**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2012-CA-00196-COA**

**JAMES WILSON** **APPELLANT**

**v.**

**PEARLEAN DAVIS** **APPELLEE**

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| DATE OF JUDGMENT: | 01/30/2012 |
| TRIAL JUDGE: | HON. PATRICIA D. WISE |
| COURT FROM WHICH APPEALED: | HINDS COUNTY CHANCERY COURT |
| ATTORNEYS FOR APPELLANT: | FELECIA PERKINS<br>JESSICA NICOLE AYERS |
| ATTORNEYS FOR APPELLEE: | JOHN R. REEVES<br>JOHN JUSTIN KING |
| NATURE OF THE CASE: | CIVIL - CUSTODY |
| TRIAL COURT DISPOSITION: | PRIMARY CUSTODY OF MINOR CHILD AWARDED TO APPELLEE; VISITATION AWARDED TO APPELLANT |
| DISPOSITION: | REVERSED AND REMANDED - 04/30/2013 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

**BEFORE LEE, C.J., CARLTON AND MAXWELL, JJ.**

**MAXWELL, J., FOR THE COURT:**

¶1. This appeal involves a child-custody dispute between the natural father and the maternal grandmother. The chancellor determined that it was in the best interest of the minor child for the grandmother to have custody. But the chancellor did not first find the natural-parent presumption had been rebutted.

¶2. The law presumes that it is in the best interest of the child for her natural parent to have custody. Because the chancellor never found this presumption had been rebutted, it was

error to consider the father and grandmother on equal footing and a conduct a best-interest analysis. We reverse the custody award and remand for the chancellor to determine whether the natural-parent presumption has been overcome.

**Background**

¶3. This matter began as a paternity and custody dispute between Concetter Davis (Concetter) and James Wilson (Wilson). Both issues were resolved in 2008, when by agreed order Wilson was adjudged to be the natural father of Concetter's minor daughter, Sha'Nyla, and Concetter was awarded custody, and Wilson visitation.

¶4. After Concetter died in July 2011, Concetter's relatives would not return the young girl to Wilson. So Wilson filed a petition to "modify" custody based on Concetter's death. Concetter's mother, Pearlean Davis (Davis), who had been keeping Sha'Nyla, moved to intervene. Davis requested she be appointed Sha'Nyla's guardian or, alternatively, be awarded grandparent visitation. The chancellor permitted Davis's intervention and temporarily ordered that Sha'Nyla remain in Davis's custody until the final hearing.

¶5. At this hearing, the chancellor did not treat the issue as an initial custody dispute between the natural parent and grandparent. Instead, she handled the request as a general child-custody modification, based on the prior custody determination between the two natural parents. The chancellor found there had been a material change in circumstances —Concetter's death. She then determined, using *Albright*,[1] that it was in Sha'Nyla's best

[1] *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983).

interest for custody to "remain" with Davis, despite noting Wilson's "genuine[ ] fatherly love for [his] daughter" and commending Wilson for initiating custody proceedings.

¶6. Wilson timely appealed.

**Discussion**

¶7. In child-custody cases, this court will only reverse the chancellor's judgment in two circumstances—(1) her factual findings are manifestly wrong or clearly erroneous, or (2) she applied an improper legal standard. *Mabus v. Mabus*, 847 So. 2d 815, 818 (¶8) (Miss. 2003) (citations omitted). In this case, we face the latter circumstance. Specifically, the chancellor failed to apply the legal presumption that it was in Sha'Nyla's best interest for her father to have custody.

¶8. The initial custody dispute was between the two natural parents, Concetter and Wilson. But the present custody battle is between the natural parent, Wilson, and Sha'Nyla's grandmother, Davis. And in a child-custody determination between a natural parent and a third party, such as a grandparent, the law presumes that it is in the best interest of the child for the natural parent to have custody. *Lucas v. Hendrix*, 92 So. 3d 699, 705-06 (¶17) (Miss. Ct. App. 2012) (citing *McKee v. Flynt*, 630 So. 2d 44, 47 (Miss. 1993)). This is because "[g]randparents have no legal right [to] custody of a grandchild, as against a natural parent." *Lorenz v. Strait*, 987 So. 2d 427, 434 (¶41) (Miss. 2008).

