IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2011-CT-01472-SCT

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

J. MARK SHELTON, MSB 9818
JANA DAWSON, MSB 99196
SHELTON & DAWSON, P.A.
Post Office Box 228
Tupelo, Mississippi 38802
Telephone: (662) 842-8002
Attorneys for Appellee,
ABBEY GALE MORRIS (CHISM) BRIGHT

TABLE OF CONTENTS

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V.

ABBY GALE MORRIS CHISM BRIGHT — APPELLEE

TABLE OF CASES AND AUTHORITIES

STATUTES:

CASES:

TRANSCRIPT:

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JIMMY RAY CHISM **APPELLANT**

V.

ABBEY GALE MORRIS (CHISM) BRIGHT **APPELLEE**

APPEAL FROM THE CHANCERY COURT
OF UNION COUNTY, MISSISSIPPI
CAUSE NUMBER 2006-0549-73-MM

BRIEF OF APPELLEE PURSUANT TO ORDER ENTERED BY THE MISSISSIPPI SUPREME COURT ON THE 6TH DAY OF AUGUST, 2014.

COMES NOW, the Appellee, Abby Gale Morris Chism Bright, (hereinafter referred to as "Abby"), by and through counsel of record, and files this her *Brief of Appellee Pursuant to Order Entered by the Mississippi Supreme Court on the 6th Day of August, 2014,* in this cause, and in support thereof, would show unto this Honorable Court the following, to wit:

SUMMARY OF ARGUMENT

In its *Order,* this Court stated that "[n]either the Court of Appeals nor the Trial Court addressed th[e] prerequisites found in subsection (1)" of *Miss.Code Ann. Section 93-15-103.* The parties were then invited to file briefs as to that issue. The subsection at issue contains the following language:

> (1) When a child has been removed from the home of its natural parents and cannot be returned to the home of his natural parents within a reasonable length of time because returning to the home would be damaging to the child or the parent is unable

> or unwilling to care for the child, relatives are not appropriate or are unavailable, and when adoption is in the best interest of the child, taking into account whether the adoption is needed to secure a stable placement for the child and the strength of the child's bonds to his natural parents and the effect of future contacts between them, the grounds listed in subsections (2) and (3) of this section shall be considered as grounds for the termination of parental rights. The grounds may apply singly or in combination in any given case.

With all due respect to this Honorable Court, this subsection does not apply to this termination proceeding. The applicability of that subsection is limited by the qualifier found within the first line which states "when a child has been removed from the home of its natural parents . . ." The clear language of the subsection appears to apply only in those instances where the minor child has been "removed" from the home, typically by the Department of Human Services after finding abuse or neglect. *Miss.Code Ann Section 93-15-107(2)* sheds light on this issue.

> (2) The Department of Human Services shall initiate proceedings to terminate parental rights in accordance with Section 93-15-101 et seq. **in cases where a child has been placed in the physical custody of a relative and the department has been given legal custody of the child**. The department may provide necessary funds to defray the costs and attorney fees for any adoption proceedings brought by the relative of such child in cases where the relative is unable to pay such costs and fees based on criteria established by the department in compliance with federal law and the availability of funds to the department to pay such costs and fees.

Miss.Code Ann. 93-15-107(2) (emphasis added).

The child has not been "removed" from the home in this instance. The minor child has always been living in the care and custody of Abby, the custodial parent and biological mother. In this particular case (as in so many others) Abby has never done anything that would have justified the child being "removed" from her home. The requirements of subsection (1) are not applicable. If the requirements of subsection (1) are to be applied to every action seeking the termination of parental rights, one in Abby's "shoes" would never be able to meet the requirements.

Jim's argument that subsection (1) must be applied to all cases of termination which fall under subsections (2) and (3) is clearly illogical. Subsection (2) is where the biological parent enters

into a voluntarily consent to the termination. Under Jim's argument, the chancellor would be required to consider whether the child can "be returned to the home of his natural paren[t]," whether "relatives are not appropriate or are unavailable" etc. That would be illogical. Why would the court be required to consider returning a child to the home of someone who is voluntarily consenting to the termination? Why would the court be required to consider placing the child with relatives of someone who is voluntarily consenting to the termination? As can easily be seen, Jim's arguments quickly loses any logical basis.

