IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KELLY R. BURGE — APPELLANT,

v. — CAUSE NO. 2015-CA-01580

CRAIG A. BURGE,

CHAD SHARFF — APPELLEE.

ON APPEAL FROM THE CHANCERY COURT
OF LAMAR COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEE
Mr. CRAIG A . BURGE

NO Oral Argument Requested

Presented by:

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v. **CAUSE NO. 2014-CA-00701**

CRAIG A. BURGE,
CHAD SHARFF **APPELLEE.**

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 judges of the Court of Appeals may evaluate possible disqualifications or recusals:

1. Ms. Kelly Burge
   Appellant

2. Mr. Craig Burge
   Appellee

3. Mr. Chad Sharff
   Appellee

4. Hon. Phillip Londeree
   Attorney for the Appellant

5. Hon. Lin Carter
   Attorney for the Appellee

6. Hon. James Johnson
   GAL

5. Hon. M. Ronald Doleac
   Hattiesburg, MS 39403
   Chancellor, Lamar County

RESPECTFULLY SUBMITTED this the 24th of October, 2016.

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AN UNUSUAL STATEMENT ON ORAL ARGUMENT

Craig A. Burge "(Craig") has no inherent desire for oral argument, and there should be no need. This is a fact-specific case where custody of natural and "third-party" children was awarded to Craig on a lopsided *Albright* analysis after both natural parent presumptions were rebutted clearly. The record below is voluminous and the opinion is long. Craig does not apprehend that the Appellant's Brief grapples seriously with either of those unusual features. This appears to reflect a tactical decision driven by Kelly's flawed strategy that presumes a Chancery Court can unwittingly lose jurisdiction to protect children when the natural father fails to prosecute custody modification claims and a Rule 41(b) dismissal is granted.

This brief is lamentably long because Craig has grappled with some of the harsh facts, has plumbed the phenomenal opinion and the cited settled law. Unless Kelly Ralston Sharff Burge ne'e Williamson ("Kelly") resolves the unnecessary factual tension through briefing to allow this Court to establish the facts in customary fashion, this Court might find oral argument helpful. That would be unfortunate. The facts dispose of Kelly's natural parent presumption rebuttal issue and confirm the legal and equitable paucity of Kelly's jurisdictional argument. Kelly seems to anticipate oral argument to adequately present her case. Craig will take whichever route leads to a final resolution so he can dedicate time and resources to his four children, but does not request oral argument.

STATEMENT OF THE ISSUES:

I: There is no reversible error in the clear rebuttal of the natural parent presumptions.

II: The Chancery Court retained subject matter jurisdiction to protect minor children after the natural mother got the natural father's custody modification claims dismissed pursuant to Rule 41(b).

III: The polestar consideration required a custody award of two natural children to Craig, and of two "third-party" children to Craig as *in loco parentis* Dad after both natural parent presumptions were rebutted clearly.

STATEMENT OF THE CASE:

Nature of the Case

This case arises from a long and contentious divorce action between Craig and Kelly, wherein custody was always the primary issue for Craig. Kelly has two children from a prior marriage to Chadwick Sharff (hereinafter "Chad"),[1] and Craig and Kelly have two children together.[2] Whether through Chad's unilateral abandonment of the Sharff Children or Kelly's parental alienation, or both, Craig is the only real father figure the Sharff Children know. The Sharff Children and the Burge Children are joined in every way beyond DNA, and Craig loves and treats them the same.

After a torrid affair and an outlandish getaway plan, Kelly absconded with her newfound soul-mate Burke Williamson ("Burke" and/or "Mr. Williamson"). Craig was doubly concerned because Kelly had already proved Burke suffers PTSD symptoms that lead to substance abuse and suicidal tendencies. Kelly moved in to Burke's apartment and bragged about romantic vacations with him but denied a romantic relationship. Burke said that Kelly having custody would be a perverted nightmare. The Chancery Court was sufficiently concerned to twice enjoin Burke from having any contact with the children. Kelly and Burke defied those orders. The children did not respond well to Burke and tensions mounted.

In essence, Kelly abandoned all four children to Craig without a fuss, and left them with Craig for nearly two years as the case proceeded through dizzying twists and turns mostly caused by Kelly, Burke and/or Chad. Still, Kelly seemed offended when Craig pursued permanent custody as his primary litigation goal. Kelly scoffed initially at Craig's efforts, but when Chad entered the case Kelly cried foul. The Guardian *ad litem* (hereinafter "GAL") bought Kelly's story for quite some time without objective proof, leading Kelly to believe she could do as she pleased and still be assured of custody of all four children. Kelly also relied on the young age of the Burge Children to boost her

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[1] The children of Kelly and Chad are referred to primarily as the "Sharff Children".

[2] Hereinafter primarily the "Burge Children".

claims, focused on one being female and then asserted that the four-fold unit must not be split. Kelly never saw Craig's custody pursuit for the Sharff Children Kelly as a serious claim. Kelly seemed confident that a generous support and property division package would follow custody without much effort.

Ever the winsome thespian, Kelly had the GAL convinced that Burke was a benevolent but mostly invisible savior and that she was the innocent victim of some monstrous conspiracy by Craig and Chad to besmirch her virtue and rob her of custody. Craig shouldered the litigation burden while supporting the children without much help from Kelly or Chad. Seemingly every time things began to be nailed down Kelly came up with something new to divert attention from who she really is and what she was doing. Only at the end did the GAL see through the lies and opine that Craig should have custody of all four children on a permanent basis.

After 7 days of trial and weeks of deliberation, The Chancery Court issued a 90-page "Opinion And Final Judgment" (hereinafter the "Opinion"). The Opinion is appended to Kelly's Brief as a Record Excerpt, and is cited as "Op. ___ " herein.[3] Craig received sole legal and physical custody of all four children. The natural parent presumptions of Kelly and Chad were rebutted clearly. Kelly's testimony was ruled utterly incredible and Kelly was found unfit for custody. The Chancery Court saw a "need to intervene" to protect the children from Kelly's post-separation lifestyle and the disturbed mental health of Kelly and Burke. Kelly did not win a single *Albright* factor, and only one was deemed neutral.

Chad was also found unfit and his natural parent presumption was rebutted clearly. This is not contested. Kelly's main contention is that a procedural wrinkle unwittingly deprived the Chancery Court of jurisdiction over the Sharff Children, making it "legally impossible" for anybody but Kelly to have custody despite her unfitness. Kelly also contends that her natural parent presumption was not rebutted clearly. Kelly and the GAL insist that the four siblings not be

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[3] The trial record below is denoted herein for citation as "R.", record excerpts included by Appellant are denoted as "R.E.", and trial exhibits in evidence below appended to Appellee's Brief are noted as "T.Exh."

separated, but Kelly never explains how she could obtain custody of the Burge Children even if her natural parent presumption could be reclaimed.

The 90-page Opinion and controlling caselaw reveal the fatal flaws in Kelly's appeal. Even if child custody could ever be awarded to an unfit parent based upon an odd third-party procedural posture, this is not the case to make such new law. This case is not about Kelly, is surely not about Chad, and is not really about Craig. This case is about "The Important People – The Children." Op. 47. The children are where they need to be with Craig, and should stay there.

Course of Proceedings and Disposition Below

While Kelly's "Course of Proceedings and Disposition in the Lower Court" is spare, for economy Craig adopts that recitation pursuant to MRAP 28(c).

Statement of the Facts

Hard Truths. Because Kelly did not itemize the relevant facts as the rules anticipate, Craig cannot adopt or amend Kelly's statement of the facts pursuant to MRAP 28(c). The record and Opinion below are so voluminous that an overview is necessary to assist the Court. Given Craig's posture on appeal and the girth of the record, Craig cites to the facts in the Opinion where practicable.

This case is rife with hard truths that scar and demean the parties but are largely ignored in Kelly's Brief. Kelly's "procedural" argument might suggest Kelly's motives were pure and maternal, but her "substantive" argument about insufficient evidence unveils another harsh truth.

