IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-00711-COA

DENISE J. IRLE **APPELLANT**

v.

PATTY FOSTER AND LAVIRL FOSTER **APPELLEES**

DATE OF JUDGMENT:	03/14/2012
TRIAL JUDGE:	HON. TALMADGE D. LITTLEJOHN
COURT FROM WHICH APPEALED:	PRENTISS COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	JOHN A. FERRELL
ATTORNEY FOR APPELLEES:	GREG E. BEARD
NATURE OF THE CASE:	CIVIL - CUSTODY
TRIAL COURT DISPOSITION:	CUSTODY OF THE CHILD GRANTED TO GRANDPARENTS
DISPOSITION:	AFFIRMED - 11/12/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE GRIFFIS, P.J., MAXWELL AND FAIR, JJ.

MAXWELL, J., FOR THE COURT:

¶1. Determining child custody is among the most difficult decisions our chancellors must make. And our appellate review of custody decisions is narrow—we will only reverse if the chancellor applied incorrect legal standards or his factual findings were manifestly wrong or clearly erroneous.

¶2. Here, the chancellor made the difficult decision that it was in the best interest of a child for her grandparents to be awarded custody, instead of her mother, who was her sole surviving parent. He arrived at this conclusion by applying the correct legal standard for a custody determination between a parent and grandparents—first, determining the natural-

parent presumption had been lost and, second, conducting an on-the-record analysis of the *Albright* factors.[1]

¶3. While the mother challenges the chancellor's factual findings regarding her drug abuse, sexual relationships, and parenting skills—findings that led him to conclude she had not only lost the natural-parent presumption but also that custody should be awarded to the grandparents—we cannot say his findings were manifestly wrong or clearly erroneously. Though the mother presented conflicting evidence, the chancellor found much of this evidence was not credible. As it was the role of the chancellor to make credibility findings and weigh the evidence as he saw best, and as it is not the role of this court to second guess custody determinations absent clear error, we affirm the chancellor's judgment awarding custody to the grandparents.

Background

¶4. The mother in this case is Denise Irle. The grandparents are Patty and Lavirl Foster. The Fosters' son, David, fathered two[2] of Irle's four children: Britney, born July 1999; and Nathaniel ("Chase"), born July 2002. David, who never married Irle, had been Britney and Chase's primary caretaker. But when Britney was ten and Chase was eight, David died. And Britney and Chase went to live with Irle.

¶5. A year and a half later, the Fosters petitioned for custody of both children. Before the

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

[2] Irle has two other children, each fathered by a different man.

chancellor ruled on their petition, they reached an agreement with Irle—they would be granted custody of Chase, and Irle would be granted custody of Britney. And the chancellor entered an agreed order to that effect.

¶6. But the very next month, something happened that prompted the Fosters to ask the chancellor to award them custody of Britney too. They learned Britney had been removed from Irle's care by the Department of Human Services (DHS). At an emergency hearing, the Fosters were granted temporary custody of Britney. A guardian ad litem (GAL) was also appointed. After a final custody hearing, the Fosters were granted permanent custody of Britney, in addition to Chase.[3]

¶7. Irle timely appealed. She challenges the chancellor's determinations (1) that she lost her natural-parent presumption and (2) that it was in Britney's best interest that the Fosters be awarded custody.

Discussion

¶8. In reviewing Irle's appeal, we have kept in mind our "narrow" standard of review in child-custody cases. *Hamilton v. Houston*, 100 So. 3d 1005, 1008 (¶7) (Miss. Ct. App. 2012). We will reverse a chancellor's decision only if he "applied an improper legal standard" or "made findings that [were] manifestly wrong or clearly erroneous[.]" *Id.* (citing *Mabus v. Mabus*, 847 So. 2d 815, 818 (¶8) (Miss. 2003)). And here, we cannot say that the chancellor did either.

[3] The custody of Chase is not at issue in this appeal.

I. Applying the Threshold Test

¶9. Irle's first argument is that the chancellor failed to apply the correct law. Because the Fosters asked that the previous agreed order be "modified" to give them custody of Britney in addition to Chase, Irle asserts the chancellor had to first apply the test for custody modification—the material-change-in-circumstances test. And because the chancellor did not apply this test, Irle asks us to find reversible error.

