However, Jim never actually entered the military. Furthermore, neither Jim nor his parents ever notified the prosecutors in Alabama that Jim had failed to fulfill his end of the bargain. [TR.60, lines 4-15]

Jim's criminal arrests, and the consequences associated with those, were not sufficient motivation for Jim to stop using drugs and alcohol. Likewise, Jim's access to rehabilitation facilities has proven unsuccessful. Jim has had the benefit of every imaginable resource. By virtue of the affluence of his parents, Jim has had opportunities not afforded to many individuals

struggling with alcohol and drug addictions. He has been to rehabilitation programs three separate times. [TR.83, lines 4-14] Yet after each time, Jim began using again. Jim testified that he got out of Haven House in September 2009. [TR.67 lines 5-8] By Christmas, Jim had already used alcohol "a handful of times." [TR.67 lines 13-16] By March of 2010, less than six (6) months after leaving Harbor House, Jim was once again using marijuana and cocaine. [TR.69 lines 15-26]

With each new rehab, Jim' professes to have finally "seen the light" or "hit rock bottom" or whatever the metaphor he wishes to use. But the simple fact is that with the exception of the time that Jim has been incarcerated or in rehab, he has used consistently and repeated abused substances dispite all the best treatment in the world. Even as the trial loomed over Jim's head, he continued to use and abuse. On one of the days that this matter was set for trial, the *GAL* requested that Jim provide a urine sample for a drug/alcohol screen. [TR.60, lines 20-27] This test was "passed." [TR.62, lines 2-6] However, the sample provide by Jim was supposed to have been observed by the court's bailiff. [TR.61, lines 7-15] It was brought to the attention of counsel for Abby that Jim had in fact not been monitored while he provided the sample. This was reported to counsel for Jim as well as the *GAL*. It was then arranged for Jim to come back to court to provide another urine sample. [TR.62 lines 10 – 19] For this test, Jim was observed providing the urine sample, and he tested "positive" for marijuana. [TR.63 lines 6-12] **Ultimately, Jim was forced to admit that since his release from Haven House,[9] only a short time prior to the fateful test, he had in fact used marijuana, cocaine [T.63 lines 21-27] and alcohol; [TR.67 lines 5-25]**

[9]This was Jim's second time to seek rehabilitation at Haven House in Oxford, Mississippi.

Consistent with Jim's chronic history of never accepting responsibility for his actions, Jim tried to convince the *GAL* that the "positive" result was in error. [TR.63 lines 13-17] Jim asserted to the *GAL* that he would go have a forensic hair follicle test performed to "prove" that the "positive" result was in error. [Id.] Finally at trial, after all of the proof of Jim's continued alcohol and drug use had come to light, Jim had to admit that he was "lying out of [his] teeth" when professing his innocence to the *GAL*. [TR.63 lines 18-23] It turns out that not only was Jim using marijuana even while the case was pending trial, but he was also using cocaine. [TR.63 lines 21-27]

> Q. Okay. And the eventually you came over here and took the [hair follicle] test, right?
>
> A. Yes, sir.
>
> Q. And it wasn't until these test results came back positive that you finally gave up this sham of, oh, my goodness, I'm going to clear my name. And you finally, at long last, admitted that, yes, in fact, you had used the drugs, correct?
>
> A. Yes, sir.

[TR.65 lines 10-18]

Not only did Jim continue to abuse drugs and alcohol even while "under the microscope" of knowing that his chancery court case was pending, he also continued to commit crimes. Jim testified that he was going to plead "guilty" to burglary. [TR.106 line 28 – p.107 line 2] Jim, while confessing to having a vague memory of the events of the crime, testified that he was under the influence of "Xanax and alcohol" and "maybe another pill, like Lortab" at the time he burglarized someone's home in May 2010. [TR.106 lines 5-13] Jim admitted that during the week of the burglary, he had been on a binge.

The testimony from the expert witness (hired and paid for unilaterally by Jim) on cross-examination is instructive on this point

> Q. At the end of the day, whether [Jim] relapses and uses drugs or alcohol is going to be up to none other than [Jim]. Correct?
>
> A. Correct.
>
> **Q. And the best predictor of future behavior is looking at past behavior. Wouldn't you agree with that?**
>
> **A. Yes.**
>
> **Q. And what [Jim] has testified by his own knowledge, here is his past behavior, Dr. Flemming: Since he turned 21, he has not been more than six months without abusing drugs or alcohol, despite the fact that he has been to three drug rehabilitation units, he has been arrested at least eight times for alcohol-related charges, including two DUI's, he has been arrested for two felonies, he has worked the AA system, and yet despite all of that enormous help he's received, what he's done I the past is neger made ie more than six months. My question is this: wouldn't you agree with us that statistically, [Jim] has a very poor prognosis for not using alcohol or drugs again?**
>
> **A. Statistically, yes.**

[TR.442 line 14 – p.443 line 5] (emphasis mine)

Dr. Flemming provided this testimony during questioning by the *GAL*.