ARGUMENT

Jim's suggestion throughout the appellate process is that the requirements of subsection (1) must be met before considering the grounds for termination set forth in subsection (3). Jim's suggested interpretation is not required by the clear language of the statute, including all subsections, when read in its entirety. Furthermore, such an interpretation of the statute would essentially make it impossible for someone in Abby's position to ever be able to terminate parental rights in order to facilitate adoption. Those requirements in subsection (1) will virtually never exist except in instances where the Department of Human Services (or someone) has removed the child from the home of both parents.

I. The Language of Subsection (1) Indicates that it is Inapplicable to this Case

Looking specifically at the language of the statute, it becomes readily apparent that subsection (1) does not apply to cases wherein one biological parent with whom the child has always resided and thrived seeks termination against another biological parent. The particular language of the subsection may be broken down as follows:

(A) "When a child has been removed from the home of its natural parents . . ."

In this instance, the child has not been "removed" from the home of Abby, nor has there ever been any reason to do so. From all accounts, Abby has been a very loving, devoted mother who has cared for the minor child during the long absences by Jim. No removal of the child has been warranted, nor has it taken place. This part of the subsection cannot possibly be applicable to one in Abby's position. To apply this requirement to every action to terminate parental rights would in effect add the additional requirement that both biological parents be unfit and subject to termination. It would prevent all terminations in cases where, as here, one parent has been a consistent, productive, fit parent while the other parent meets the grounds for termination under subsection (3). The legislative intent behind our termination of parental rights statute certainly was not to limit terminations to those cases where both parent's rights would be terminated. "The termination of the parental rights of one (1) parent may be made without affecting the parental rights of the other parent, should circumstances and evidence ever so warrant." *Miss.Code Ann. Section 93-15-109.*

(B) "cannot be returned to the home of his natural parents within a reasonable length of time because returning to the home would be damaging to the child or the parent is unable or unwilling to care for the child . . ."

Once again, this requirement cannot possibly be applicable to individuals in Abby's shoes. The child cannot be "returned" to Abby's home because he has never been "removed" from her home. Certainly leaving the child in Abby's home would not be "damaging" to the child as the child has always thrived within her home. Abby is not in the class of individuals who are "unable or unwilling to care for the child" in that she has always done so. Again, this subsection is simply inapplicable to those individuals in Abby's circumstances.

(C) "relatives are not appropriate or are unavailable . . ."

The language contained within the subsection referring to "relatives" again almost certainly is applicable only to those cases where the child has been removed from the home of both parents and wherein both natural parents are unable, unwilling or unfit to maintain custody. It would be inconceivable for the Court under the facts of this case (and of so many like it) to be required to consider placement of the child with "relatives" when the child is thriving in the care of one of the biological parents. In this instance in that Abby has always been providing excellent care of the minor child. No action has ever been asserted by the Department of Human Services or by Jim to "remove" the child from her care and custody. There would be no basis in this particular case to explore "relatives" to care for the minor child – Abby (and her husband, C.J. Bright) are doing a great job of that.

(D) "when adoption is in the best interest of the child, taking into account whether the adoption is needed to secure a stable placement for the child and the strength of the child's bonds to his natural parents and the effect of future contacts between them . . ."

Once again, the language of this subsection strongly suggests it is in reference to circumstances where the child has been "removed" from the home of both parents. It is the position of Abby that subsection (1) is not applicable. However, it should be pointed out that in this instance adoption is sought by Abby's current husband, C.J. Bright. C.J. testified in the hearing that his desire is to adopt the minor child. [T.147, line 2] Jim even acknowledged during the trial that C.J. is the person whom has provided stability for the minor child.

> Q. With all of that going for you, Mr. Chism, good, bad or ugly, you still were not able to stay clean, were you?
>
> A. Yes, sir. Or no, sir, I couldn't stay clean.
>
> Q. And what – you know, while this case has still been pending, your child is getting older. Right?