¶10. But our supreme court has made clear that "[t]he principle that there must be a material change of circumstances which adversely affects a child's welfare before a custody decree may be modified *only applies between parents of the child*." *Mabus*, 847 So. 2d at 819 (¶17) (emphasis added) (quoting *Thomas v. Purvis*, 384 So. 2d 610, 612-13 (Miss. 1980)). Despite the style of the Fosters' petition, this case does not involve custody modification between parents. So the material-change-in-circumstances test does not apply.

¶11. Instead—as the chancellor correctly recognized—the threshold test for changing custody from a parent to a third-party, such as grandparents, was whether the grandparents had overcome the legal presumption that it was Britney's best interest for her sole parent to have custody. *See id.* Only then could the chancellor conduct an *Albright* analysis to determine whether it is in Britney's best interest for her grandparents, versus her mother, to be awarded custody. *In re Smith*, 97 So. 3d 43, 46 (¶¶7-9) (Miss. 2012).

II. Rebutting the Natural-Parent Presumption

¶12. Irle's second argument is that the chancellor erroneously found the natural-parent presumption had been rebutted. The natural-parent presumption may be rebutted "by a clear

showing" of one of four circumstances:

(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 at 46 (¶9) (citations omitted). In this case, the chancellor found Irle lost the presumption through the third circumstance—conduct by her that was so immoral as to be detrimental to Britney.

A. Chancellor's Findings

¶13. In reaching this conclusion, the chancellor relied on evidence of Irle's illegal drug use and sexual promiscuity. Irle's suspected drug abuse had led DHS to remove Britney from Irle's custody and had led the Fosters to petition for Britney's custody. While Irle asserts she was later cleared following the DHS investigation, the chancellor took into account other evidence of Irle's drug abuse.

¶14. In particular, both the Fosters and the chancellor were deeply troubled by what happened when Irle attempted to move out-of-state with Britney. In order to find work, Irle planned for her and Britney to move in with Irle's sister. Irle sent Britney ahead with a relative so Britney could start school. While Irle was to immediately follow, she instead wrecked her car and ingested a substance that left her incapacitated for four days. And her incapacitation left Britney alone in her aunt's house, where her aunt's boyfriend, a registered sex offender, also lived.

¶15. The chancellor also found that Irle's having four children outside of marriage, as well as living with a man while she and the man were both married to other people, set a bad moral example for pre-teen Britney. *See S.C.R. v. F.W.K.*, 748 So. 2d 693, 700-01 (¶43) (Miss. 1999) (affirming a chancellor's finding that the father lost the natural-parent presumption by immoral conduct "demonstrat[ing] a profound lack of respect for honesty, truth, and rectitude of conduct [(i.e., 'moral virtue')]"); *Brumfield v. Brumfield*, 49 So. 3d 138, 149 (¶42) (Miss. Ct. App. 2010) (finding no error in chancellor's faulting mother for exposing her children to her extramarital sexual relationships). Irle claims that she was not having a sexual relationship with the man she and Britney had lived with. She points to both her and her "roommate's" testimony that their relationship was platonic. The chancellor acknowledged this testimony but found it was not credible. As it is "the sole responsibility of the chancellor" to evaluate credibility of a witness and the weight of her testimony, *Mabus v. Mabus*, 890 So. 2d 806, 816 (¶38) (Miss. 2003), we find no abuse of discretion in the chancellor's finding that the totality of the evidence amounted to a clear showing of immoral conduct.

¶16. Nor do we agree with Irle's third argument—that the chancellor failed to consider whether the conduct he found immoral was also detrimental to Britney. Irle is correct that proof of immoral conduct is not enough—the immoral conduct must be found to negatively impact the child. *See Cockrell v. Watkins*, 936 So. 2d 970, 972-73 (¶8) (Miss. Ct. App. 2006) (finding that the natural-parent presumption had remained intact because, while there was evidence of the father's immoral conduct, the chancellor had determined that the child had

"not been affected by his father's conduct"). But here, while the chancellor did not use the words "detrimental to the child" in his final order, the transcript of his bench opinion shows he did find Irle's conduct was detrimental to Britney.