> Q. And, lastly, you testified about an alcoholic picks up where they stopped. And I think the metaphor that I'm acquainted with is a gorilla in a cage. When one stops using, that gorilla of addiction is placed inside of a cage, stays the same size, doesn't atrophy at all and once the cage is taken away by a resumption of use, that gorilla is the same size.
>
> A. Right.
>
> Q. As you are familiar with the history of [Jim], when he resumed use after some period of sobriety, when he resumed that use in November of last year[10],

---

[10] This episode occurred while this case was still pending.

after a day or two of use, he ended up in someone's home committing a felony and was in need of immediate medical attention when found. Are you familiar with that history?

A. Yes.

Q. Can you testify that based on your experience, if and when [Jim] were to use again that he would pick right back up at that level and intensity of use and behavior?

A. I think the potential is high for that, yes.

[TR.445, lines 4-24] There is an abundance of evidence within the record to support the Chancellor's finding that Jim's alcohol and drug addictions are "unlikely to change within a reasonable time."

F. "Which Condition Makes the Parent Unable to Assume Minimally, Acceptable Care of the Child:"

As argued under paragraph C. above, the proof establishes clearly and convincingly that Jim's alcohol and drug addiction prevents him from being able to assume "minimally acceptable care" of Johnny. The fact that Jim has two parents who can provide that care, even if they can occasionally do so while Jim is present, does not give Jim immunity from the clear language of the statute. Whatever care Jim's parents can provide does not shield him from the well-established proof that he, himself, cannot provide such care. The last time that Johnny was left in the unsupervised care of Jim, he found himself in a car with his dad passed out (or asleep if you believe Jim's version) in the drive-thru lane at McDonald's. It is unknown whether Jim believes such care was "minimally acceptable" but reasonable and logical people would conclude that it is not. Jim had every opportunity since July 5, 2008 to take those steps to get his

life in order so that he could provide such "minimally acceptable" care for Johnny. Yet each and every time Jim failed, and failed miserably.

The *GAL* assigned by the Court in this case was Honorable Jonathan Martin. Jim could hardly have gotten the benefit of a *GAL* who would be more likely to believe a person can successfully overcome addictions. The *GAL* testified that he himself was someone who had "suffered from alcohol addiction." [TR.457 lines 4-9] The *GAL* testified that he had been "sober for over six years." [TR.457 line 12]

> Q. So is it a trust statement that you believe if a person does the right things, he or she can overcome alcohol problems?
>
> A. Yes.

[TR.459 lines 13-16] The great problem that Jim is never willing to admit is that he chooses not to do the "right things." Jim chooses not to follow the steps to stay sober. Even while this case was pending, having full knowledge that the fate of his relationship with Johnny lay in the hands of the Court, Jim refused to do the "right things" to stay sober and stay out of jail. As a result of the consistent, predictable, repeated pattern of substance use and abuse and criminal activity, the Court correctly concluded that Jim's condition prevented him from being able to provide "minimally acceptable" care for Johnny. The Court was correct in reaching that conclusion.

Jim's Misplaced Reliance Upon The Chancellor's Wording: With all due respect, in many instances in the Appellant's Brief, Jim's arguments and assertions stretch credulity. The greatest of these instances, however, is where Jim argues the Chancellor's ruling manifests "*ratio decidendi.*" [Appellant's Brief, p.26] Although very colorful in language, Jim's argument here is essentially that the Chancellor terminated Jim's parental rights because it found that Charles

would be a better, more stable, father-figure for the minor child. Jim places gargantuan importance on the Chancellor's use of the words "so that." [Appellant's Brief, p.26]

> "So that" reveals it all – the reason the lower court terminated was because it elevated its own perceived wisdom as to *who would be the better father* for Johnny above the federal and state constitutions and the strict requirements of the termination statute – that a court cannot do."

[Appellant's Brief, p.26] (emphasis in original)

A fair and logical reading of the Chancellor's written opinion completely contradicts Jim's argument that "reason" for the Chancellor terminating Jim's parental rights was because it felt Charles would be the better parent. After a thorough recitation of the testimony and proof presented at trial, the Chancellor in its *Memorandum Opinion and Judgment* stated: "A review of Jim's history shows a troubling pattern of substance abuse increasing in intensity, risk and severity of consequences." [R. p.194-215] The Court then went on to state the precise statute under which it was terminating Jim's parental rights:

> The court finds that Jimmy Ray Chism, Jr. exhibits ongoing behavior which would make it impossible to return the minor child to his care and custody because he has a diagnosable condition, specifically alcohol and drug addiction, unlikely to change within a reasonable time, which makes him unable to assume minimally, acceptable care of the child and constituting ground for termination of his parental rights pursuant to Mississippi Code §93-15-103(3)(e)(i).

