**2011-CA-01472**

IN THE
**SUPREME COURT OF THE STATE OF MISSISSIPPI**

JIMMY RAY CHISM, JR., APPELLANT

*V.*

ABBY GALE MORRIS CHISM BRIGHT, APPELLEE

*On Grant of Petition for a Writ of Certiorari to the Court of Appeals of the State of Mississippi*

# SUPPLEMENTAL BRIEF OF PETITIONER/APPELLANT

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[1]The following abbreviations are used to refer to the record and transcripts: (1) Trial Record—**R** and (2) Transcript—**TR**.

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## JURISDICTION

The Court of Appeals entered its judgment on May 21, 2013, and denied Petitioner's motion for rehearing on November 26, 2013. On December 30, 2013, the Honorable Justice Chandler extended Petitioner's time for filing a petition for certiorari to January 9, 2014. By Order filed April 3, 2014, this Court granted Petitioner's Petition for Certiorari (7-2). By Order filed August 6, 2014, this Court ordered the parties to simultaneously submit supplemental briefs on four (4) issues identified by the Court that were not addressed by the Chancery Court or the Court of Appeals.

## STATEMENT OF SUPPLEMENTAL ISSUES

Pursuant to the Court's August 6, 2014 Order, Petitioner ("Jim") submits this Supplemental Brief to address the following prerequisites of Miss. Code Ann. § 93-15-103(1) , prerequisites which, as this Court noted, were not addressed by the Chancery Court or by the Court of Appeals:

**1.** Removal of a child from his home;

**2.** An inability to return the child to his home within a reasonable time;

**3.** The unavailability of a relative to care for the child; and,

**4.** Proof that adoption is in the best interest of the child.

## SUMMARY OF THE ARGUMENT

As this Court noted, both the Chancery Court and the Court of Appeals failed to address four (4) statutory prerequisites of Miss. Code Ann. § 93-15-103(1), prerequisites that must be proven by clear and convincing evidence before resorting to the termination provisions of Miss. Code Ann. § 93-15-103(3). That failure, in and of itself, is sufficient to reverse the termination decision. When coupled with the fact that the Chancery Court ruled (consistent with Abby's

testimony) that Jim's parents were appropriate and available to care for Johnny (by exercising visitation) the failures not only mandate reversal, but also mandate rendering of the termination decision.

Moreover, the termination decision cannot survive the constitutional strict scrutiny standard required by this Court as to the statute, and generally, and as required by the U.S. Supreme Court. This Court's precedents establish the following principle, a principle wholly disregarded by the Chancery Court and the Court of Appeals: if a parent and child have a good relationship (i.e., not substantially eroded), absent a finding that the parent presents a danger to the child that cannot be ameliorated by a supervised visitation requirement, Mississippi courts have neither the authority nor the power to sever the fundamental constitutional rights created by natural law between a parent and a child.

Here, there is not a scintilla of evidence, much less clear and convincing evidence, that Jim ever abused his son Johnny. There was a single incident where Jim went to sleep while waiting in the drive-through line at McDonalds with Johnny in the car (which resulted in no harm to Johnny and no conviction of any offense). With the exception of the McDonald's incident, there is a not an allegation, much less a shred of evidence that Jim otherwise committed any crime, abused alcohol, drugs, or otherwise acted as anything but a loving father in Johnny's presence after his and Abby's divorce. Again, even though the lower court terminated Jim's parental rights on the one hand, it held on the other hand that after six months of sobriety Jim could exercise supervised contact with Johnny (again, consistent with Abby's own testimony).

Furthermore, and most importantly, the loving relationship between Jim and Johnny is undisputed. Abby admitted it. Abby's husband admitted it. Jim, Johnny's paternal grandmother, Johnny's paternal grandfather, Johnny's paternal aunt, and the guardian ad litem

testified to it. For these and other reasons, the decision terminating Jim's fundamental constitutional rights as a parent should be reversed and rendered.