¶17. This is not a case where a parent's sexual conduct or drug use was kept secret from the child. Britney was actually living with her mother and the man with whom she was having an extramarital affair. And Britney was directly impacted by Irle's drug use—in one incident being left in a house with a registered sex offender because her mother was too strung out to come and get her. *Cf. S.C.R.*, 748 So. 2d at 700 (¶42) (finding the father's immoral conduct —spreading false allegations of child molestation—was detrimental to his son because the father instructed the son to lie as well). Thus, the chancellor correctly focused on what was required for him to find the natural-parent presumption had been rebutted—conduct so immoral as to be detrimental to Britney.

B. GAL's Recommendation

¶18. In finding no basis to reverse the chancellor's finding that the natural-parent presumption had been rebutted, we note that the chancellor's finding did not follow the recommendation of the GAL. While also concerned with Irle's immoral conduct, the GAL could not say her conduct was so immoral and detrimental to Britney to justify the loss of the presumption. Thus, the GAL had recommended Irle be awarded custody based on the presumption.

¶19. Still, the chancellor was not bound by the recommendation of the GAL. But the chancellor did have to include in his findings the reason for rejecting the recommendation

that Irle be awarded custody based on the natural-parent presumption. *See J.P. v. S.V.B.*, 987 So. 2d 975, 983 (¶20) (Miss. 2008) (citation omitted) ("[I]f the court rejects the recommendations of the [GAL], the court's findings must include its reasons for rejecting the [GAL]'s recommendations."). This he did. Because the chancellor explained his reason for rejecting the GAL's recommendation and instead finding Irle had acted so immorally as to lose the natural-parent presumption, we find no abuse of discretion in the chancellor's coming to a different conclusion than the GAL.

III. Determining the Child's Best Interest Under the *Albright* Factors

¶20. Finding the natural-presumption has been rebutted "does not end the inquiry." *In re Dissolution of Marriage of Leverock & Hamby*, 23 So. 3d 424, 431 (¶24) (Miss. 2009). The chancellor "must go further to determine custody based on the best interests of the child through an on-the-record analysis of the *Albright* factors." *Id.* (citing *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983)).

¶21. Here, the chancellor conducted an on-the-record analysis of each *Albright* factor:

(1) age, health, and sex of Britney;

(2) continuity of Britney's care;

(3) parenting skills of both Irle and the Fosters and their respective willingness and capacity to provide primary child care;

(4) Irle's and the Fosters' employment and the responsibilities of that employment;

(5) physical and mental health and age of Irle and the Fosters;

(6) emotional ties between Irle and Britney and the Fosters and Britney;

(7) moral fitness of Irle and the Fosters;

(8) the home, school, and community record of Britney;

(9) Britney's custody preference;

(10) stability of the home environment and the employment of Irle and the Fosters, and other factors relevant to the parent-child relationship.

Lee v. Lee, 798 So. 2d 1284, 1288 (¶15) (Miss. 2001) (citing *Albright*, 437 So. 2d at 1005). Based on this analysis, the chancellor concluded it was in Britney's best interest for the Fosters to be awarded custody.

¶22. This leads us to Irle's final argument—that the chancellor came to the wrong *Albright* conclusion. To support her argument, Irle emphasizes that the chancellor found half the factors favored her, while she attacks the evidence and credibility assessments the chancellor relied on to find the other factors favored the Fosters.

¶23. In particular, she asserts the chancellor wrongly characterized her roommate as her "boyfriend" to find the fact she lived with her boyfriend weighed against her parenting skills and moral fitness. But the issue of whether Irle was having a sexual relationship with her male roommate came down to credibility. "The credibility of the witnesses and the weight of their testimony, as well as the interpretation of evidence where it is capable of more than one reasonable interpretation, are primarily for the chancellor as the trier of facts." *O'Briant v. O'Briant*, 99 So. 3d 802, 806 (¶19) (Miss. Ct. App. 2012) (quoting *Johnson v. Gray*, 859 So. 2d 1006, 1014 (¶36) (Miss. 2003)). And here, we cannot find the chancellor's interpretation of Irle's living situation was unreasonable. In *Brumfield*, we found no error

in the chancellor's weighing the moral-fitness factor against a mother who exposed her children to her extramarital sexual relationships. *Brumfield*, 49 So. 3d at 149 (¶42). Similarly, we find no error in the chancellor's finding that Irle's making Britney live with a man who was not Irle's husband weighed against her parenting skills and moral fitness.

