IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CT-01955-SCT

IN THE MATTER OF THE PETITION OF WILLIAM SMITH AND WIFE SARA SMITH FOR THE ADOPTION OF JASON WELLS, A MINOR CHILD: TARA WELLS

v.

WILLIAM SMITH AND SARAH SMITH

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	10/30/2009
TRIAL JUDGE:	HON. GLENN ALDERSON
COURT FROM WHICH APPEALED:	TIPPAH COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	JOHN D. WEDDLE
ATTORNEYS FOR APPELLEES:	JOE M. DAVIS JOHN A. FERRELL
NATURE OF THE CASE:	CIVIL - CUSTODY
DISPOSITION:	THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED. THE JUDGMENT OF THE TIPPAH COUNTY CHANCERY COURT IS AFFIRMED - 07/26/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

WALLER, CHIEF JUSTICE, FOR THE COURT:

¶1. William and Sarah Smith are the grandparents of Jason Wells. Jason's mother, Tara Wells, is Sarah's daughter.[1] The Smiths filed a petition for temporary and permanent custody

[1] The names of the parties used in this opinion are fictitious to protect the privacy of the minor child. We have carried forward the same fictitious names that were used in the opinion of the Court of Appeals.

of Jason. They later filed a separate petition for adoption and to terminate the parental rights of Tara and Robert Johnson, the biological father. The chancellor declined to terminate Tara's and Robert's parental rights but awarded the Smiths primary custody of Jason. In awarding the Smiths custody, the chancellor found that Tara had "by her long and continuous absences from [Jason] failed to exercise her parental rights and fulfill her parental responsibilities." He found that this had caused the Smiths to assume the role of parents to Jason for virtually his entire life and that the Smiths thus stood *in loco parentis*. The chancellor then conducted a best-interest, ***Albright***[2] analysis and concluded that Jason should remain with the Smiths.

¶2. Under Mississippi law, a natural parent loses the legal presumption that custody should be with him or her only if there has been a clear showing of abandonment, desertion, or unfitness on the part of the parent. *See infra* ¶¶ 8-9. The ***Albright*** factors are not considered unless such showing has first been made. ***Id.*** Since the chancellor here proceeded to conduct an ***Albright*** analysis, he treated the natural-parent presumption as though it had been overcome; thus, he implicitly and necessarily found that it had been. We must decide whether he did so based on the doctrine of *in loco parentis* — which would be error — or based on a finding of desertion by Tara, which, in turn, had necessitated the Smiths standing as *in loco parentis* for Jason. We find the latter; therefore, we affirm the judgment of the chancery court.

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[2] ***Albright v. Albright***, 437 So. 2d 1003, 1005 (Miss. 1983). ***Albright*** listed certain factors that must be considered in determining the best interest of a child in custody cases. ***Id.***

FACTS

¶3. The Court of Appeals set out the facts and procedural background as follows:

> Jason was born on June 14, 2003. Sarah is Jason's maternal grandmother; William is related to Jason only by marriage. After Jason was born, he and Tara lived with the Smiths while Tara attended college. Tara sometimes visited Jason during the weekends while she attended college. Tara attended school for approximately the first three years after Jason was born. According to the Smiths, Tara's visits with Jason became less frequent the longer she was in school. In April 2006, Robert and Tara were married. Robert was in the military and was stationed near Washington D.C.; Tara moved to Washington D.C. shortly after the marriage, and Jason went to live with Tara in Washington D.C. approximately a month later. In June 2006, after being married for less than three months, Tara and Robert separated. Not long after his arrival in Washington D.C., Jason returned to Mississippi. Jason spent time in both Washington D.C. and Mississippi until November 2006, when he permanently returned to Mississippi. Jason lived with Robert's parents for some of his time in Mississippi in 2006, although he eventually moved in permanently with the Smiths. Around the same time, Tara lost her job in Washington D.C.
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> Tara worked a number of different jobs beginning in 2007. Jason remained in Mississippi, and Tara visited him here sporadically. According to William, he offered to pay for Tara to move back to Mississippi, but she refused. In April or May 2007, Tara gave the Smiths medical guardianship over Jason. According to Cindy Howell, Tara's sister, Cindy once planned a birthday party for Jason that Tara was supposed to attend, but Tara spent her time in Jackson, Mississippi, with a boyfriend instead of visiting Jason.
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> From January 2008 to June 2008, Tara's visits with Jason became more infrequent. From February 2008 to March 2009, Tara worked for a company called Soft Edge. She indicated that she made enough money at this job to support herself; regardless, she made no attempt to live with Jason during her employment. In December 2008, Tara moved in with another man, Neil Baker. In March 2009, Tara and Baker moved to Arizona. Tara and Baker became engaged, despite Tara's inability to locate Robert, to whom she was still married. In April 2009, the chancery court appointed a guardian ad litem (GAL) to represent Jason's interest; at the time of the GAL's report, Tara was dependent on Baker for financial support. At that time, Baker had never met Jason.