¶9. The natural-parent presumption is rebuttable—but only "by a clear showing 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." *In re Smith*, 97 So. 3d 43, 46 (¶9) (Miss. 2012) (citations omitted). Only after the presumption is rebutted is the grandparent on equal footing with the parent, permitting the chancellor to apply *Albright* to determine whether it is in the best interest of the child for the grandparent, versus the parent, to have custody. *In re Dissolution of Marriage of Leverock & Hamby*, 23 So. 3d 424, 431 (¶24) (Miss. 2009) (citations omitted).

¶10. With respect to Judge James's conclusions and recitation of "relevant facts," it is clear from the bench opinion that the chancellor failed to apply the correct legal standard. Instead, she treated the particular custody battle as a modification, failing to recognize that Davis, Sha'Nyla's grandmother, had no right to custody, as against Wilson, Sha'Nyla's natural parent. In doing so, the chancellor impermissibly permitted Davis, who had to intervene as a third party, to stand in the shoes of the deceased Concetter for the purposes of determining if custody should be modified. But once Concetter died, the issue was no longer should the custody be modified *between the two parents*. *Cf. Martin v. Coop*, 693 So. 2d 912, 915-16 (Miss. 1997) ("Grandparents do not stand in lieu of or in the shoes of the deceased parent."). Rather, the law presumed custody should go to Wilson, Sha'Nyla's sole remaining parent. To hold otherwise, the chancellor would first have to find the natural-parent presumption had been rebutted by clear evidence of Wilson's desertion or abandonment of Sha'Nyla, immoral conduct detrimental to Sha'Nyla, or other unfitness *before* the chancellor could decide whether it was in Sha'Nyla's best interest that Davis, versus Wilson, be awarded custody. *See Leverock*, 23 So. 3d at 431 (¶24). And here, the chancellor made no such finding.

¶11. Because we find the chancellor legally erred by awarding Davis custody, we reverse the custody award and remand for a determination of whether Davis can show by clear evidence that the natural-parent presumption is rebutted. If so, then the chancellor should apply *Albright* to determine if it is in Sha'Nyla's best interest to remain with her grandmother. If not, the chancellor should consider Davis's request for grandparent visitation under Mississippi Code Annotated section 93-16-3 (Supp. 2012).

¶12. **THE JUDGMENT OF THE HINDS COUNTY CHANCERY COURT IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.**

**LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE AND ROBERTS, JJ., CONCUR. CARLTON, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION, JOINED BY IRVING, P.J.; JAMES, J., JOINS IN PART. JAMES, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY FAIR, J.**

**CARLTON, J., SPECIALLY CONCURRING:**

¶13. I concur with the opinion and judgment of the majority, and I respectfully submit this opinion to specially acknowledge the fundamental rights of parents to the care and custody of their children.[2]

¶14. The United States Supreme Court's precedent recognizes the constitutionally protected interests of parents in their relationships with their children when facing

[2] *See Troxel v. Granville*, 530 U.S. 57, 66 (2000).

deprivation of these cherished rights by third parties.[3] The Supreme Court jurisprudence establishes that the Due Process Clause of the Fourteenth Amendment of the United States Constitution protects the fundamental rights of parents to make decisions concerning the care and custody of their children and protects the parents from deprivation of these rights by third parties. *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *MLB v. SLJ*, 519 U.S. 102, 109 (1996); *see also Mabus v. Mabus*, 847 So. 2d 815, 819 (¶16) (Miss. 2003) (explaining that due-process protections, as set forth in *Troxel,* do not apply to custody disputes between two parents).[4]

¶15. I therefore specially concur with the majority in its determination that grandparents possess "no legal right to custody of a grandchild, as against a natural parent." *Lorenz v. Straight*, 987 So. 2d 427, 434 (¶41) (Miss. 2008); *see also Troxel*, 530 U.S. at 66. We must be mindful of the constitutional protection of parental rights against deprivation by third parties. To rebut the natural-parent presumption, there must be clear evidence showing circumstances threatening the child's welfare, such as unfitness, abandonment, or desertion necessitating such intervention. Miss. Code Ann. § 43-21-103 (Supp. 2012).