Craig believes Kelly skipped the facts to obfuscate the Chancery Court's six core conclusions: (1) it was "necessary to point out how incredible the Court finds Kelly's testimony to be, in nearly all respects", Op. 53; (2) that Kelly's conduct is "so immoral as to be detrimental to the children", Op. 52; (3) that "Kelly is unfit, mentally or otherwise, to have custody", *Id.*; (4) that Kelly is willing to harm the children to preserve her "self-perceived victimization", Op. 54; (5) that the "Court deems it necessary to intervene for the sake of the children", Op. 53, and; (6) "that this Court's hands are not tied, so to speak, in such a posture", Op. 47, that it could not follow the

polestar to the conclusion that Craig must be awarded custody of all four children.

Craig does not relish re-telling or re-living these truths. His brief has been written and re-written to be more gentle for Kelly and the children, but that course risks losing facts so compelling that no caselaw found by either party describes it or provides a singular precedent to bind or guide this Court. Craig regrets the length and gravity of this brief, but has concluded that only by summarizing the more glaring truths can this Court appreciate what the Chancery Court faced and why it labored for 90 pages to conclude the matter so decisively.

The Early Years. Craig and Kelly married after a very brief courtship. Op. 36. Craig had not married previously and had no prior children. Kelly had custody of two boys, then ages 5 and 2 (again, the "Sharff Children") from her prior marriage to Chad. The new family moved into a house built previously by Craig on family property in rural Lamar County, Mississippi. Craig's family lives on large adjacent woodland parcels. Craig and his family took in the Sharff Children as their kith and ken from the beginning.

Chad was mostly absent. From the outset Kelly complained that Chad had abandoned the Sharff Children and sporadically paid child support. Op. 29, 33; T.Exh. 22. As time wore on Chad became even less involved, but his family visited occasionally and Craig believed that the Sharff Children enjoyed what little bond they had with the Sharff family. Kelly pronounced Chad unfit and urged Craig to hire legal counsel to terminate Chad's parental rights and adopt. Op. 33. Kelly even began to tell Craig, the Sharff Children and others that she did not know if Chad "was dead or alive." Op. 17, 29. Kelly concealed that Chad was making routine child support payments. R. 387-90.

The Sharff Children began to see Craig as "Dad" and--at Kelly's behest--even began to wear the "Burge" name on sports jerseys and to hold themselves out as Craig's. Op. 29. Craig gladly took on role of Dad and *in loco parentis* father from the time the Sharff Children were 5 and 2. Op. 14, 29.

After a year of marriage, Craig and Kelly were blessed with a daughter. Three years later they welcomed a son. (Again, together hereinafter the "Burge "Children"). The four children are

integrated as a matter of the heart and daily reality. Craig was intimately involved in matters of family, faith, discipline and extracurricular activities. Op. 29. For the most part, in the early years, Kelly tended to domestic matters and did not work outside the home.

Because Kelly advised that the Sharff Children suffered from 'dyslexia' and showed some attention deficit issues, Kelly believed home-schooling was the best approach for the Sharff Children. R. 562-571. Craig did not prevent this course. When the Burge Children came along Kelly advised that each of them, too, suffered the same maladies and thus needed to be schooled by her only. Op. 28. Craig's consent was grudging.

The Beginning of the End. Early in the Fall of 2012, Kelly began to grow restless of domestic life and determined to start a business as a personal fitness expert who sells nutritional supplements. Craig was dubious, especially when Kelly announced that cosmetic surgery would be required for her to fit her role in this new venture. R. 143. Craig was also concerned that the home-schooling effort would suffer, but Kelly assured him that she had it under control. Craig relented, and Craig and his family began to fill domestic and educational duties Kelly had ostensibly been providing. Op. 19.

Kelly's absences from the home became more frequent and extended, R.138-40, presumably training her body and developing her new business. Craig did not know then that his family frequently covered for Kelly when her absences and failures left the children at loose ends and untended. Op. 19. Mostly unbeknownst to Craig, the home-school portion of the Burge routine fell to the DVD player and the eldest child, Patrick Sharff ("Patrick"). Op. 32. What was supposed to be home-schooling devolved to un-schooled children with Patrick as chief babysitter and Craig's family as overseer when Craig was working. Op. 55

A Black Knight Emerges. Part of Kelly's business plan was to contact old friends and acquaintances to sell dietary supplements and promote her business. One former classmate Kelly contacted was Burke, who then lived in the Jackson area. Burke had little interest in dietary supplements but was drawn to Kelly. R. 451-91. Kelly was attracted to, among other things,

Burke's unsettled and urbane lifestyle and his troubled plight as a wounded military veteran suffering from symptoms associated with "Post Traumatic Stress Disorder" ("PTSD"). *Id.* Kelly was particularly aware of Burke's open suicidal urges. R. 413-15. When Craig noticed that Kelly was spending undue time communicating with Burke, Kelly assured Craig her interest was platonic and even theological. R. 106-109.

Kelly's New Soul-Mate. Only Burke and Kelly know when the romance became carnal and neither is willing to tell. In late 2012, Kelly began to prefer time spent locked away in the bathroom or other secluded places talking and texting with Burke and consuming alcohol. *Id.* This had a deleterious affect on the marriage and the children. Kelly became more restless and absent from the home more often, and when she was home her drinking became a problem. Op. 31.

Things first peaked when Kelly woke Craig up around midnight in December 2012 with news that Burke was attempting suicide and only her intervention would save him. R. 107-108; Op. 18. Craig raced to Jackson with Kelly, only to find Burke inebriated but unharmed. T.Exh. 17. Craig asked Kelly to cut all ties with Burke, and she indicated she would. *Id.* Kelly did the opposite, determining that Burke was her "soul-mate". Op. 18.

Kelly's Grenada Trip and the Wounded Warrior Picture. In January 2013, Kelly announced a weekend trip to see her Aunt in Grenada to clear her head. Whether Kelly ever made it to Grenada that weekend remains unknown, but she did find her way into Burke's bed as he serenaded her with song and plied her with liquor. Op. 18. That same weekend Kelly posed for a semi-nude photograph as part of Burke's 'wounded warrior' affiliation. T.Exh. 24. "As for the photo she allowed to be taken of herself in which she appears to be wearing nothing but an American flag draped around her waist, however, [Kelly] defended the photo as 'Christian'." Op. 31; T.Exh.24.

Craig asked Burke to leave his wife alone, and Craig demanded that Kelly renounce Burke and return to him and the family. R. 413-415 Kelly continued to drink, became even more withdrawn and had little love and affection left for Craig and the children. Op. 32. Kelly bristled as Craig rebuffed her demand to be with Burke–her "best friend" and "soul-mate"–on Valentine's

Day in 2013. T.Exh.52. Craig intercepted text messages from Burke to Kelly in which Burke asked if he needed to come rescue Kelly from Craig. Craig was unable to stop Burke or make Kelly return. The children occupied little of Kelly's time at this point. Op. 19-20, 32.

Kelly's Pine Grove Visit. In March 2013 Kelly announced that she needed still more time to clear her head and thus would spend the weekend with her mother. After a brief period with her mother, Kelly checked herself in to the **Pine Grove Psychiatric unit of Forrest General Hospital** (hereinafter "Pine Grove") to address her suicidal thoughts. Kelly advised Pine Grove that she had been depressed, and suicidal, for some 14 years. Pine Grove professionals diagnosed Kelly with a "broad range of psychopathology" including "magical thinking, delusional beliefs or full-blown hallucinations", "thought blocking", "dissatisfied and uncertain with her life's direction and major life goals", "interpersonal discord", "likely interacts with others in a masochistic and dependent manner", "a longstanding pattern of depression", and ultimately significant "Major Depressive Disorder" and "Personality Disorder NOS (Borderline and Dependent features)". T.Exh. 58 at 8-9.

Kelly confessed to Pine Grove professionals that she was "torn between two men," *Id.* at 6-11, that Craig would not release her to be with Burke, *id.* at 18, and that she would be "okay once I figure this out.", Kelly was in contact with Burke while in Pine Grove, Op. 18, but not with Craig.