> Jason's school teachers testified that the only mother or father that Jason had ever mentioned were the Smiths. In December 2008, Robert joined in the Smiths' petition for custody of Jason and consented to the Smiths' continued custody of Jason. Robert also consented to and joined in the Smiths' petition to adopt Jason.
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> The GAL recommended to the court that Jason's best interest would be served by remaining in the custody of the Smiths. In his report, the GAL noted: "While it is undisputed that [Tara] loves her son, the facts clearly establish that she has done little to insure his welfare, other than leaving him with [William] and [Sarah]."

Smith ex rel. Adoption of Wells v. Smith, __ So. 3d __, 2011 WL 2120085, at **1-2 (Miss. Ct. App. May 31, 2011).

¶4. The chancery court found that Tara had "failed to exercise her parental rights and fulfill her parental responsibilities" by her "long and continuous absences" from Jason. Consequently, the Smiths had raised Jason virtually his entire life and therefore stood in the position of *in loco parentis.* The chancery court then proceeded to conduct an analysis based on the ***Albright*** factors to determine custody. It concluded that Jason's best interest was served by allowing the Smiths to retain custody.

¶5. Tara appealed to this Court, and we assigned the case to the Court of Appeals. She argued that the chancery court had erroneously relied upon the Smiths' status as *in loco parentis* to find that Tara's right to the natural-parent presumption had been relinquished. The Court of Appeals agreed. ***Smith ex rel. Adoption of Wells v. Smith***, __ So. 3d __, 2011 WL 2120085, at *3. It reversed and remanded the case for the chancery court to determine instead whether Tara had relinquished her right to the natural-parent presumption by deserting Jason. ***Id.***

¶6. The Smiths now file this petition for writ of certiorari. They argue that the chancery court *did* find that Tara had deserted Jason and that it had used desertion — not the doctrine of *in loco parentis* — as the basis for its finding that Tara had relinquished the natural-parent presumption. Alternatively, the Smiths assert that their standing as *in loco parentis* should overcome the natural-parent presumption in favor of Tara. We granted certiorari to address these issues.

DISCUSSION

¶7. A chancellor's custody decision will be reversed only if it was manifestly wrong or clearly erroneous, or if the chancellor applied an erroneous legal standard. *E.g.*, ***Johnson v. Gray***, 859 So. 2d 1006, 1012 (Miss. 2003) (citing ***Mabus v. Mabus***, 847 So. 2d 815, 818 (Miss. 2003)).

¶8. The best interest of the child is paramount in any child-custody case. *E.g.*, ***Sellers v. Sellers***, 638 So. 2d 481, 485 (Miss. 1994) (citing ***Smith v. Todd***, 464 So. 2d 1155 (Miss. 1985)). In custody battles between a natural parent and a third party, it is presumed that it is in the child's best interest to remain with his or her natural parent. ***Carter v. Taylor***, 611 So. 2d 874, 876 (Miss. 1992) (quoting ***Rodgers v. Rodgers***, 274 So. 2d 671, 672 (Miss. 1973)). To be awarded custody, therefore, the third party must first clearly rebut the natural-parent presumption or preference; if it is successfully rebutted, the chancellor must then examine the ***Albright*** factors and determine that third-party custody serves the best interest of the child. ***Logan v. Logan***, 730 So. 2d 1124, 1127 (Miss. 1998); *see also* ***In re Custody of M.A.G.***, 859 So. 2d 1001, 1004 (Miss. 2003) (stating that "a finding of unfitness is necessary

to award custody to a third party against a natural parent and must be done before any analysis using the ***Albright*** factors").