¶24. Irle also asserts that the chancellor ignored evidence by others of her good parenting skills. Again, "[t]he chancellor has the ultimate discretion to weigh the evidence the way [he] sees fit in determining where the child's best interest lies." *O'Briant*, 99 So. 3d at 806 (¶19) (quoting *Blakely v. Blakely*, 88 So. 3d 798, 803 (¶17) (Miss. Ct. App. 2012)). The record shows that in his *Albright* analysis the chancellor weighed the good and the bad regarding Irle's parenting of Britney. And it is not the role of this court to reweigh that evidence.

¶25. Finally, regarding the factors of stability of employment and stability of the home environment, Irle asserts the chancellor trapped her in a "Catch-22" —penalizing her for not having steady employment but also penalizing her for trying to move Britney out of state in an effort to gain steady employment. But we find no abuse of discretion in the chancellor's consideration of Irle's efforts to move Britney out of state as weighing against Irle. It was not the fact Irle tried to move with Britney so that Irle could get a job out of state that troubled the Fosters and the chancellor—it was the fact Irle tried to move Britney into a house with a registered sex offender. Further, while "[t]here is no 'hard and fast' rule that the best interest of siblings will be served by keeping them together," it was within the chancellor's discretion to consider as relevant the fact Irle's move would have separated

Britney from Chase, her only sibling who shared the same father. *Copeland v. Copeland*, 904 So. 2d 1066, 1076 (¶43) (Miss. 2004) (citation omitted).

¶26. As the chancellor acknowledged, this custody decision was not clear-cut. The chancellor was acutely aware that his decision would separate Britney from her only living parent. But the chancellor awarded the Fosters custody based on what he determined would be in Britney's best interest. In affirming the chancellor's decision, we are mindful that "[d]etermining custody of a child is not an exact science," but instead "one of the most difficult decisions that courts must make." *O'Briant*, 99 So. 3d at 805 (¶15) (quoting *Lee*, 798 So. 2d at 1288 (¶15); *Brewer v. Brewer*, 919 So. 2d 135, 141 (¶21) (Miss. Ct. App. 2005)). "[E]ven when the trial judge sensitively assesses the factors noted in *Albright* and [its] progeny, the best the [chancellor] can offer is a good guess." *Love v. Love*, 74 So. 3d 928, 932 (¶17) (Miss. Ct. App. 2011) (quoting *Buchanan v. Buchanan*, 587 So. 2d 892, 897 (Miss. 1991)). Because it is not the role of this court to "second guess" that decision—but to instead affirm that decision in the absence of legal error or manifestly erroneous factual findings—we affirm the chancellor's judgment that awarded the Fosters custody of Britney.

¶27. **THE JUDGMENT OF THE PRENTISS COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

LEE, C.J., GRIFFIS, P.J., BARNES, ISHEE, ROBERTS, CARLTON AND FAIR, JJ., CONCUR. IRVING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY JAMES, J.

IRVING, P.J., DISSENTING:

¶28. The majority finds that the chancery court did not err in awarding custody of Britney,

Irle's oldest child, to the Fosters, Britney's paternal grandparents. Because I believe that the chancery court's determination—that the evidence presented by the Fosters clearly rebutted the natural-parent presumption accorded Irle—was manifestly wrong and clearly erroneous, I dissent. I would reverse and render the judgment of the chancery court.