After 5 days of testing and treatment, Kelly committed to a "plan of safety" sufficient for PG to release her. T.Exh. 58 at 63-65. Part of that plan was to leave Burke alone and return to Craig. Kelly's follow-up treatment included pharmacologic and therapeutic treatment for her depression, completion of 90 meetings in an Alcoholics Anonymous program and a Narcotics Anonymous program. T.Exh. 58 at 171-173.

The Pine Grove Meeting. Prior to being released from Pine Grove, Kelly arranged for a meeting with Craig and Pine Grove officials. When Craig was contacted for the meeting by Pine Grove officials he was advised to "expect the worst" because the marriage was broken and Kelly was leaving. R. 110-113.

The Black Knight Strikes Directly. Shortly before the Pine Grove meeting, Burke

contacted Craig to advise he wanted to share news of his activities with Kelly that might be upsetting to Craig. Craig told Burke to "bring it." T.Exh. 20. Burke unleashed a series of text message traffic between Burke and Kelly that was sexually explicit and made clear that Burke had arrested Kelly's affections. *Id.* These "sexts" were "troubling to the Court." Op. 54. Burke further apprised Craig that, during Kelly's Grenada trip, Kelly had been in his bed and was begging for congress that Burke was too stalwart a gentleman to yield to, but that others would have and indeed may have. Op. 18, 54. Kelly later testified that "Burke told her that he wanted Craig to be hurt" by those posts. Op. 34.

Kelly had told Craig that the marriage was "over" before she went to Pine Grove. Op. 18. What Craig did not know when he went to the Pine Grove meeting was that Kelly had planned to make things appear as if she might come home after all, T.Exh. 58, 63-65, that her treatment had somehow been effective, and there really was nothing further to discuss about Burke. Stung by the revelations from the Pine Grove officials and from Burke, Craig advised Kelly she had "no home to come to." Op. 18. Kelly said she was distraught and homeless, rejected unfairly by Craig at an innocently vulnerable moment.

From Pine Grove To The Black Knight's Lair. Kelly and her mother testified that Kelly left Pine Grove and lived with her parents in Hattiesburg for 3-4 weeks, essentially homeless and destitute as a result of Craig. R. 622-23. The stories of this by Kelly and her mother differ. *Compare* Op. 33, 35 and 42-43. Kelly first told her story in a deposition, and the story morphed as she recounted it first to the GAL, and ultimately to the Chancery Court. What bank records, and later testimony, revealed is that Kelly was in Burke's back yard within hours of leaving Pine Grove. Op. 43; T.Exh. 57, 100-104. Kelly returned to Purvis to get the things she wanted from the Burge homestead, but she never tried to go back home.

Burke paid all of Kelly's expenses, aside from whatever she earned from her dietary supplement business and the child support she received from Chad. Kelly claimed that Burke "stayed elsewhere" while she lived in his apartment. Op. 33. Kelly made no genuine attempt to

was in place.

The Children Stayed With Craig. Kelly also did not seek to remove the children from the Burge home for 16 months after the case began. D# 53. Craig and his family redoubled efforts to help the children. Craig placed the children in public school, only to learn that Kelly's home schooling left them painfully below age-appropriate academic levels. Op. 19, 22, 55. Craig got the expert help the children needed and did what he could, Op. 21-22, and the children responded quickly to solid instruction and a stable home life. Op. 55, 41-42.

Craig's Divorce and Custody Complaint. Craig filed the instant action, seeking a divorce on grounds of adultery, habitual drunkenness, habitual cruel and inhuman treatment and, in the alternative, irreconcilable differences. Craig also sought to retain custody of all four children. Craig sought traditional property division and equitable relief. R.E., D#1. Kelly never filed responsive pleadings. Op. 47.

The First Temporary Order. When the matter came on for hearing on temporary features, Kelly quietly agreed that Craig should retain custody of all four children. Op. 30-31. The story that Chad may be "dead or alive" was generally believed so the Chancery Court did not address Chad's rights or responsibilities directly. Op. 17. Because Kelly represented that she was living on her own somewhere in the Jackson area with little income and no child support from Chad, Op. 33, no temporary support was ordered from Kelly. R.E. D#14.

Temporary visitation was established, but each party was enjoined from exposing the minor children to paramours and romantic interests during any custodial period. *Id.* There were to be no overnight guests with romantic interest when the children were present. *Id.* Any ruling on property division was deferred and status quo was preserved. *Id.*

The Natural Father Engages. Around this time Craig was contacted by Chad, who proved he had been paying support for years. T.Exh. 23. Chad was disturbed over the stories told about him by Kelly over the years, particularly the "dead or alive" and 'deadbeat dad' portions. Op. 29, 33. Chad claimed his visitation efforts had been thwarted by Kelly.

Chad appeared in this litigation, and also filed pleadings in his divorce case with Kelly. R.E, D#19. Chad sought a custody modification based in part upon Kelly's efforts to alienate him and upon Kelly's alcohol, suicide, depression and adultery issues that he was just learning about. *Id.* Chad overtly consented for Craig to continue to have custody of the Sharff Children. *Id.* Craig requested that Chad's child support be re-directed from Kelly to Craig. D# 22. Chad appeared at only one hearing, but was always represented by Counsel. Op. 46.

The Chancery Court ordered the parties to amend pleadings to address Chad's participation and Kelly's new objection that the Chancery Court had no jurisdiction over the Sharff Children despite the Temporary Order. R.E., D# 51. The Sharff custody modification case was consolidated with the Burge divorce case. R.E., D#62. Kelly did not seek review or appeal of this consolidation order. *See* Trial Court docket sheet in Appellant's R.E.

Burke And The Amended Temporary Order. In open defiance of the Temporary Order, Burke emerged during the early visitation exchanges, presumably to protect Kelly. T.Exh. 33; Op. 81-84. When the children returned from early visits Craig became concerned with Burke's presence and began to understand that Burke and Kelly were living together. Op. 14. Craig filed pleadings to address Kelly's violation of the Temporary Order. D#22.

In the Second Temporary Order the Chancery Court enhanced the "morals clauses" of the Temporary Order about overnight guests and romantic interests, and specifically named Burke Williamson in the list of enjoined participants. D#27. Kelly was ordered to tender to Craig any new child support paid by Chad. *Id.*

The GAL Appointment. A guardian *ad litem* was appointed for all four of the children. Kelly complained to the GAL that Craig and Chad were conspiring against her because both were allegedly jealous of her new life with Burke, and both seek to punish her for leaving them.

Kelly's New Life. Kelly missed her an early scheduled visitation to attend a "Willliamson Family Vacation" with Burke at the Ritz Carlton in North Carolina. T.Exh. 18. This lavish trip, some of which Kelly published on social media, was allegedly funded by Burke. Op. 42. This notwithstanding, Kelly continued to maintain she and Burke were merely "best friends." Kelly

discontinued her anti-depressant medications and never went to AA/NA meetings as ordered by Pine Grove. Kelly pronounced herself cured from her 14-years of suicidal depression, all of which she blamed on Chad and/or Craig.

Kelly's Defiance of Rules, Orders and Objective Truth. Kelly's collusion story appealed to the GAL for some time, but ultimately even the GAL concluded that Kelly left the marriage "more to get to Burke than to get away from Craig." R. 837. The proceedings were protracted and an exhaustive recount is not required here, but Craig contends that the majority of the delay and unusual procedures and steps and hearings is attributable to Kelly. For example, Kelly did not file responsive pleadings so there was little room to resolve the divorce or property division issues by consent. Op. 47.

Similarly, Kelly continually denied any romantic relationship with Burke, and maintained that she lived alone in Burke's old apartment while Burke moved off elsewhere to give his dwelling to her. R. 406-09, Op. 33. Kelly told these stories in depositions, to the GAL and in direct testimony. Kelly provided grossly inadequate discovery responses, T.Exh.12, and never provided a complete Rule 8.05 financial declaration. *See, e.g.*, T.Exh. 50. Kelly's 8.05 showed no contribution from Burke and thus reflected living expenses that could not have possibly been met by her. *Id.* Kelly never did disclose the child support she had received for years, and was still receiving, from Chad. *Id.*

Kelly Confesses Some But Not All. Kelly finally confessed to an adulterous relationship with Burke on the 3rd day of trial. Kelly quickly back-pedaled by claiming that the post-separation beginning does not even constitute adultery because it was "after the fact." Op. 23. Notwithstanding the Pine Grove visit, Kelly continued to deny any drinking or mental illness infirmities. Kelly admitted she and Burke are "best friends" and live together, went on the Williamson Family vacation but were not too serious. Kelly "said Burke Williamson will likely be her boyfriend after the divorce is concluded." Op. 25. That same day Burke admitted that "he is Kelly's boyfriend" but nothing more. Op. 25-26. Craig undertook more time and expense in discovery to get at the truth.