¶9. The natural-parent presumption can be rebutted 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. ***Carter***, 611 So. 2d at 876 (quoting ***Rodgers***, 274 So. 2d at 672); ***Vaughn v. Davis***, 36 So. 3d 1261, 1264-65 (Miss. 2010); ***In re Dissolution of Marriage of Leverock and Hamby***, 23 So. 3d 424, 429-30 (Miss. 2009).

¶10. The doctrine of *in loco parentis* does not, by itself, overcome the natural-parent presumption. The term *in loco parentis* means "in the place of a parent." ***Farve v. Medders***, 241 Miss. 75, 81, 128 So. 2d 877, 879 (1961). It "'exists when [one] person undertakes care and control of another in absence of such supervision by [the] latter's natural parents and in absence of formal legal approval, and is temporary in character and is not to be likened to an adoption which is permanent.'" ***J.P.M. v. T.D.M.***, 932 So. 2d 760, 780 (Miss. 2006) (quoting Black's Law Dictionary 787 (6th ed. 1990)) (Cobb, P.J., specially concurring); *see also* ***J.P.M.***, 932 So. 2d at 769 n.6 (Miss. 2006) (quoting ***Griffith v. Pell***, 881 So. 2d 184, 186 n.1 (Miss. 2004)) (defining *in loco parentis* as "'[a]ny person who takes a child of another into his home and treats it as a member of his family, providing parental supervision, support and education, as if it were his own child . . .'").

¶11. *In loco parentis* can — in very limited, unique situations — sometimes be used to help rebut the natural-parent presumption. In both ***Pell*** and ***J.P.M***, a husband learned during the pendency of divorce proceedings that he was not the biological father of a child born of,

or just prior to, the marriage. ***J.P.M.***, 932 So. 2d at 762-65; ***Pell***, 881 So. 2d at 185. In those cases, we reasoned that the natural-parent presumption had been overcome[3] based on several facts: (1) the husbands stood *in loco parentis*; (2) they had supported, cared for, and treated the child as their own; (3) they could have been required to pay child support ("[w]ith the burden should go the benefit"); and (4) the biological fathers were not really in the picture: the one in ***Pell*** had disclaimed any interest in the child and had agreed to relinquish his parental rights, while the one in ***J.PM.*** could not even be determined conclusively.[4] ***Pell***, 881 So. 2d at 186-87; ***J.P.M.***, 932 So. 2d at 767-70. Though *in loco parentis* was considered in

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[3] In ***Pell***, we reversed the chancellor's termination of the husband's parental rights and remanded the case for a best-interest ***Albright*** analysis; thus, we implicitly found that the natural-parent presumption had been overcome. ***Pell***, 881 So. 2d at 187. And in ***J.P.M***, we relied on ***Pell*** to affirm the chancellor's decision to award physical custody to the husband. ***J.P.M.***, 932 So. 2d at 770. In doing so, we specifically rejected the wife's argument that the chancellor had not had the authority to award custody to the husband without first finding that she had abandoned the child, that her conduct was so immoral as to be detrimental to the child, or that she was mentally or otherwise unfit for custody. ***Id.*** at 768.

[4] Notably, Presiding Justice Kay Cobb's special concurrence in ***J.P.M.*** criticized the majority and ***Pell*** for "us[ing] *in loco parentis* to strip custody from [a natural parent]." ***J.P.M.***, 932 So. 2d at 781 (Cobb, P.J., specially concurring). She emphasized that "a person standing *in loco parentis* has the rights of a parent as against the entire world *except the natural parents*." ***Id.*** "*In loco parentis*," she explained, "was never meant to be used against the natural parent . . . [but] was intended to protect third parties, who assume custody and care of a child whose natural parents are absent or unable to care for it, from losing the child to other third parties . . . ." ***Id.*** Presiding Justice Cobb's concerns are well-taken. Yet, ***Pell*** and ***J.P.M.*** are limited to their unique facts; as discussed above, *in loco parentis* was just one of the factors that influenced the Court's decision in those cases. ***J.P.M.***, in fact, stated that ***Pell*** was controlled by the following rationale: If the husband could be required to pay child support due to his continued support and care for the child, and the wife's reliance on the same, it follows that he should have custody or visitation rights as well. ***J.P.M.***, 932 So. 2d at 769 (quoting ***Pell***, 881 So. 2d at 186).