## ARGUMENT

Miss. Code Ann. § 93-15-103(1) includes two (2) threshold prerequisites (1) removal from the home of the natural parents and (2) inability to return to that home within a reasonable time) followed by three (3) narrowing, conjunctive conditions (one of the three being an alternative condition) that must be met before the grounds for termination under Miss. Code Ann. § 93-15-103(3) may be considered. Because the statute involves fundamental constitutional rights, this Court has held that it must be strictly construed,[2] applying a strong presumption that a natural parent should retain those rights. *Lauderdale County Dep't of Human Servs. v. T.H.G.*, 614 So.2d 377, 385 (Miss. 1992).[3]

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[2]*See Gunter v. Gray*, 876 So.2d 315, 319, ¶18 (Miss. 2004) explaining that "courts have no right, authority or power to add to th[e] reasons set forth in the statute for termination". Constitutional case law precedents and interpretations of the termination statute at issue have implicitly recognized that the familiar strict scrutiny test requiring a compelling governmental interest narrowly tailored by the *least restrictive means* must be employed in termination proceedings. *See Rias v. Henderson*, 342 So.2d 737, 739 (Miss. 1977) (acknowledging that statutes affecting fundamental rights are subject to strict scrutiny).

[3]The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV. The right of a parent to custody, care and control of their children is one of the oldest of the fundamental liberty interests recognized by the United States Supreme Court. *See Meyer v. Nebraska*, 262 U.S. 390 (1923) (liberty protected by the Due Process Clause includes rights of parents); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (explaining that a "child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (explaining that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Parham v. J. R.*, 442 U.S. 584 (1979); *Santosky v. Kramer*, 455 U.S. 745 (1982). *See also Troxel v. Granville*, 530 U.S. 57 (2000) (state statute regulating *mere grandparents' visitation rights* must meet strict scrutiny before interfering with a parent's right to control a child's upbringing).

The governing principles of statutory construction, i.e., construing a statute to give effect to the legislature's intent,[4] applying the plain meaning rule,[5] determining the legislative intent from the entire statute (not a provision in insolation)[6] without adding to the plain meaning or presuming that the legislature failed to state something other than what was plainly stated,[7] must be applied through the lens of strict construction governing the fundamental constitutional rights at issue.

**I. "Johnny", the minor child, was not removed from his natural parents' home; consequently, the termination decision under Miss. Code Ann. § 93-15-103(3)(e)(i) was erroneous a matter of law and should be reversed and rendered because the threshold prerequisite of Miss. Code Ann. § 93-15-103(1) (removal from the natural parents' home) was not met.**

The first threshold prerequisite under Miss. Code Ann. § 93-15-103(1) that must be met is removal of the child "from the home of its natural parents. . .." Although the prerequisite initially refers to parents in the plural, subsection (1) speaks of a parent's (singular) inability or unwillingness to care for the child as do the remaining subsections Miss. Code Ann. § 93-15-103(2)-(6). What, then, does removal from the home mean?

Does the mere existence of a custody order in which a parent has restricted or supervised visitation which precludes the child from being returned to the parents' or parent's home constitute removal? If so, then the fundamental constitutional rights of a parent having a history

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[4]*Clark v. State ex rel. Miss. State Medical Ass'n*, 381 So.2d 1046, 1048 (Miss. 1980); *see also Kerr-McGee Chemical Corp. v. Buelo*, 670 So.2d 12, 16-17 (Miss. 1995) (citations omitted).

[5]*Lawson v. Honeywell Intern., Inc.*, 75 So.3d 1024, 1027, ¶7 (Miss. 2011) (summarizing the rules); *see also* MISS. CODE ANN. § 1-3-65 (undefined nontechnical terms in statute must be ascribed common and ordinary meaning), *Tower Loan v. Miss. State Tax Comm'n*, 662 So.2d 1077, 1083 (Miss. 1995), *Jones v. Mississippi Employment Security Comm'n*, 648 So.2d 1138, 1142 (Miss. 1995).

[6]*Id.* at 1029, ¶15 (noting the longstanding maxim) (quoted citation and other citations omitted).

[7]*Lawson*, 75 So.3d at 1029, ¶17.

of drug abuse, addiction, a mental disorder, or other condition which precludes physical visitation would be subject to termination.

This Court, however, has rejected that notion and has consistently reversed termination decisions where the parent and child had a good relationship, even if that relationship had to be preserved through supervised visitation. *See In re V.M.S.*, 938 So.2d 829 (Miss. 2006); *compare Gunter v. Gray*, 876 So.2d 315, 319, ¶18 (Miss. 2004) (rights of father who was incarcerated at time of trial improperly terminated) *with Mayfield v. Braund*, 217 Miss. 514, 64 So. 2d. 713 (Miss. 1953) (rights of father who was sentenced to 10 years in penitentiary improperly terminated); *see also J.J. v. Smith*, 31 So.3d 1271 (Miss. Ct. App. 2010) (rights of mother whose bipolar disorder precluded her from seeing her child were improperly terminated). It would thus seem logical to conclude that removal from the parent's or parents' home as used in the statute means removal by law enforcement, the Department of Human Services, or a youth court or chancery court order.