¶29. It is well established that "[i]n [a] custody battle[] between a natural parent and a third party . . . the third party must first clearly rebut the natural-parent presumption[.]" *In re Smith*, 97 So. 3d 43, 46 (¶8) (Miss. 2012) (internal citations omitted). The evidence must *clearly* show that either (1) "the [natural] parent has abandoned the child; (2) the [natural] parent has deserted the child; (3) the [natural] parent's conduct is so immoral as to be detrimental to the child; or [that] (4) the [natural] parent is unfit, mentally or otherwise, to have custody. *Id.* at (¶9) (citing *Carter v. Taylor*, 611 So. 2d 874, 876 (Miss. 1992)). Here, the chancery court determined that Irle's conduct was so immoral as to be detrimental to Britney. With the utmost respect to the majority, I must say, based on my review of the record, that the record does not contain clear evidence of immoral conduct on the part of Irle that is detrimental to Britney.

¶30. The chancery court focused on Irle's alleged drug abuse and conduct that the court viewed as sexually promiscuous. I quote extensively from the chancellor's bench opinion:

> Now, where does that put this [c]ourt in this case today. The [c]ourt, taking those considerations into account, this [c]ourt has noted the guardian ad litem found that the mother is not mentally unfit, that she's not abandoned or deserted this child, or that she is morally unfit and so held that she was not such. But I have to take exception to the guardian ad litem's report in this respect. This [c]ourt does hereby find that the mother is morally unfit to claim the benefit of the natural parent presumption.

> Now, I'll get into the factors under *Albright* a little later and dwell more fully upon that, but the [c]ourt so finds under this case that even going back – this was brought out in the trial of this case and unobjected to by the parties – that she has four out-of-wedlock children. That the boyfriend, Mr. [Gary] Voyles . . . was the one who occasionally visits with [her] or she came over to see him with these two children, spent the night there. She said there's no sexual involvement and he did, too. But, you know, Mr. Voyles was as nervous as a cat on a hot tin roof when he testified here. It's interesting to me, as a matter of comment, that the mother this morning testified that they got their divorces the same day from their respective spouses. No wonder he was nervous on the witness stand that day. They both got their divorces from their respective spouses, as evidenced by her testimony here today, and it was brought out in the proof, March 6, 2012, after this case had been recessed for a period of time.
>
> Furthermore, this [c]ourt finds that she has actually failed one drug test, a cocaine test administered in October of 2011, by the guardian ad litem. Even though, admittedly, she passed the one the next day when she hired a separate firm to do it. She was visiting with and taking the children in the presence of a married man while she was still married to another man. This [c]ourt find[s] that she's morally unfit to claim the benefit of this natural parent presumption.
>
> I now turn to a discussion of the evidence as reflected in the record.
>
> *1. Alleged Drug Use*

¶31. Throughout trial, the chancery court heard testimony regarding Irle's suspected drug use. Her second daughter's father testified that on one occasion he met Irle at a motel room and saw drugs in the bathroom. He also stated that Irle was so intoxicated that she could not drive herself to pick up her youngest son from his father. Additionally, Darlene Braswell, Irle's former roommate, testified that on one occasion when she and Irle lived together she found, in her bathroom, a straw with white powder on the tip. She suspected that Irle had used this straw to ingest drugs, which made Irle sleep approximately four days. The GAL reported that Irle had tested positive for cocaine on a drug test performed in his office.

¶32. What is missing from all of the allegations of Irle's alleged drug use is definitive evidence that what the witnesses saw was in fact illicit drugs. In the case of the father of Irle's second daughter, there is no evidence that any of the alleged drugs that he saw in the bathroom were in fact contraband. None of the alleged drugs were tested, and there is no evidence that he was competent to identify illicit drugs. As to the former roommate, her testimony was sheer speculation, nothing more. Further, neither witness actually *saw* Irle using drugs. Britney testified that she has never seen her mother intoxicated. Patrick Irle, Irle's brother with whom she allegedly uses drugs, testified that he had never seen Irle use drugs and that he had not used drugs with her. Also, the day after receiving a positive reading on the drug test administered by the GAL, Irle passed a drug test given by professionals at a toxicology screening laboratory.

¶33. Based on my review of the record, there is no *clear* evidence that Irle has ever used drugs. But accepting that she has, there is no evidence that Irle's alleged conduct has detrimentally affected Britney. This host of unsubstantiated allegations against Irle is insufficient to deprive her of the natural-parent presumption.