Pell and ***J.P.M.***, those cases do not support — nor have we ever suggested — that *in loco parentis* alone can rebut the natural-parent presumption.

¶12. Turning to the facts before us, we have held that grandparents who stand *in loco parentis* have no right to the custody of a grandchild, as against a natural parent, unless the natural-parent presumption is first overcome by a showing of abandonment, desertion, detrimental immorality, or unfitness on the part of the natural parent. *See* ***Ethredge v. Yawn***, 605 So. 2d 761, 764, 766 (Miss. 1992) (citations omitted). Thus, the Smiths' standing as *in loco parentis* is insufficient to overcome the natural-parent presumption.

¶13. Having found that *in loco parentis* is insufficient to overcome the natural-parent presumption, we consider the chancellor's order. The Smiths insist that the chancellor actually relied on Tara's desertion of Jason — not the Smiths' standing as *in loco parentis* — to find that Tara had relinquished the natural-parent presumption.

¶14. The chancellor's order stated, in pertinent part, that:

> [T]he Court finds that [Tara] has by her long and continuous absences from [Jason] failed to exercise her parental rights and fulfill her parental responsibilities, which has necessitated [the Smiths] to assume the role of parents to [Jason], who has been raised by [the Smiths] for virtually his entire life, it is
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> FURTHER ORDERED, ADJUDGED AND DECREED that the Court finds that because they have raised [Jason] for virtually his entire life, [the Smiths] stand in the position of *in loco parentis* concerning the minor child, it is
>
> FURTHER ORDERED, ADJUDGED AND DECREED that due to [the Smiths] being found to stand in the position of *in loco parentis* concerning [Jason,] the Court shall use the factors found in ***Albright v. Albright***, 437 So. 2d 1003, 1005 (Miss. 1983) (emphasis added) to determine custody . . . .

¶15. The Smiths maintain that a careful reading of the order shows that the chancellor first found that Tara had deserted Jason; he then concluded that the Smiths had assumed the role

of *in loco parentis* because of Tara's desertion. Everything therefore — the Smiths' status as *in loco parentis* and Tara's relinquishment of the natural-parent presumption — stemmed from the initial finding of desertion.

¶16. We agree with the Smiths. The chancellor found that Tara's "long and continuous absences," her failure "to exercise her parental rights," and her failure to "fulfill her parental responsibilities" had caused the Smiths to stand *in loco parentis*. These actions are consistent with desertion, which means "'[t]o forsake (a person, institution, cause, etc., having a moral or legal claims upon one) . . . [or] [t]o forsake one's duty, one's post or one's party." ***Leverock***, 23 So. 3d at 430 n.2 (quoting ***Ainsworth v. Natural Father***, 414 So. 2d 417, 420 (Miss. 1982)). Though the chancellor never explicitly used the term "desertion," his description of Tara's behavior met the definition of the term. The record supports desertion as well. The GAL, for example, asserted that Jason had been in Tara's "exclusive care and custody for a period totaling no more than twelve weeks since he had been born[,]" and that Tara had "constructively abandoned or *deserted* [Jason] because she [had] not offered any financial support, or made any reasonable efforts to be with the child prior to the initiations of [the] proceedings[.]" (Emphasis added.) In sum, the chancellor made findings consistent with desertion, and the record supports such a finding. We will not reverse simply because the chancellor omitted or neglected to use the specific word "desertion."