In this case, Johnny was not removed from either parents' home by law enforcement. Johnny was not removed from either parents' home by the Department of Human Services. Johnny was not removed from either parents' home by a youth court or chancery court order. Instead, prior to the instant iteration of this case being commenced by Jim's Complaint for Citation for Contempt, **R100-103**, the Chancery Court imposed supervised visitation requirements upon Jim. **R96-98**.

Thus, the first threshold prerequisite, removal from the parent's home was not met and it was error to resort to the termination provisions of the statute. Hence, the Chancery Court's termination of Jim's fundamental constitutional rights should be reversed and rendered.

**II. Because "Johnny" was not removed from his natural parents' home, the question of returning Johnny to the home cannot logically be reached, thus, the termination decision under Miss. Code Ann. § 93-15-103(3)(e)(i) was erroneous as a matter of law and should be reversed and rendered because the second threshold prerequisite of Miss. Code Ann. § 93-15-103(1) could not be met.**

The second threshold prerequisite under Miss. Code Ann. § 93-15-103(1) that must be considered before resorting to subsection (3) (grounds for termination) is the inability to return the child to the "home of his natural parents within a reasonable length of time. . .." Logically, if the child was never removed from the home of his natural parents, as in this case, the question of returning him to the home within a reasonable time cannot arise. Disregarding the seemingly logical impossibility, the Chancery Court not only granted visitation rights to Jim's parents (Johnny's paternal grandparents), but also ruled that Jim could exercise supervised visitation with Johnny after 6 months of sobriety (again, consistent with Abby's testimony).

With respect to subsection (3) (grounds for termination), Abby makes the argument (an argument unsupported by case law or sound reasoning) that unless a parent can exercise unsupervised visitation, he or she cannot exercise the minimal level of acceptable care under subsection (3). Although Abby has not yet extended that same argument to subsection (1), it would be logical for her to do so, though again it would not be supported by case law or by sound reasoning.

To accept such an argument would require one to reject statutory canons of construction, reject the superimposed strict construction standard applicable to the statute at issue, reject the strong presumption that a natural parent should retain his or her rights, and illogically conclude that returning to a child to a home within a reasonable time means that any parent subject to supervised visitation (regardless of the loving relationship between the parent and child) is already in jeopardy under the statute of having his or her fundamental constitutional rights

severed. Such a conclusion, not founded upon any case precedent but rather upon compounded errors in reasoning, cannot withstand scrutiny.

With respect to the issue of reasonable time, although *Mayfield* is not directly on point, one can fairly infer that if a period of incarceration of ten years is not sufficient to constitute an unreasonable time, then a period of six months of sobriety is not sufficient to constitute an unreasonable time. *Mayfield v. Braund*, 217 Miss. 514, 64 So 2d. 713 (Miss. 1953) (reversing adoption decree where the lower court found the father to be morally unfit, and that he had abandoned his children because he had been sentenced to ten years in the penitentiary).

**III. The Chancery Court found that Jim's mother, Johnny's paternal grandmother, was not only available, but an appropriate relative to care for Johnny; hence, the termination decision under Miss. Code Ann. § 93-15-103(3)(e)(i) should be reversed and rendered because one of the mandatory, narrowing conjunctive conditions of Miss. Code Ann. § 93-15-103(1) was not met.**

As this Court noted, both the Chancery Court and the Court of Appeals failed to address the threshold prerequisite (or narrowing, conjunctive condition of the threshold prerequisites) of the unavailability of a relative to care for Johnny under Miss. Code Ann. § 93-15-103(1). Like the Courts' respective failures to address the other prerequisites, this would be sufficient in and of itself to reverse the termination decision.

Here, however, the Chancery Court indirectly addressed this threshold prerequisite by granting the paternal grandparents visitation. **R212-215**. The Chancery Court's grant of visitation rights to the paternal grandparents' manifestly equates to a finding that Johnny's paternal grandparents were available (and appropriate) to care for Johnny. Abby did not cross-appeal any issue, including the Chancery Court's determination with respect to Johnny's paternal grandparents. Thus, Abby has conceded the finding below, *Ladner v. Ladner*, 843 So. 2d 81, 83, ¶8 (Miss. Ct. App. 2003) (failure to cross-appeal essentially concedes judgment below), and,

moreover, is procedurally barred from contesting the finding. *Tillmon v. Mississippi State Dep't of Health*, 749 So. 2d 1017, 1020, ¶14 (Miss. 1999) (failure to raise issue in cross appeal constitutes procedural bar to contesting issue). Hence, this Court should reverse and render the termination decision.