Kelly had the GAL convinced of her "virtue" and of the jealous men conspiring to get even. Despite direct questioning by the Chancery Court, R.444-49, and documents showing a contrary story, Kelly never wavered. When pressed on cross-examination about the gross discrepancies in her testimony and that of others, Kelly explained "that she suffers from dyscalculia, a condition she claimed causes her to be uncertain about dates, times and her sense of direction. . .[and that] may be why she doesn't remember some things." Op. 31.

The Pine Grove Records. Kelly did not cooperate with Craig's efforts to get the Pine Grove records, other medical records or even her bank records. D# 73, 78. Craig finally got the Pine Grove records by virtue of a direct Order waiving Kelly's medical privilege claims and circumventing the Hippa compliance loopholes used to block the records release. D# 79. Those records comprise 184 pages. T.Exh. 58 The Pine Grove records revealed and clarified many things, but caused greater alarm for the safety of the children.

Court To Burke: Do You Know What Perjury Is? Burke was called as a witness by Craig. At the end of Burke's tortuous testimony, the Chancery Court inquired directly: "Do you know what perjury is? Because I'm going to refer this case to the District Attorney. . .." R. 451-491. Despite inconsistent testimony of Kelly and Burke, it became clear that Kelly and Burke were living together and drinking frequently, and that Burke was mixing prescription drugs and alcohol on top of a PTSD diagnosis and associated medical drugs. R. *Id.* Burke testified boldly that his view of Kelly receiving custody of the four children would be "a F'g nightmare." R. 468. Kelly was not troubled. R. 451-91.

Kelly's Child Support & Discovery Contempt. Kelly never did turn over to Craig any of the child support Chad paid, instead declaring it "none of your business" what she was doing with Chad's child support. R. 916-17. A total contempt sum of $3,667.86 was adjudicated. Op. 83. Kelly never reimbursed Craig for un-insured medical and dental expenses incurred by the children during the pendency of the matter. A total contempt amount of $5,866.66 was adjudicated for this. Op.81,83. Because Kelly refused to comply with the Chancery Court's Order compelling discovery responses, Kelly's ability to present proof at trial on the property and support issues was curtailed.

D# 35.

The Rule 41(b) Dismissal. As noted, Chad appeared physically at only one hearing. Op. 46. Chad was represented at each hearing by able Counsel. Id. Kelly continued to urge the Chancery Court to dismiss Chad's pleadings for custody modification in the Sharff portion of the consolidated matter. Op. 27; R. 509. Chad's Counsel finally advised the Chancery Court that Chad was unable to attend hearings due to travel restrictions placed by a Louisiana court in which Chad was embroiled for substance issues. R. 493-502.

When the Chancery Court dismissed Chad's claims for his failure to prosecute, Op. 27, 46, Kelly moved the Chancery Court to relinquish the Sharff Children to her immediately under the theory that all jurisdiction was lost with the Rule 41(b) dismissal. *Id.* Kelly added that, because the four children should not be separated, the Burge Children must be moved as well. The Chancery Court refused. R. 509. Kelly did not seek review or interlocutory appeal. R. 509, Op. 27.

Compelling Testimony of Patrick Sharff. Having been exposed to life with Burke and Kelly, the eldest child--Patrick Sharff (then age 16)--testified during Craig's case in chief. Patrick verified that he had signed an "election" stating a custodial preference to live with Craig. T.Exh. 25. He explained a rational basis for this request, Op. 19-20, and denied being promised anything or threatened with any reprisal if he did not make the election and/or testify. T.Exh.25; Op.19.

Patrick clarified that Kelly's early home-schooling efforts had been a failure and amounted to babysitting by him. Op. 19-20, 32. Patrick verified that he and his siblings had returned to public school through Craig's efforts after Kelly left, were ill-prepared to do so and found themselves at significant educational deficits. *Id.* Patrick confirmed that, with hard work and much assistance from Craig and his family, all of the children had overcome their troubling and embarrassing deficiencies and were thriving at home and at school. Op. 19.

Patrick made clear that Kelly and Burke had not obeyed the injunction against contact between Burke and the children. *Id.* Patrick hinted that things were not good in that dwelling for children. R.320-46. Patrick testified to tension with Kelly about missed visitation due to sports events truly important to Patrick, Op. 20, and that he and Craig had tried without success to assuage

Kelly. Op. 19. Patrick confirmed that Kelly had told him Chad paid no support and she did not know if Chad was "dead or alive." Op. 19; R.320-46.

Kelly's Marital Rape Bomb. Trial was laborious and contentious, and Craig rested his case in chief on the third day. Op. 27. Kelly's case was primarily a rebuttal to Craig's, blaming everything on Craig and extolling her virtue. Op. 27-35. Kelly continued to raise new issues. One prominent example is that, toward the end of her case in chief, Kelly testified that Craig had been guilty of marital rape for years. Op. 36.

The Chancery Court inquired directly whether Kelly had apprised Pine Grove of this, and Kelly assured the Chancery Court that she had. R. 611-13. The Chancery Court thus recessed the matter, ordered the parties to undergo psychological testing, and appointed an expert. Op. 36. More delay, expense and turmoil ensued.

The Court's Psychological Expert. When the matter finally came back on for hearing the psychological expert noted that Kelly had not apprised Pine Grove of any alleged marital rape or other misconduct by Craig. Despite a battery of testing, Craig was deemed as psychologically fit as the general population. Kelly was noted to have somehow moved beyond her decades-old depression, was no longer suicidal but was given to "magical thinking." Op. 39. The expert did note an elevated score for Kelly on the Psychopathic Deviate Scale. Op. 38. The expert opined that a 14-year depression period is of concern, and that Kelly is easily manipulated and cannot be alone. Op. 37-39.

The Chancery Court had ruled previously that either party could re-open the record to address matters raised by the psychological testing, and each did. Op. 36. Trial dragged on.

The GAL Changes Sides. After the parties sought to rebut new revelations, Op. 36-40, the GAL testified. Op. 40-43. Having heard all of the testimony, the GAL changed the position taken in his prior written reports about the alleged "conspiracy" between Chad and Craig, Op. 43, and opined ultimately that Craig should have custody of all four children. R. 41-42. The GAL further opined that the four children should not be separated. Op. 41. The GAL had critical things to say about each party, and about visitation struggles, *id.*, but did confirm that he had been lead by Kelly

for quite some time to believe that there was no romantic or other relationship with Burke. The GAL was not troubled by Kelly's myriad lies and deceptions, Op. 42, and discounted concerns about Burke because Kelly assured him Burke would not be around the children because she had no plans to marry Burke. Op. 41-43.

The Opinion. Trial ended and the Court requested post-trial briefing on certain issues not necessarily relevant here. Both parties submitted those briefs and the record was closed. The Chancery Court took the matter under advisement and deliberated for 76 days. On September 16, 2015, the Chancery Court issued the Opinion.

As noted, the Opinion is comprised of 90 pages. 44 of those pages are dedicated to the "Course Of Proceedings" and include the Chancery Court's extensive findings of fact from the testimony and exhibits received. The record consists of 7 volumes of testimony and 63 Exhibits. Numerous reasons are cited therein to support the clear rebuttal of Kelly's natural parent presumption, and to support the conclusion that the polestar consideration requires that Craig retain physical custody of all four children and be the sole legal custodian. All other divorce and support issues were resolved but are not now at issue.