2. Alleged Sexual Promiscuity

¶34. As additional justification for depriving Irle of the benefit of the natural-parent presumption, the chancery court cited Irle's relationship with Voyles. While separated from her husband, but still legally married, Irle met and began spending time with Voyles, who was also separated from his spouse. Irle and Voyles define their relationship as a non-sexual friendship. During the early stages of her relationship with Voyles, Irle had several overnight

visits at Voyles's home. Irle took Britney with her on these visits. Irle and Voyles stated that during these overnight visits, Britney slept in one of the bedrooms, Voyles slept in his own bedroom, and Irle slept on the couch. There is no testimony to the contrary. Yet, the chancery court concluded that Irle and Voyles were engaged in a sexual relationship.

¶35. Despite what the chancery court thought about Irle and Voyles's relationship, "under Mississippi law, the [chancery court] may not make a finding that a custodial parent is morally unfit merely because she has sexual relationships outside of marriage[.]" *Glissen v. Glissen*, 910 So. 2d 603, 611 (¶27) (Miss. Ct. App. 2005). Thus, even if the chancery court suspected that Irle and Voyles were being less than truthful about their relationship, "[a]bsent a finding of some conduct harmful in a more specific sense than the certain knowledge of sexual relations[,] . . . custody cannot be withheld on that basis." *Id.* at 611-12 (¶27) (quoting *Sullivan v. Stringer*, 736 So. 2d 514, 517 (¶16) (Miss. Ct. App. 1999)). There is no evidence that Britney has witnessed any acts of intimacy between Voyles and Irle. Moreover, there is no evidence that Irle's relationship with Voyles, whatever its status, has had a detrimental effect on Britney.

¶36. The majority cites *S.C.R. v. F.W.K.*, 748 So. 2d 693, 700-01 (¶43) (Miss. 1999), and *Brumfield v. Brumfield*, 49 So. 3d 138, 149 (¶42) (Miss. Ct. App. 2010), to support its decision that the chancery court correctly determined "that Irle's having four children outside of marriage, as well as living with a man while she and the man were both married to other people, set a bad moral example for pre-teen Britney." Maj. Op. at (¶15). First, neither case addresses having children outside of wedlock. Regardless, "[o]ur focus should not be on the

past wrongdoing of the [mother] but, rather, on what is in the best interest of the child in the present[,]" *Williams v. Stockstill*, 990 So. 2d 774, 778 (¶16) (Miss. Ct. App. 2008); and there is no evidence that having additional brothers and sisters, despite the circumstances surrounding their births, has had a detrimental effect on Britney. Secondly, the "immoral conduct" exhibited by the parents in *S.C.R.* and *Brumfield* is distinguishable from the alleged immoral conduct in the case before this Court. In *S.C.R.*, a father encouraged his son to make a false report of sexual abuse against the child's maternal uncle. *S.C.R.*, 748 So. 2d at 701 (¶43). In *Brumfield*, there was testimony that the mother had engaged in numerous extra-marital affairs. *Brumfield*, 49 So. 3d 148 (¶¶39-40). Furthermore, the mother admitted that the relationships were sexual and that her children had seen her with her boyfriends. *Id.* ¶37. Here, it is clear that Irle and her husband were separated when she began talking to Voyles. Nevertheless, there is no evidence that the relationship between Voyles and Irle is anything other than a platonic relationship. The chancery court inferred that the two were engaged in a sexual relationship because the dates of their divorces from their respective spouses coincided. However, there is no evidence to justify such an inference. More importantly, there is no evidence that Irle's platonic relationship with Voyles has been, is, or will be detrimental to Britney. And despite what the majority says, the chancery court made no such finding. After deciding that Irle would not retain the natural-parent presumption, the chancery court immediately began an *Albright*[4] analysis.

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

¶38. It is clear from the record that Irle loves her daughter. It is clear from the record that Irle has made mistakes in the past. What is missing from the record is clear evidence that Irle has acted so immorally as to justify taking her daughter away from her. For the reasons stated, I dissent.

JAMES, J., JOINS THIS OPINION.