**IV. The Chancery Court's determination that Jim's fundamental parental rights should be terminated "so that a permanent and stable father may assume the role and that the minor child will be eligible for adoption" disregarded the unmet threshold prerequisites and mandatory, narrowing conjunctive conditions of Miss. Code Ann. § 93-15-103(3)(e)(i) and exceeded the scope of the Court's authority under the federal and state constitutions; hence the termination decision should be reversed and rendered.**

Again, as this Court noted, both the Chancery Court and the Court of Appeals failed to address the threshold prerequisite (or narrowing condition of the threshold prerequisites) of whether adoption is in the best interests of the child, or, as expressed in subsection (1) of the statute: "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. . ." before addressing the termination provisions of subsection (3) of the statute. *See* Miss. Code Ann. § 93-15-103(1).

To the extent the Chancery Court addressed the issue of adoption being in Johnny's best interests at all, it largely consists of its conclusory opinion that Abby's new husband would be a better father for Johnny than Jim, which, whether objectively correct or not, is constitutionally impermissible under the strict scrutiny least restrictive means test which must be met before terminating Jim's fundamental constitutional rights as a parent. Again, Johnny is "not a mere creature of the State"—he is Jim's son and the State cannot impose its view of whom would be the better parent, supplant the Creator and natural law, without adherence to the constitutional strict scrutiny standard, including application of the least restrictive means test to preserve this most fundamental relationship. *See Pierce*, 268 U.S. at 534-535 (a "child is not the mere creature

of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"); *see also supra*, nn. 2-3.

Applying the least restrictive means test compels the following rule of law which should be applied to this case and stated as a bright-line rule for future cases: if a parent and a child have a good and loving relationship that can be preserved by supervised visitation or other means, a State cannot constitutionally terminate that parent's (or concomitantly, that child's) fundamental constitutional rights. Jim is not proposing a rule of law out of whole cloth, but rather one that appears to be a legal principle founded upon many years of jurisprudence, and concomitantly the absence of a single reported case in which a parental termination decision has been affirmed where there was a parent-child relationship remotely as good as Jim's and Johnny's relationship. *See In re V.M.S.*, 938 So.2d 829 (Miss. 2006); *Gunter v. Gray*, 876 So.2d 315 (Miss. 2004); *Matter of Yarber*, 341 So.2d 108 (Miss. 1977); *Mayfield v. Braund*, 217 Miss. 514, 64 So. 2d. 713 (Miss. 1953); *see also J.J. v. Smith*, 31 So.3d 1271 (Miss. Ct. App. 2010).

Here, it is undisputed that Jim and Johnny have a good and loving relationship. Abby admitted it, **TR246**, her new husband admitted it, **TR156**, the guardian ad litem testified to it, **TR495-496**, Jim testified to it, **TR125-26, 370**, Johnny's paternal grandmother testified to it, **TR270**, Johnny's paternal grandfather testified to it, **TR296**, Jim's sister testified to it, **TR331-32**—no one disputed it. Indeed, even the Chancery Court ruled that Jim and Johnny could have supervised visitation after Jim was sober for 6 months. Even Abby admitted that under certain

circumstances (supervision by Jim's mother and after Jim's 6 months' of sobriety) she would have no objection to Jim spending time with Johnny. **TR247**.[8]

Putting this testimony in context of subsection (1) of the statute at issue, the Chancery Court was required to factor in the "strength of the child's bonds to his natural parents and the effect of future contacts between them" (it did not), but it could only do so after finding that:

(a) Johnny had been removed from the home of his natural parents (he was not—the Chancery Court made no such finding);

(b) Johnny could not be returned to the home of his natural parents (impossible to find if he was never removed—the Chancery Court made no such finding);

(c) returning Johnny to Jim's home would be damaging to Johnny or Jim was unable or unwilling to care for Johnny (the Court stated a corollary legal conclusion under subsection (3), but stated not a single finding of fact by the mandatory clear and convincing evidentiary standard,[9] a legal conclusion which if affirmed would beg the question as to whether a parent having supervised visitation could, as a matter of law, ever provide the minimally acceptable level of care sufficient to survive a termination challenge (the import of the Chancery Court's ruling being that such a parent could never provide the minimally acceptable level of care)); and,

(d) Johnny had no appropriate or available relatives (the Chancery Court implicitly found just the opposite—that Johnny's paternal grandparents were both appropriate and available to exercise visitation with Johnny).