[R, p.211-212] It was Jim's ongoing drug and alcohol addiction, use and abuse, which led the Chancellor to the conclusion that his parental rights should be terminated, not the Chancellor's preference for Charles over Jim. Jim's argument to the contrary is not supported by the record.

It is very interesting to note, however, Jim's characterizations about Charles, Abby's present husband, in his brief as compared to Jim's testimony during the trial.[11] Reference after reference is made to Charles' age, which apparently Jim finds to be too young. It is uncertain why these critical inferences appear in Jim's brief. Certainly Jim voiced no such problems with Charles during the trial. From the witness stand, Jim testified to the following:

A. I like Abby. I **love** [Charles.] He's a great guy.

Q. Have you always been able to get along with him>

A Sure.

[TR.377 lines 18-20]

Jim also had this to say about Charles:

Q. Doesn't your child, at some point, need stability and doesn't he need a father who may be here - -

A. **He does have stability. [Charles] is his stability. Why do they have to take away parental rights? Why can't I see him under supervised visits?**

Q. Yes, sir.

A. This stability y'all are looking for, he has.

Q. And I appreciate you admitting that. And I agree with that - -

A. **I think [Charles] is great.**

[11]The tone of Jim's brief as it relates to Charles is so contrary to Jim's own testimony that it is somewhat difficult to understand. There are numerous references throughout the brief of Charles' age, yet at not time was this made an issue during the trial. Examples of these references are as follows: "23-year old husband" [Appellant Brief p.vi] "new-in-the-picture 23-year old stepfather" [*Id.* p.14] "the then 21-year old Charles" [*Id.*p.2] "then 20-year old Charles" [*Id.* P.5] Other examples could be given.

[TR.381 lines 17-24] (emphasis mine) Even Jim's father testified that Charles was a "fine man." [TR.305 lines 27-28]

For whatever reasons that Jim's brief attempts to cast any negative inference to Charles for his age, the undeniable truth is that Charles is much more of a responsible adult than is Jim. The record shows clearly that Charles, though seven years Jim's junior, is a much more mature, productive, stable male roll model for Johnny than Jim has ever been, and almost certainly will ever be. As Jim admitted, Charles is Johnny's source of stability.

At the time of the trial, Jim was thirty (30) years of age. [TR.112 lines 3-7] Jim's source of income came from working for his parents [TR.87 lines 27- p.88 line 11] Jim's parents continue to pay his bills. From the time of the divorce, Jim has not written a single child support check to Abby to help support his child. [TR.88, lines 2-4] Each and every child support payment to Abby has been made by Jim's parents. [TR.88, lines 5-8] Jim admitted that he hasn't worked anywhere longer than a year. [TR.101 lines 27-29] Jim admits that his history of addiction is the reason for his lack of stability in employment. [TR.201 lines 3-8]

Jim's argument that the Chancellor "revealed it all" by use of the words "so that" is misplaced. The Chancellor's opinion made it clear the basis for the termination of Jim's parental rights. The inclusion of the words, "if so," was probably intended more as a transitionary phrase than anything else. Certainly the words were not intended to show the Chancellor's basis for the termination, as that has already been shown in the immediately preceding paragraph in the *Memorandum Opinion and Judgment.* The language apparently offensive to Jim is: "the parental rights of Jimmy Ray Chism, Jr. should be terminated so that a permanent and stable father may assume the role and that the minor child will be eligible for adoption." [R 211-212] Whatever the Chancellor's true intention of including those two words within the sentence, the entire

reading of the *Memorandum Opinion and Judgment* shows clearly that the Chancellor simply applied the facts to the elements of the subsection of the statute, and found by "clear and convincing evidence" that Jim's rights should be terminated. The Chancellor correctly applied the facts to the law, rather than imposing its own view of natural laws, as Jim suggests in his brief.

CONCLUSION

The record is replete with substantial and credible evidence, to support the Chancellor's opinion terminating Jim's parental rights. This Court should affirm the decision of the Chancellor.

Respectfully submitted, this the 5th day of September, 2012.

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 5, 2012, he forwarded a true and correct copy of the foregoing documents by depositing the same in the U.S. mail, postage prepaid, addressed to:

Honorable Michael Malski (Chancellor)
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So certified, this the 5th day of September, 2012.

J. MARK SHELTON, MS[redacted]

CERTIFICATE OF MAILING

The undersigned certifies that on September 5, 2012, the foregoing original Appellee's Brief and three (3) copies of the same, along with an electronic copy of the same on optical disk in PDF format, were sent by Federal Express for overnight delivery, postage prepaid, for filing to:

Honorable Kathy Gillis, Clerk
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So certified, this the 5th day of September, 2012.

J. MARK SHELTON, MS[redacted]