¶17. The chancellor's order further stated that "due to [the Smiths] being found to stand in the position of *in loco parentis* concerning [Jason,] the Court shall use the factors found in ***Albright*** . . . " to determine custody. This statement was erroneous; as discussed above, *in loco parentis* does not rebut the natural-parent presumption so that an ***Albright*** analysis

is warranted. Reversal is not required for this misstatement, however. The chancellor found, and the record supported, desertion. The natural-parent presumption, therefore, was properly rebutted, and an ***Albright*** analysis was justified on that basis.

¶18. Because the chancellor found that Tara had deserted Jason, we hold that he did not err in treating the natural-parent presumption as having been overcome. A best-interest, ***Albright*** analysis, therefore, was proper. And since no assignment of error has been raised regarding the chancellor's ***Albright*** analysis, we affirm his decision.

CONCLUSION

¶19. We find that the chancellor did not err in treating the natural-parent presumption as having been overcome. Though the chancellor did not use the word "desertion," his factual findings regarding Tara's behavior satisfied the definition of the term. Accordingly, the chancellor properly reviewed the ***Albright*** factors and concluded that it was in Jason's best interest to award custody to the Smiths. Therefore, we reverse the judgment of the Court of Appeals and affirm the judgment of the chancery court.

¶20. **THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED. THE JUDGMENT OF THE TIPPAH COUNTY CHANCERY COURT IS AFFIRMED.**

CARLSON, P.J., RANDOLPH, LAMAR, KITCHENS, CHANDLER AND PIERCE, JJ., CONCUR. DICKINSON, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, J.

DICKINSON, PRESIDING JUSTICE, DISSENTING:

¶21. The chancellor awarded primary custody of Jason, a minor child, to his grandparents without making a specific finding – by clear and convincing evidence – that Jason's natural

parents had abandoned him. This error, in my view, requires reversal, so I respectfully dissent.

¶22. The chancellor did not find, by clear and convincing evidence, that Tara had abandoned or deserted her child. So, according to this Court's precedent, the evidence in the record is insufficient to overcome the natural-parent presumption. Forced to recognize that the chancellor didn't actually say the natural-parent presumption was overcome, and didn't actually find Tara had abandoned or deserted her child – indeed, the chancellor refused to terminate Tara's parental rights – the majority engages in an episode of appellate fact-finding that is as incorrect for the case before us today as it is dangerous for cases later to come. The majority simply says that Tara's actions "are *consistent* with desertion." (Emphasis added.)

¶23. A chancellor's discretion to award custody of children to third parties, rather than their natural parents, must be exercised within the parameters of the law. The controlling statute in Mississippi limits a chancellor's authority to award custody to third parties by requiring

> a finding by the court that both of the parents of the child have abandoned or deserted such child or that both such parents are mentally, morally or otherwise unfit to rear and train the child . . . .[5]

¶24. And this Court has long recognized, "our society demands, and the law approves the rule, that the natural parents of children have the natural right to the nurture, care and custody of their children."[6] So, when a custody dispute arises between a natural parent and a third party – including a grandparent – "it is presumed that it is in the best interest of a child to

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[5] Miss. Code Ann. § 93-5-24(1)(e) (Rev. 2004).

[6] ***Simpson v. Rast***, 258 So. 2d 233, 236 (Miss. 1972).

remain with the natural parent as opposed to a third party."[7] The presumption may be overcome, but only where the chancery court finds the natural parent has abandoned his or her child.[8]

¶25. At the conclusion of the hearing in this case, the chancellor discussed Jason's custody for six pages of transcript without ever saying Tara had abandoned or deserted Jason. In fact, the chancellor specifically stated that Tara had "good intentions," but (as the chancellor put it):

> [M]other, you should be raising this baby. You should be raising this baby, but you're not ready yet . . . . I don't want this child going out to Arizona with his mother still being married to her first husband and having a boyfriend out there. It's just not healthy. I know our morals have changed. I know people accept adultery now. I know people accept live-ins now. I'm sorry. I'm from the old school, I don't.

¶26. After discussing his concerns from the bench, the chancellor never mentioned abandonment or desertion or that Tara had failed to exercise parental rights. The chancellor's order – prepared by the grandparents' counsel – says nothing about the moral concerns the chancellor voiced from the bench. Instead, it states as the reason for granting custody to the grandparents, the following:

> [T]he Court finds that [Tara] has by her long and continuous absences from [Jason] failed to exercise her parental rights and fulfill her parental responsibilities, which has necessitated [the Smiths] to assume the role of parents to [Jason], who has been raised by [the Smiths] for virtually his entire life . . . .