A. Right.

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

A. **He does have stability. C.J. is his stability**. . . .

[T. 381, lines 8-17] (emphasis added)

The Guardian ad Litem also testified concerning C.J.:

A. I do. From my impressions, Mr. Bright, as the witnesses who have taken this chair previously testified to in this hearing, including Mr. Chism, is an exceptionally bright, disciplined person of good and sound moral judgment. He has taken on the responsibility of being a father figure to the minor child at issue in a very serious and conscientious way.

He is asking the court, I believe, in a thoughtful and sincere manner, based on my interviews with Mr. Bright, that he wishes to adopt the minor child for no other reason than he believes it's in the minor child's best interest to have a stable father figure in his life. Mr. Bright has sufficient financial resources, moral character, to be able to serve in the capacity as this child's father, I believe, in an exemplary manner. And I don't believe that anyone has contested that issue, either at trial or over the past several days or during any of my investigatory interviews.

[T. 468, Line 27; T. 469, line 15]

(E) "the grounds listed in subsections (2) and (3) of this section shall be considered as grounds for the termination of parental rights. The grounds may apply singly or in combination in any given case."

Here the statute makes it clear that even in instances where the child has been "removed" from the home and the other requirements contained within the subsection have been satisfied, the grounds for termination must still fall under subsection (2) or (3). Note, however, that there is no such complimentary language to be found in subsections (2) or (3) which refer back to the requirements of subsection (1). If the legislature intended for the requirements of subsection (1) to apply in all cases (as opposed to only those where the child has been removed from the home of both

parents, the statute would contain language to that affect just as subsection (1) contains language referring to subsections (2) and (3).

II. Applying Subsection (1) to Cases Under Subsection (2) where one Biological Parent has Always had Physical Custody and with Whom the Child has Thrived is Grossly Illogical

Mississippi Code Annotated Section 93-15-103(2) states the following:

> The rights of a parent with reference to a child, including parental rights to control or withhold consent to an adoption, and the right to receive notice of a hearing on a petition for adoption, may be relinquished and the relationship of the parent and child terminated by the execution of a written voluntary release, signed by the parent, regardless of the age of the parent.

The fallacy in logic of Jim's argument becomes readily apparent when it is attempted to be applied to instances that falls under subsection (2) of the statute. Jim's suggestion that the requirements of subsection (1) must first be met before a chancellor may consider termination under subsections (2) or (3) simply is impractical. Subsection (2) provides the mechanism whereby a parent may have the chancellor terminate his/her parental rights "by the execution of a written voluntary release, signed by the parent . . ." Under Jim's theory, even in instances where the parent has executed a consent, the chancellor would still be required to consider (a) whether the child can be returned to the parent, (2) whether relative placement would be appropriate. Surely the legislature did not intend such a consequence. It is hard to conceive an instance wherein a chancellor would need to hear proof as to those issues in instances wherein a parent has voluntarily executed a written consent to termination.

III. Case Law Does Not Support Jim's Interpretation of the Statute

In *L.O. v G. V.,* the Court of Appeals affirmed the chancellor's order terminating the parental rights of the mother, a case with a procedural history as in this case. *L.O. v G. V., 37 So.3d 1248 (Miss.App.2010).* In *L.O.* the father of the child had physical custody, and the child was doing well in the home of father and his new wife, with whom the child had bonded closely. The father of the

child filed an action seeking to terminate the parental rights of the mother under *Miss.Code Ann. 93-15-103(3). Id. at 1250.* The child in that case had not been "removed" from the father's home. *Id.*

> ¶ 23. We find that the chancellor's holding that George proved abandonment for a period of one year under section 93–15–103(3)(b) by clear and convincing evidence is not supported by substantial credible evidence. **However, section 93–15–103(3) is clear that only one ground is necessary to terminate parental rights.** Because the chancellor properly found deep-seated antipathy on the part of Jenny toward Lori, as we discuss in the next section, we hold that the lack of clear and convincing evidence to support the finding of abandonment is harmless error. See *In re Adoption of Minor Child, 931 So.2d 566, 578 (¶ 33) (Miss.2006)* (holding that the chancellor's erroneous finding of abandonment was harmless error where the chancellor properly found that parental rights should be terminated on other statutory grounds).

Id. at 1254 (emphasis added.) The Court of Appeals correctly found that only one (1) ground is needed in order for the chancellor to terminate. Clearly in *L.O.* the child had not been "removed" from the home, nor had the other requirements of subsection (1) been established from the facts contained within the record.