A Tangled Web Indeed. This is an intensely fact-specific case. In assessing the natural parent presumptions and then custody, the Chancery Court painstakingly recorded and relied on Kelly's: pre-meditated marriage abandonment with an elaborate coverup story to blame the breakup on Craig; continually lying about where she lived or whom she lives with after the separation, and having the children lie about it; un-treated long-term depression that lead to self-referred psychiatric hospitalization for suicidal ideation, T.Exh. 58; telling the children repeatedly that she did not know if Chad was 'dead or alive' while secretly receiving child support from him, R.529, T.Exh 45; exposing the children to threats to have Chad and/or Craig arrested without any justiciable claim for such relief, T.Exh 22; giving non-prescribed hydrocodone to an ill child, Op. 54; T.Ex. 52; refusal to take a sick child to an ER because she said she did not have money for the co-pay despite the child being on Medicaid, Op. 54; Ex.52; continuous exposure of the children to a perjurious, suicidal PTSD patient who mixes drugs and alcohol and views custody of the children as horribly

nightmarish; Op. 25-27, R. 451-91; eleventh-hour claims of heinous marital 'crimes' by Craig while knowing she had recently told mental health professionals that no such misconduct ever occurred, R.611-613; refusal to support the children financially while taking support from them and converting it to her own use for things like alcohol and beauty treatments, Op. 52; abdication of any role in the public school education "because she is 'completely disgusted' that her children are in public schools", Op. 32; refusal to attend extracurricular activities of the children because she felt shunned by the public after leaving Craig and publishing her affair with Burke on social media, R. 562-572, and; lack of any articulated plan to provide for the best interests of the children during or after the extended proceeding. This is not an exhaustive list.

The *Albright* Analysis awards not one factor to Kelly, calls only one neutral, and scores the balance for Craig decisively. Op. 53-58. Kelly has not challenged this *Albright* analysis or the ultimate conclusion that the best interests of the children compels a custody award to Craig.

The Chancery Court addressed squarely the dismissal of Chad's pleadings seeking a custody modification for the Sharff Children. Op. 51-53. The grounds for the previous dismissal pursuant to MRCP 41(b) describe Chad as one who "did not see fit to himself appear for trial" or to testify. Op. 46.

The Chancery Court granted Craig a divorce on grounds of un-condoned adultery by Kelly, regardless of when the adultery occurred. Op. 47. The Chancery Court then turned to "The Important People–The Children". *Id.* The Chancery Court noted that "Kelly never filed a responsive pleading to Craig's initial complaint, neither an answer nor a counterclaim." *Id.* The Chancery Court then ruled that, despite the dismissal of Chad's pleadings pursuant to Rule 41(b), the Chancery

> "Court's hands are not tied, so to speak, in such a posture; caselaw indicates that, in keeping with the best interests of the children for which it is tasked to determine, the Court may award any custody, not just that requested or pled, based on the Court's findings as to the best interests of the children. See *Crider v. Crider*, 904 So.2d 142 (Miss. 2005); *Clark v. Clark*, 126 So.3d 122 (Miss.Ct.App. 2013).

Op. 47.

Emphasizing the severity of the fitness issues presented by Kelly herself and her

contumacious exposure of the children to Mr. Williamson, the Chancery Court found that "[g]iven the exhaustive amount of evidence in the record concerning Williamson, [Kelly's] decisions regarding Williamson and the children seriously call her parental fitness and her mental fitness into question, to the point that the Court deems it necessary to intervene for the sake of the children." Op. 52-53.

With the facts established, the Chancery Court found that deciding custody of the Burge Children is "relatively straightforward" under the *Albright* analysis. Op. 48.

The Chancery Court next turned to the custody of the Sharff Children, and cited extensively to controlling authority. Op. 51-52. Included therein is the familiar "clear and convincing" evidence standard Craig must meet to overcome any natural parent presumption, an explanation of the *in loco parentis* doctrine, and a summary of its impact in third-party custody proceedings like this. *Id.*

The Chancery Court then gave twelve pages of "Findings" and conclusions of law as to the children alone. Op. 52-63. The Chancery Court scored only factor number six of the *Albright* analysis (emotional ties of parent and child) as neutral, Op. 56, and determined that the other factors favor Craig., Op. 54-58. Craig was awarded sole legal and physical custody of all four children, with Chad's support to be paid to Craig. Op. 62.

The Chancery Court devoted close attention in reaching the conclusion that "Kelly's natural parent presumption has been rebutted." Op. 52-53. The Chancery Court itemized 7 specific findings, and an "exhaustive amount of evidence in the record" to support the conclusion that Kelly's "conduct is so immoral as to be detrimental to the children" and that Kelly is "unfit, mentally or otherwise, to have custody." *Id.* The Chancery Court capped off these conclusions with a singular conclusion: "[t]he Court also finds it necessary to point out how incredible the Court finds Kelly's testimony to be, in nearly all respects." Op. 53.

The Chancery Court found that Chad's natural parent has been rebutted because Chad has "abandoned the children; has deserted the children; and that Chad is unfit, mentally or otherwise, to have custody." Op. 53. This conclusion is not contested.

Eighteen pages of "Findings" follow on property division, support and other issues not now

germane. Kelly's contempt citations are catalogued extensively in nearly four pages. Op. 81-84. The remaining pages are the explicit rulings, all consistent with the findings.

Aggrieved, Kelly appealed.

SUMMARY OF THE ARGUMENT:

The 90-page Opinion--which cites and follows correct legal standards and contains multiple key findings supported by 7 volumes of testimony and 63 Exhibits in evidence--is abundant support for the conclusion that Craig rebutted the natural parent presumptions clearly, and that the best interests of all four children require an award of sole legal and physical custody to Craig.

In her Brief Kelly chose to hide the facts. Kelly's arguments are thus thin, legal veneer designed to mask a record replete with her shocking moral, parental and legal failures, and persistent but untreated psychological impairment. Craig contends that Kelly neglected to summarize the proceedings below because no veneer is big enough, and no mastic is strong enough, to hide the conclusion that Kelly's "conduct is so immoral as to be detrimental to the children" and Kelly is "unfit, mentally or otherwise, to have custody." Op. 52.

Kelly also asks this Court to overlook that the Chancery Court found it "necessary to point out how incredible the Court finds Kelly's testimony to be, in nearly all respects", Op. 53, that Kelly is willing to harm the children to preserve her "self-perceived victimization", Op. 54, and that the "Court deems it necessary to intervene for the sake of the children." Op. 53. Kelly's fundamental arguments have not changed in this Court, and the devastating facts are still true and controlling.

The record shows that Kelly did not "lose" custody due to three modest indiscretions which should make no modern thinker blush. Kelly abandoned custody voluntarily at the beginning of the case for a new life with Burke. Kelly's claim is impossible to square with the record and cannot be reconciled with the Opinion. While it might be possible theoretically for a Chancellor to be manifestly wrong for 90 pages, Kelly has not tried seriously to prove that he was. The Opinion shows the Chancellor got it right despite Kelly's dedicated efforts to hide the ugly truth that has become her life, and now Kelly does not seem to contest the facts.

Kelly's substantive argument--that the Chancery Court somehow "lost" jurisdiction when

Chad's claims were dismissed for his failure to prosecute--never addresses where child custody jurisdiction allegedly went or where it might now be found. Kelly's implicit claim is that Rule 41(b) obliterates the Constitutional authority delegated to Chancery Courts to protect minors. This proposition would cut down on third-party custody claims, but Kelly cites no authority for the vacant notion and this Court need not labor long to dispatch it.

Equally hollow is Kelly's claim that the Chancellor applied an erroneous legal standard, especially when the precise standard is cited verbatim in the Opinion and then applied. The Chancery Court cited and followed authority prohibiting use of custody awards as a sanction for adultery, but there is far more at work in this case to justify–even compel–the Chancery Court's custody award without any reliance on sanctions. This Court should AFFIRM.

ARGUMENT:

Kelly has presented this Court with two primary arguments, one dubbed as 'substantive' and the other 'procedural'. Brief at 9-12. Regardless of the label applied, neither argument focuses on the polestar consideration in custody cases, neither reflects accurately the immense record below or the expansive findings by the Chancery Court, and neither has merit.