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[7] ***Vaughn v. Davis***, 36 So. 3d 1261, 1265 (Miss. 2010) (citing ***In re Leverock***, 23 So. 3d 424, 429-30 (Miss. 2009)).

[8] Miss. Code Ann. § 93-5-24(1)(e)(i) (Rev. 2004).

¶27. While I am somewhat concerned with the difference in the chancellor's concerns announced from the bench and those stated in the order, the fact is that neither the bench opinion nor the order states proper grounds for bypassing a natural parent and awarding custody to third parties.

¶28. The majority – recognizing that the grandparents' *in loco parentis* status was not a sufficient basis to require examination of the ***Albright*** factors[9] – speculated that the chancellor had found desertion. That contradicts the chancellor's own words, which were as follows: "***due to [the Smiths] being found to stand in the position of in loco parentis concerning [Jason,]*** the Court shall use the ***Albright*** factors to determine custody . . . . (Emphasis added.) One would think the chancellor would be in the best position to say what his reason was.

¶29. The majority then proceeds to make an astonishing statement. Says the majority: Since the chancellor here proceeded to conduct an ***Albright*** analysis, he treated the natural-parent presumption as though it had been overcome; thus, he implicitly and necessarily found that it had been. We must decide whether he did so based on the doctrine of *in loco parentis* — which would be error — or based on a finding of desertion by Tara . . . .

¶30. This Court has never held that "long and continuous absences" and failure to exercise parental rights and fulfill parental responsibilities are the test for a finding of abandonment.

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[9] ***Albright v. Albright***, 437 So. 2d 1003, 1005 (Miss. 1983). ***Albright*** listed certain factors that must be considered in determining the best interest of a child in custody cases. ***Id.***

Abandonment requires an intent to abandon and relinquish all rights, and this Court has steadfastly required a chancellor to find that the natural parent intended

> to forgo all duties and relinquish all parental claims to the child. . . . The test is an objective one: whether under the totality of the circumstances, be they single or multiple, the natural parent has manifested his severance of all ties with the child . . . . [T]he party charging abandonment must prove his charge "by clear and convincing evidence."[10]

Nothing in this record suggests that Tara intended to relinquish her rights and sever all ties with her child.

¶31. A parent's long and continuous absence and failure to exercise parental rights may, or may not, be of sufficient duration – and so lacking in reasonableness under the circumstances – as to justify a finding of abandonment or desertion. But a chancellor *must* make that call – and the law requires that it be made by clear and convincing evidence.[11]

¶32. The chancellor in this case did not make a finding of abandonment or desertion. The majority assumes not only that the chancellor meant to find abandonment or desertion, but also that he meant to do so by clear and convincing evidence. The chancellor never did. I cannot join the majority's dangerous course of speculation. A natural parent's rights are far too important for appellate courts to make assumptions about a chancellor's required findings and the burden of proof.

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[10] ***Ethredge v. Yawn***, 605 So. 2d 761, 764 (Miss. 1992) (*quoting* ***Bryant v. Cameron***, 473 So. 2d 174, 178 (Miss.1985)).

[11] ***Id.***

¶33. Ultimately, the law holds the chancellor responsible for evaluating the quality and quantity of evidence in finding abandonment.[12] That is to say, for instance, that under the facts and circumstances of a particular case, a one-year absence might evince an intent to forgo parental rights, while under the facts and circumstances of another case, it might not.

¶34. I find the law to be crystal clear on this point: A chancellor ***must*** make an on-the-record finding that, under the totality of the facts and circumstances of the case, the natural parent's conduct evinces an intent to relinquish parental rights and abandon or desert the child. Any failure by the chancellor to make this finding – *by clear and convincing evidence* – requires reversal. The chancellor failed to do so in this case, so I would reverse and remand this case for further review.

KING, J., JOINS THIS OPINION.

[12] ***Id***.