In *C.K. v N.F.,* an adoption case that is admittedly procedurally dissimilar to the one at hand, the Court of Appeals stated the following: "Hence, N.F. is subject to the terms of *Mississippi Code Annotated section 93–15–103(3)* regarding termination of her parental rights." *C.K. v N.F., 53 So.3d 870, 874, Miss.App.2011.* The simple fact is that under Jim's interpretation of the statute, there would be no such thing as a "93-15-103(3) termination ..... each and every termination would be required to fall under "93-15-103(1)" as well. In that event, literally scores of adoptions within this statute initiated by one biological parent against the other would be impossible because the requirements of subsection (1) could not be met without harm to the child by "removing" the child from the home. That was not the intention of the legislature and should not be required by this Court.

CONCLUSION

With all due respect, it is clear that subsection (1) of *Miss.Code Ann 93-15-103* is not applicable in instances where the child has not been "removed" from the home of both biological parents. Logic and practicality demands that the requirements of subsection (1) not be applied in cases such as here, where one parent is fit and proper for custody and who is seeking the termination of parental rights against the other parent. The references within subsection (1) to "removal of the child," "cannot be returned to the home of his natural parents within a reasonable length of time" and consideration of "relative" placement, all make it clear those requirements simply do not apply to those in "Abby's shoes."

With all due respect, Jim's interpretation is simply backwards; termination of parental rights must be done in accordance with subsections (2) or (3) even in cases which fall under subsection (1), (eg. where the child has been "removed" from the home) but the requirements of subsection (1) do not apply to those actions falling solely under subsections (2) or (3). *Miss.Code Ann. Section 93-15-103(3)* begins as follows: "(3) Grounds for termination of parental rights shall be based on one or more of the following factors" and then it goes on to identify various grounds for termination. Conspicuously absent is any reference to subsection (1) or the requirements contained therein. The grounds for termination stand on the own under subsections (2) and (3) in instances where the child has not been "removed" from the home. If the evidence satisfies the requirements set forth in subsections (2) or (3), termination may be granted if found to be in the best interests of the minor child.

RESPECTFULLY SUBMITTED, this the 20th day of August, 2014.

s/ J. Mark Shelton
J. MARK SHELTON, MSB 9818
JANA L. DAWSON, MSB 99196
Shelton & Dawson, P.A.
Attorneys for Appellee
219 North Church Street
Post Office Box 228
Tupelo, Mississippi 38802
Telephone: 662-842-8002
Facsimile: 662-842-7010

CERTIFICATE OF SERVICE

The undersigned certifies that on August 20, 2014, 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)
Post Office Box 543
Amory, Mississippi 38821

Honorable Jak M. Smith, Esq. (Attorney for Appellant)
357 North Spring Street
Post Office Box 7213
Tupelo, Mississippi 38802

Honorable Greg Hunsucker, Esq. (Attorney for Appellant)
1020 North Gloster Street
Tupelo, Mississippi 38804

Honorable Jonathan Martin, Esq. (Guardian Ad Litem)
Post Office Box 6
Tupelo, Mississippi 38802

So certified, this the 20th day of August, 2014.

s/J. Mark Shelton
J. MARK SHELTON, MSB 9818

CERTIFICATE OF FILING

The undersigned certifies that on the 20th day of August, 2015, the foregoing original *Brief of Appellee Pursuant to Order Entered by the Mississippi Supreme Court on the 6th day of August, 2014,* was electronically filed pursuant to the Mississippi Electronic Courts appellate e-filing system to the following:

Honorable Kathy Gillis, Clerk
Clerk, Mississippi Supreme Court
Post Office Box 249
Jackson, Mississippi 39205

Physical Address:
Gartin Justice Building
450 High Street
Jackson, Mississippi 39201

So certified, this the 20th day of August, 2014.

s/ J. Mark Shelton
J. MARK SHELTON, MSB 9818
SHELTON & DAWSON, P.A.
219 North Church Street
Post Office Box 228
Tupelo, Mississippi 38802
Telephone: 662.842.8002
Telecopier: 662.842.7010
jana@shelton-dawson.com