I. The Standard of Review Is Clear & Limited

The standard of review found in *In re Waites*, 152 So.3d 306 (¶ 13) (Miss. 2014), is cited properly. Brief at 8. There is no dispute that questions of law are reviewed *de novo*. *Waites*, 152 So.3d at ¶ 14.

There is no real dispute that natural parent presumptions can be rebutted by third parties like Craig only by 'clear and convincing' proof that: (1) the parent has abandoned the child; (2) the parent has deserted the child; (3) the parent's conduct is so immoral as to be detrimental to the child, or (4) the parent is unfit, mentally or otherwise, to have custody." *Id.* There is no dispute that Craig's *in loco parentis* status does not, by itself, overcome the natural parent presumption. *In re Smith*, 97 So.3d 43 (¶ 10) (Miss. 2012). While not addressed directly by Kelly, the "best interest of the child is paramount in any child-custody case." *Id.* at ¶ 8.

Once any of the rebuttal factors was established clearly, Kelly's natural parent presumption

protection"vanishes, and the court must go further to determine custody based on the best interests of the child through an on-the-record analysis of the *Albright* factors." *In re Waites*, 152 So.3d 306, Note 9. Our appellate courts do " not reevaluate the evidence, retest the credibility of witnesses or otherwise act as a second fact-finder." *Bower v. Bower*, 785 So.2d 405, 412 (Miss. 2000). "The standard of review in child custody cases is limited." *Borden v. Borden*, 167 So.3d 238, 241 (¶ 4) (Miss. 2014). The "precise question we must answer is whether the evidence in the record supports the chancellor's decision." *Smith v. Smith*, 2015-CA-00213-SCT, at ¶22 (Miss. October 13, 2016).

II. The Facts Control The Decision

Third-party custody decisions are made on a case-by-case basis by Chancellors who have wide discretion. When a Chancellor follows the rules and guideposts–like the Chancery Court did below--his decision is not to be disturbed absent manifest wrong or clear error. *Mabus v. Mabus*, 890 So.2d 806, 810 (¶14) (Miss. 2003). No such error or abuse of discretion is manifest in this case. The Chancery Court was clearly apprised of, and followed, the "clear and convincing" evidentiary standard to rebut Kelly's natural parent presumption. Op. 51-53. The decision rendered is the only one that upholds the polestar consideration.

Although differing and sincere views of truth are possible, polar opposite truths are not. This case can be reduced to three options: (a) Craig and the Chancery Court are manifestly wrong and are lying about Kelly's parental unfitness and the resulting legal compulsion to award custody to Craig; (b) Kelly's cavalcade of moral failures, cleansing "dyscalculia", "magical thinking" and continuous contempt are simply misunderstood and she has a procedural wrinkle that makes it "legally impossible" for this Court to do anything but award custody to her, or; (c) the GAL and the Chancery Court got it right. The exhaustive record makes clear that the latter is the true choice, and the circumscribed nature of review bars serious consideration of most of Kelly's entreaty.

The disturbing parade of outrageous facts about Kelly outlined above, *see supra* at pages 4-5, 17-18 places this case outside of any controlling caselaw Craig has found, and well beyond any caselaw cited by Kelly. If anything, Kelly's natural parent presumption is obliterated many times over by Kelly's manifest immorality that the Chancellor expressly found detrimental to the all of the

children, and by her equally clear unfitness–mental and otherwise–to have custody. Op. 14, 52, 54-56. Whether Kelly's presumption 'vanished' due to her mental health impairment, to her depravity toward truthful testimony, court orders and rules, or to absconding with the wrong sort of man while steadfastly lying about it--or some combination thereof--the conclusion that Kelly's natural parent presumption has been rebutted clearly is supported by abundant record evidence. But there is more.

Hopefully unique here is that the Chancery Court emphasized just "how incredible the Court finds Kelly's testimony to be, in nearly all respects." Op. 53. At least unusual is that the eldest child made a written "election" to remain in Craig's custody over his mother and his father, and then offered solid testimony in support. Op. 17, 19-20. Hardly common is that Chad (as natural father of the two elder children) and the GAL supported Craig's custody request. Op. 41-42, 53. The GAL's recommendation that the four "blended" siblings not be separated is perhaps not yet routine, Op. 33, 41, but Kelly agreed with this position and the Chancery Court adopted it. Op. 34. The Chancery Court's decision not to award Kelly even joint legal custody speaks volumes. Op. 59. In short, Craig believes that this case stands alone in its remarkable depth and breadth of distinguishing facts.

Moreover, the facts here are so well developed and catalogued that this case should have little value as legal precedent. Kelly's attempt to paint this case as the stage for some ground-breaking "third-party custody" analysis distorts and over-sells the legal questions and ignores the torrent of unusual factual underpinnings that support the Chancery Court's custody award to Craig.

III. The Natural Parent Presumptions Are Rebutted Clearly

The clear rebuttal of Chad's natural parent presumption has not been challenged, but is manifestly correct.

Kelly contends that the Chancellor erred by ruling that her natural parent presumption was rebutted simply because she "had a boyfriend", and because she failed to comply with ostensibly mundane temporary orders regarding child support and shielding the children from Mr. Williamson. Brief at 9. Kelly's premise is at best misleading. This is "part of a larger pattern of behavior" by Kelly to mislead, just as Kelly did with the GAL and the Chancery Court. *See, James v. James*, 135

So.3d 188, 192 (¶ 14-15) (Miss.Ct.App. 2013).

The list of findings against Kelly's conduct, poor parental judgment and custodial fitness covers far more major issues than any case Kelly cites. Because Kelly elected not to address those findings in her Brief, a partial list is provided above. *See supra* at 4-5, 17-18. This Court is to "view the facts of a divorce decree in the light most favorable to the appellee." *Street v. Street*, 936 So.2d 1002, 1007 (¶ 12) (Miss.Ct.App. 2006), *citing Fisher v. Fisher*, 771 So.2d 364, 367 (¶ 8) (Miss. 2000).

Kelly is really asking this Court to substitute its judgment for that of a chancellor, which is inappropriate. *See, e.g.*, *Copeland v. Copeland*, 904 So.2d 1066, 1074 (¶ 30) (Miss. 2004). The Chancery Court's findings of "evidentiary fact" and "ultimate fact" are entitled to the same deference. *Ricker v. Ricker*, 431 So.2d 1139, 1144 (Miss. 1983). The Chancellor "was in the best position to evaluate the factors pertaining to the best interests of the" children, and his rulings will not be disturbed if supported by the record. *Street*, 936 So.2d at 1009 (¶21). The exhaustive record amply supports even the few findings Kelly assails.

Craig submits that some of the Chancellor's findings may be sufficient alone to support the clear rebuttal of Kelly's natural parent presumption. Any triad of those findings is likely more than appears in caselaw where natural parent presumption rebuttals are upheld. Regardless, the combination of those findings satisfies even the most rigorous definition of "clear and convincing" proof. Having failed to address the voluminous record directly, Kelly does not appear to fault any of these findings as untrue or inaccurate. The record refutes any such claims she might now make.

A. Far More Than A One-Page Natural Parent Presumption Rebuttal

The Opinion belies Kelly's contention that the Chancery Court's findings in support of the rebuttal are limited to one page of the Opinion. Brief at 14. Kelly cites no authority for the veiled proposition that the Chancery Court's failure to recount each finding under the specific heading of the Opinion that addresses the natural parent presumption most directly is reversible error. *See Mabus*, 890 So.2d at ¶16. As shown above, Kelly's attack on the Opinion as thin, generic or reliant upon "miscellaneous grounds" is untrue and unfair.

B. More Than A Little Paramour Problem

Kelly's argument that she lost custody simply for having "a relationship with a paramour, and then. . .permitted her children to spend time in his company" is equally flawed. Brief at 14. As the record and the Opinion show, Burke is not just a garden-variety paramour or occasional overnight visitor. Craig has found no custody case where the live-in "paramour" suffers Burke's dangerous combination of physical and psychological afflictions, is known to be suicidal and comfortable living with a suicidal married woman, or is so averse to children that he deems them living in his house to be a perverted nightmare. Not many cases reflect a paramour who goes to Burke's extreme to expose a sordid affair via texts designed to "hurt" the husband at a particularly vulnerable time.