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[8]It was Abby who consumed alcohol to the point of intoxication in front of Johnny, **TR210**, and Abby who consumed illicit drugs while she was pregnant with Johnny (i.e., she essentially administered illicit drugs to Johnny while he was in her womb). **TR97, 120**.

[9]To overcome the strong presumption that a natural parent's fundamental rights should not be terminated, a party must carry the evidentiary weight of clear and convincing evidence. *See, e.g., Lauderdale County Dep't of Human Servs. v. T.H.G.*, 614 So.2d 377, 385 (Miss. 1992); *Ethredge v. Yawn*, 605 So.2d 761, 764 (Miss. 1992) (reversing termination of parental rights); *N.E. v. L.H.*, 761 So.2d 956 (Miss. Ct. App. 2000) (reversing the instant Chancellor for want of clear and convincing evidence and explaining that "review of the record has left us troubled by the lack of supporting evidence"); Miss. Code Ann. § 93-15-109 (clear and convincing proof required); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). In this instance, the lower court's opinion is devoid of a single factual finding by clear and convincing evidence—the lower court's September 8, 2011 decision, after two pages of procedural history, consists simply of 16 pages of mere scrivener's recitation of the trial testimony, without a single finding of fact, on a clear and convincing basis or otherwise. **R3-17**.

Here, the Chancery Court, having failed to find that the statutory prerequisites were met, could not consider proof as to whether adoption was "needed to secure a stable placement for the child". Even if the statutory prerequisites were met, and they were not, the conclusory assertion that the then 23-year old husband of Abby would be a better father, whether objectively true or not, is not a permissible constitutional basis to terminate Jim's fundamental constitutional rights.

In *Yarber*, this Court reversed a decree granting an adoption to the step-father. As in this case, the moving party therein alleged that the father was mentally, morally and otherwise unfit to rear or train the children. The allegation was based upon the father shooting the step-father four times in front of the children and failing to financially support the children. The father therein visited the children about once every six months, called them on the telephone at infrequent intervals and sent them Christmas presents. This Court explained that although the situation between the father and stepfather was "regrettable", the chancellor was manifestly wrong to find the father unfit, and noted that the chancellor had power in the original divorce decree to enforce the support obligations. *Yarber*, 341 So.2d 110. The Court further explained:

> Even though [the stepfather] loves the children, provides for them, and is willing and anxious to educate them, and can and will provide finer things for them, this, in itself, does not justify the taking of the children from their natural father. If a person could adopt a child from his natural parents because the person could better provide for him, give him things he needed and wanted, educate him and provide a fine home for him, then many people in the so-called underprivileged group could have their children taken away from them because it could be said their best interest was promoted by doing so.

*Id.*

The reversible error in *Yarber* was repeated by the Chancery Court in this case, which impermissibly concluded that because in its view Abby's new husband would be a better father for Johnny than Jim, termination was appropriate. Jim's child is not a creature of State or a chess piece whose parents can be chosen by the State depending upon its views that another parent

might be able to provide more or simply be a better parent. Neither the state nor the federal constitutions permit the State to impose such views or to use them to justify termination of such fundamental constitutional rights (both Jim's and Johnny's). Hence, this Court should reverse and render the termination decision.

## CONCLUSION

For the reasons set forth herein, in Jim's principal brief, Jim's reply brief, motion for reconsideration, and petition for certiorari, Jim asks the Court reverse and render the lower court's decision terminating his parental rights.

Respectfully submitted, this the 20th day of August, 2014.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of August 2014, I electronically filed the foregoing Supplemental Brief of Petitioner/Appellant with the Clerk of the Court using the MEC system which upon information and belief will automatically send notification of such filing to the following:

Honorable J. Mark Shelton (Attorney for Appellee)
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If such notification is not received, the undersigned certifies that said document shall be deposited in the U.S. mail, postage prepaid, addressed to the foregoing on this date, and otherwise certifies that it has been deposited in the U.S. mail, postage prepaid, addressed to the Honorable C. Michael Malski (Chancellor), Post Office Box 543, Amory, Mississippi 38821.

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