**IRVING, P.J., JOINS THIS OPINION. JAMES, J., JOINS THIS OPINION IN PART.**

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[3] *See also Lorenz v. Strait*, 987 So. 2d 427, 434 (¶41) (Miss. 2008); *Lucas v. Hendrix*, 92 So. 3d 699, 705-06 (¶17) (Miss. Ct. App. 2012).

[4] *See also* Miss Code Ann. § 43-21-103 (Supp. 2012) (providing that Mississippi public policy holds parents responsible for their children's care, custody, support, and education, and providing that the State may act to remove a child when necessary for the child's welfare).

**JAMES, J., DISSENTING:**

¶16. I agree with the statements of the law in the majority opinion and the specially concurring opinion.[5] However, it appears from the record that the chancellor properly considered the legal presumption that it is in a child's best interest for the natural parent to have custody. The chancellor stated in her bench opinion that "[i]t is only that behavior of a parent [that] clearly causes danger to the mental or emotional well being of a child[,] . . ." and "the presumption is in favor of awarding custody [to] the natural [parent] . . . ." The record indicates that the chancellor considered the totality of the circumstances, and that the presumption of awarding the child to the natural parent had been overcome by clear and convincing evidence.[6] The chancellor was reluctant to extensively criticize the father, and she commended him for showing love for his daughter.

¶17. There were several parties involved in the assessment of the minor child according to the guardian ad litem's report: family-protection specialists with the Mississippi Department of Human Services (DHS); a grief-support counselor; and the pastor of the church where the minor child attends services. Also, the pleadings in the chancery court were styled *James Wilson v. Pearlean Davis and Mississippi Department of Human Services*, which means DHS was involved in some manner.

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[5] The father filed a petition for modification of custody instead of a petition for custody, and on appeal he complains about the procedure.

[6] This was in the bench opinion, which satisfied one of the requirements to overcome the natural-parent presumption, namely that the parent's conduct be clearly detrimental to the child's health. *See Sellers v. Sellers*, 638 So. 2d 481, 486 (Miss. 1994).

¶18. Relevant facts entered into evidence were:

(1) The minor child was three years of age when the natural father came into her life. This shows that the father abandoned the child during the early stages of her life, pursuant to Mississippi Code Annotated section 93-15-103(3)(b) (Rev. 2004).

(2) The father came into the minor child's life after paternity had been established. The child was eight years of age at the time of the trial. The minor child is presently nine years of age, and she will be ten later this year.

(3) The father was seventy years of age at the time of the trial, and his wife was thirty-seven. There are three stepchildren – one girl and two boys. The two boys, ages ten and fourteen at the time of the trial, had anger-management issues, and they were receiving behavior therapy.

(4) The father has been married three times, and he had only been married ten months to his present wife at the time of the trial.

(5) The father smokes, but he states that he only smokes outside because his two stepsons have bronchitis.

(6) The father has four adult children, but the record does not show that he raised any of the children, or that he has parenting skills.

(7) The father's present wife and the minor child's deceased mother were friends, and it caused problems in the past.

(8) In addition to counseling, the minor child has been writing poems to her mother after her death. However, the child is on the honor roll.

(9) The minor child calls her father by his first name and calls one of her mother's friends "dad."

¶19. It is clear from the record that the minor child was in need of a protective order of custody. The child was bonded with her maternal grandmother, and since her mother's death, has been living in her mother's home with her grandmother and sister. Relatives are favored over nonrelatives when there are issues to be settled with the natural parent before the natural parent can receive custody. This prevents a child from being in DHS custody and being placed in a foster home.

¶20. Here, it is in the best interest of the minor child that the father yield to the best interests of the child and work out a plan to make sure that the child's best interests are protected. This is suggested in the guardian ad litem's report:

> The child needs the relationship with her father, but she needs time to transition. The child needs time to build or strengthen the relationship with her father because she knows him as "James" and not as her dad. [I]t is the recommendation of this guardian ad litem that [the minor child] remain with her grandmother and [be] housed with her sister in order that they may be able to deal with the death of her mother, and ultimately . . . go into counseling with the father in order that she may strengthen the relationship, and at such time as the court deems appropriate to make that transition for the minor child.

¶21. The chancellor left the door open for the natural father by adopting the guardian ad litem's report by reference so that the father could develop a plan to gain custody of his child if at all possible.

**FAIR, J., JOINS THIS OPINION.**