Kelly's decision to move in with Burke, a 'practicing alcoholic' by her tacit admission, "necessitated an exercise of parental judgment" that was at best a "poor one." *Street*, 936 So.2d at 1010 (¶ ¶ 26-27). Relying on "all of the evidence before him," *J.P.M. v. T.D.M.*, 932 So.2d 760, 777 (¶ 53) (Miss. 2006), the Chancellor found Burke to be "an individual the Court deems to be detrimental to the children's best interests." Op. 52.

Kelly cites no authority for the implicit notion that the Chancery Court was powerless to enjoin her from having the children around Williamson. Such injunctions are proper, *see, e.g., Street*, 936 So.2d 1006-07 (¶ 8-11), and Kelly clearly "defied and refused to obey the Court's injunction". Op. 52. "Such actions exhibit a disregard for the safety and well-being of the child that a chancellor must certainly consider when making a custody determination." *J.P.M.*, 932 So.2d at ¶ 53.

Burke defied court orders, abused at least one of the children physically, Op. 14, and lied so egregiously on the witness stand that the Chancery Court threatened perjury prosecution. Op. 26. Surely it is not the average paramour who cannot testify clearly about where he lives, Op. 25, how often he stays with the married woman versus at his other place, or where his clothes are. *Id.* This is not an exhaustive list.

Kelly's continued effort to normalize Mr. Williamson's outrageous misconduct paints them both with the same brush, and there is no argument that Burke and Kelly together somehow get

better than they are individually. Craig contends that Kelly and Burke are a toxic combination for the children, and the Chancery Court agreed. There is far more at work here with the paramour than in the cases cited by Kelly.

C. It Was Necessary For The Court To Intervene

Kelly cannot escape the finding that "[g]iven the exhaustive amount of evidence in the record concerning Williamson. . .the Court deems it necessary to intervene for the sake of the children." Op. 52-53. This finding demonstrates harm and/or substantial likelihood of harm to the children. This same finding demonstrates detrimental impact upon the children from Kelly's refusal to obey orders and from her insistence that Burke be allowed to live with her and the children. *See, e.g., In re Custody of Brown*, 902 So.2d 604, 609 (Miss.Ct.App. 2004), and *Wilson v. Davis*, 181 So.3d 991 (¶ 8) (Miss. 2016). Other express findings of harm and detrimental impact populate the Opinion. Op. 14, 54-56.

The record contains many more parenting errors, on a larger scale and with more adverse impact on the children than any case cited by Kelly. Brief at 15. None of the cases cited by Kelly involve a mother's teenage son testifying that his mother is ignoring two injunctions against a live-in-paramour, that the situation is not good for the children, that he and his siblings are tasked with lying about it, and that he believes he and his full-blood-sibling should remain in the custody of an *in loco parentis* Dad. Op. 19-20.

D. More Than A Little Child Support Problem

Equally vacant is Kelly's contention that the other *faux pas* used to rebut her natural parent presumption was some benign misappropriation of child support funds (assuming there is such a thing). Brief at 14. Kelly defied a direct order to turn over to Craig child support paid by Chad. Op. 52. Kelly lied about whether Chad was paying support in the face of proof to the contrary and direct questioning by the Chancery Court. Op. 81-84. This issue alone may constitute "desertion" or "actions consistent with desertion." *Raines v. Raines*, 2014-CA-01266-COA, Lee, C.J., Concurring, at ¶ 46 (Miss.Ct.App. April 5, 2016).

Kelly lied about her receipt of this support on every Rule 8.05 declaration she bothered to

file. *See Trim v. Trim*, 33 So.3d 471, 477 (Miss. 2010). Kelly intended to improperly influence the court in its decision (*see* Op. 54, "she did not have money for a co-pay"). Kelly continued to assail Chad as an "unfit parent" for his alleged failure to pay the very support she stole, Op. 33, and then used Chad's support to wine and dine herself and Burke. Op. 52. Kelly's effort to deflect her disturbing liquor store purchases by claiming she "cooks a lot with wine" fooled nobody, but she did try. Op. 27.

Kelly knew that her representations–to Craig, about Chad, to the GAL and to the Chancery Court--were false and Kelly exhibited consistent intent that they be acted upon. Op. 53. *See Catherine Doe v. Stan Smith*, 2015-CA-00740-SCT, ¶ 15, 20 (and cases cited therein) (Miss. September 22, 2016). Not only did Kelly "misappropriate" $3,667.86 in child support from Chad, but she contemptuously refused to pay $5,866.66 in un-insured healthcare expenses for the minor children. Op. 81-84. As noted, Kelly refused medical treatment to at least one child due to alleged lack of money although she found money to go to the State fair. Op. 54. When pressed about her use of Chad's support on herself Kelly quipped that it was "none of your business what I do with my money." *See Raines*, 2014-CA-01266-COA, Lee, C.J., Concurring, at ¶ 46 (Miss.Ct.App. April 5, 2016).

The pattern that rings through Kelly's testimony, and Burke's testimony, before the Chancery Court, and in their assertions to the GAL, is consistent with the patterns that emerge in this Court. Kelly appears "to have been saying whatever she needed to say to regain custody. . .. It did not matter whether what she said was truthful or not." *Hamby v. Hamby*, 102 So.3d 334, 339 (¶20) (Miss.Ct.App. 2012). Kelly's schemes, lies and deception constitute "moral turpitude" because her misconduct "is the result of deliberation [that] is generally more serious" than merely "knowing and/or deliberate" action, but there is too much record evidence of her untruthfulness to call her misconduct "spontaneous." *Miss. Comm. On Judicial Performance v. Skinner*, 119 So.3d 294, 306-07 (¶ 32) (Miss. 2013). The Chancery Court was sorely bothered by Kelly's "incredible" testimony. Op. 53. Kelly's claim that she has been judged harshly for precious little indiscretion is yet more deception.

E. More Than A Vague Mental Health Record

Kelly's direct challenge to the sufficiency of mental health evidence against her is brazen. Brief at 15. The record is replete with mental health concerns and Kelly seems to ignore that the Chancery Court specifically found adverse impact on the children therefrom. *Compare* Brief at 15 *with* Op.14, 52, 54-56, 81-84. Unflinching mendacity is not evidence of sound mental health. Fourteen years of depression and suicidal thought is not a minor issue somehow divorced from children in her care, and a simple lay pronunciation that one is now cured since true love and cohabited bliss have been found with a suicidal alcoholic who loathes children does not smack of a firm attachment to reality.

It is difficult to ascertain whether Kelly seeks to cloak her utterly incredible testimony with "magical thinking" so pervasive that is antithetical to sound parenting, Op. 39, or whether she has tacitly confessed to fraud upon a court (and GAL as officer of the court) that may or may not betray a mental health impairment. While Kelly will likely have an answer to this Hobson's choice, the record does not suggest it will be objectively credible.

IV. The Magic Label Implication

Kelly's natural parent presumption argument suggests the Chancery Court applied an erroneous legal standard. Brief at 8. The Chancery Court cited, in detail, the proper "clear and convincing" evidence standard. Op. 51-52. Kelly's argument is thus difficult to follow and neither Craig nor the Court should have to guess.

If Kelly's argument is that manifest error exists simply because the term "clear and convincing" does not appear adjacent to the finding that Kelly's natural parent presumption is rebutted, Kelly has cited no authority for the claim and it need not be considered. *See Mabus*, 890 So.2d at ¶16. Any suggestion that error exists because the Chancery Court did not say "rebutted clearly" or "rebutted by clear and convincing evidence" is fatuous. See Op. 53.

This Court has rejected the need "for so-called magic words", while noting that "we do require enough words indicative of the basis of the chancellor's decision." *Raines v. Raines*, 2014-CA-01266-COA, Lee, C.J., Concurring, at ¶ 46 (Miss.Ct.App. April 5, 2016). A 90-page opinion

saturated with clear proof to support the conclusion that Kelly's conduct is "so immoral as to be detrimental to the children" and that Kelly is "unfit, mentally or otherwise, to have custody", Op. 52, is surely "enough words."

Craig is aware of no caselaw requiring more detailed written findings than those at bar. In the mind of one learned jurist, the "elusive concept" of 'clear and convincing evidence' may be viewed through the prism of Mr. Justice Stewart's famous observation in an unrelated context that "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), *cited in* "The Better Chancery Practice Blog", Judge Larry Primeaux, September 28, 2016. The Chancery Court could not help but see that Kelly's presumption was rebutted clearly, and made detailed findings about how and when it was observed. Kelly has done nothing to assail the acuity of that vision and the resulting conclusions.

V. The Failed Neutron Bomb: Rule 41(b) and Vanishing Custody Jurisdiction

Sensing that her "substantive argument" about insufficient evidence is as frail as it is misguided, Kelly sought once again to drop a "procedural" bomb that nobody could survive: the notion that the Rule 41(b) dismissal of Chad's custody modification claims made it "legally impossible" for the Chancery Court to address custody of the Sharff Children. Brief at 9. Once again Kelly cites no direct authority for this claim beyond the rule itself, so it need not be considered. *See Mabus*, 890 So.2d at ¶16. Even if it is considered, manifest error undergirds this claim. No such rule may prescribe authority vested by Constitution and statute. *See Logan v. Logan*, 730 So.2d 1124, 1126 (¶8) (Miss. 1998).

Kelly raised this issue below via *ore tenus* motion, and her argument was overruled and rejected at trial. Op. 27. If the issue was dispositive, as Kelly now contends, Kelly should have sought interlocutory relief. Kelly did not do so.

The Opinion affirms the earlier rejection of Kelly's jurisdictional premise by noting, among other things, that the:

> Court's hands are not tied, so to speak, in such a posture; caselaw indicates that, in keeping with the best interests of the children for which it is tasked to determine, the Court may award any custody, not

> just that requested or pled, based on the Court's findings as to the best interests of the children. See *Crider v. Crider*, 904 So.2d 142 (Miss. 2005); *Clark v. Clark*, 126 So.3d 122 (Miss.Ct.App. 2013).

Op. 47. Kelly has not responded to this conclusion directly in her Brief, nor has she assailed the authority relied on to make it. *See Mabus*, 890 So.2d at ¶16.

Chancery Courts have a "duty to determine what is in the best interests of the child." *Logan*, 730 So.2d at ¶11. That same duty includes a virtual permanent injunction against "doing nothing after having found the mother unfit." *Id.* at ¶ 13. In short, the Chancery Court "had the authority to determine the custody" of the Sharff Children, *id.* at ¶ 15, and had a duty to do so. *Id.* at ¶ 13.

There is a natural overlap among the *Albright* factors and the natural parent presumption rebuttal analysis. In light of the Burge Children, the Chancery Court was duty-bound to consider the *Albright* factors throughout the entire case. No case requires the Chancery Court to ignore any *Albright*-type evidence as to the Sharff Children until the natural parent presumption decisions were reached, and no such evidence can or should be un-heard as to the Sharff Children after the Rule 41(b) motion was granted. While the *Logan* Court chided a Chancellor for "doing nothing after having found the mother unfit", *Logan* at ¶ 13, this is precisely what Kelly now asks this Court to reverse to do.

Kelly cites no authority for the notion that the Chancery Court had jurisdiction to preserve and protect the best interests of the Sharff Children solely by virtue of Chad's pleadings in the Sharff divorce matter. *See Mabus*, 890 So.2d at ¶16. As *"parens patriae,"* Chancery courts have full jurisdiction over all cases involving divorces and/or minors. Miss. Const. Art. VI, Sec 159; Miss. Code Ann. Sec. 93-5-23 (2004)*; Logan*, 703 So. 2d at 1126, ¶ 8. "Historically, jurisdiction to determine child custody was based on a child's presence in the state." Deborah H. Bell, Bell on Mississippi Family Law Sec. 18.05(1), 562 (2d ed. 2011). Kelly does not appear to dispute this.

Rather, Kelly seems to argue that the Chancery Court somehow lost jurisdiction to adjudicate custody of the Sharff Children when Chad's custody modification pleadings were dismissed because Chad failed to prosecute. Brief at 17-18. MRCP 41(b) does not even pretend to reach this far. The

Logan analysis stands on the axiomatic truth that no procedural rule trumps Constitutional authority for inherent Chancery Court jurisdiction over minors. *Logan*, 703 So. 2d at 1126, ¶ 8.

"Custody is regarded as an adjudication of status similar to a divorce action." Bell on Mississippi Family Law at Sec. 18.09(8), 579, and 18.05(2), 563. "Personal jurisdiction over the child and the defendant is not required." *Id.* As a result, the Chancery Court was authorized to adjudicate at least temporary custody features for the Sharff Children regardless of whether Chad was involved in the litigation. The Sharff matter was consolidated with the Burge matter. Kelly did not appeal that consolidation order, and may not challenge it now. *See, e.g., Johnson v. Adkins*, 513 So.2d 922, 925 (Miss. 1987).

As a result, the Chancery Court had–and at all relevant times retained–personal jurisdiction over Kelly, Craig and all four children. The Chancery Court had subject matter jurisdiction over custody of all four children even before Chad entered the case. Dismissal of Chad's Petition did not affect any of these jurisdictional attachments. Kelly cites no direct authority for the notion that the Chancery Court's authority and duty to protect the children "magically disappears". *See Oktibbeha County DHS v. N.G., et al*, 782 So.2d 1226, ¶ 4 (Miss. 2001).

Similarly, Kelly cites no direct authority for the notion that the default of a natural parent in third-party custody litigation can or should prejudice the rights of an *in loco parentis* Dad to custody of the same children–especially when such a result is clearly not in the best interests of the minor children. *See Mabus*, 890 So.2d at ¶16. The Chancery Court's Rule 41(b) dismissal did not include or anticipate an order de-consolidating the Sharff case with the Burge case, and Kelly cites no authority for the notion that such an order may be implied. *See Mabus*, 890 So.2d at ¶16; Op. 63. Article 6, Section 159 of the Mississippi Constitution and Miss. Code Ann. Sec. 93-5-23 (2004) stand against the notion that the Chancery Court unwittingly stripped itself of subject matter jurisdiction to protect the Sharff Children by virtue of the Rule 41(b) dismissal. Chad could not, on his own, confer jurisdiction over the Sharff Children in the Chancery Court. As a result, dismissal of Chad's claims cannot, on its own, deprive the Chancery Court of continuing jurisdiction.

Kelly's argument seems to suggest that, by virtue of some invisible and ineffable mechanism,

the Rule 41(b) dismissal left the Sharff Children bereft of the protective cover of any Chancery Court until Chad returns. Simply put, even if there could be a case where a Chancery Court could somehow strip itself of jurisdiction over children due to the default of a deserting natural parent and then create a situation where it is "legally impossible" for that same court to "intercede for the sake of the children", this is not that case. Op. 53.

Kelly's misguided attack on jurisdiction is really a sidebar to ignore the polestar consideration and, again, Kelly has yet to assail a lopsided *Albright* analysis or the ultimate custody award to Craig. Any "best interests" argument Kelly might now table is overdue and will likely amount to more dissembling.

CONCLUSION:

Kelly has twice now bet the proverbial ranch and literal children on a flawed "procedural" jurisdiction argument that is wrongheaded in a child custody case. Her new argument that she lost custody as an 'unjust sanction' is far more reflective of her "self-perceived victimization" than of the exhaustive record. Kelly's Brief is primarily about Kelly, but this case is about custody. With both natural parent presumptions rebutted clearly and Kelly ruled unfit for custody, and with an *Albright* analysis that awards not even one factor in Kelly's favor, the Chancery Court could not award custody to Kelly after Chad's custody claims were dismissed pursuant to MRCP 41(b). The Chancery Court's findings are supported by clear and convincing evidence, provide the only custody solution that honors the polestar consideration, and contain no error of law. This Court must AFFIRM.

Respectfully submitted on the 24th of October, 2016.

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Certificate Of Service

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This the 24th day of October, 2016.

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