**2011-CA-01472**

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

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JIMMY RAY CHISM, JR., APPELLANT

*V.*

ABBY GALE MORRIS CHISM BRIGHT, APPELLEE

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

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# PETITION FOR A WRIT OF CERTIORARI


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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Jimmy Ray Chism, Jr. ("Jim") respectfully petitions for a writ of certiorari to review, reverse and render the decision of the Mississippi Court of Appeals, a decision which affirmed the lower court's decision to terminate his fundamental parental rights. Jim respectfully contends that a Mississippi court cannot permissibly terminate a father's constitutionally-fundamental parental rights when the undisputed testimony (from the mother, stepfather, guardian ad litem, grandparents, sole expert witness, every witness. . .) establishes a good and loving relationship and strong bond between the father and his son, and, no one (not the mother, stepfather, guardian ad litem, grandparents, sole expert witness, or any witness, or the lower court in its ruling) objects to, constrains or seeks to constrain, the father's right to exercise supervised contact with his son after six months of sobriety. The lower court and the court of appeals concluded to the contrary. This Court's precedents, interpreting not only the federal and Mississippi constitutions, but also Miss. Code Ann. § 93-15-103, along with U.S. Supreme Court precedents interpreting the federal constitution, compel the opposite conclusion and reinstatement of Jim's fundamental parental rights to participate as a parent in the upbringing of his son "Johnny" (fictitious name).

## OPINION BELOW

The court of appeals opinion, No. 2011-CA-01472-COA (May 21, 2013) is attached as Appendix A. Petitioner's Motion for Rehearing is attached as Appendix B.

## JURISDICTION

The court of appeals entered its judgment on May 21, 2013, and denied Petitioner's motion for rehearing on November 26, 2013. On December 30, 2013, the Honorable Justice Chandler extended Petitioner's time for filing a petition for certiorari to January 9, 2014. This

Court's jurisdiction rests on MISS. CONST. ART. VI, § 146, MISS. CODE ANN. § 9-3-9, and is proper under MRAP 17(a)(1)-(2).

## REASONS FOR GRANTING THE PETITION

The court of appeals affirmance of the lower court's termination decision conflicts with prior United States Supreme Court decisions, prior Mississippi Supreme Court decisions, and a prior Court of Appeals decision. Moreover, instead of addressing the legal issues briefed on Jim's behalf that manifestly mandate reversal of the termination decision, the court of appeals engaged in a substantive abuse of discretion review (only), disregarding Jim's fundamental constitutional rights which must be reviewed under the governing principles of strict scrutiny. For these and other reasons, this Court should grant the petition, reverse, and render a judgment reinstating Jim's fundamental constitutional rights as a parent.

First, the termination decision disregards the strict scrutiny standard this Court has repeatedly enforced with respect to termination of the fundamental constitutional rights of a parent, *Gunter v. Gray*, 876 So.2d 315, 319, ¶18 (Miss. 2004),[1] the strong presumption that a natural parent should retain those rights. *Lauderdale County Dep't of Human Servs. v. T.H.G.*, 614 So.2d 377, 385 (Miss. 1992), and strict construction of the termination statute under well-established canons of statutory interpretation. For example, under the plain language of the statute, the threshold requirements of subsection 1 of Miss. Code Ann. § 93-15-103 must be met

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[1]*Gunter* also explained that "courts have no right, authority or power to add to th[e] reasons set forth in the statute for termination". Jim respectfully suggests that constitutional case law precedents and interpretations of the termination statute at issue have implicitly recognized that the familiar strict scrutiny test requiring a compelling governmental interest narrowly tailored by the *least restrictive means* must be employed in termination proceedings. *See Rias v. Henderson*, 342 So.2d 737, 739 (Miss. 1977) (acknowledging that statutes affecting fundamental rights are subject to strict scrutiny); *compare Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000) (state statute regulating *mere grandparents' visitation rights* must meet strict scrutiny before interfering with a parent's right to control a child's upbringing). *See also* authorities cited *infra* at pp. 5, 8-9.

before termination may be considered by any court under subsection 3. *LePori v. Welch*, 93 So.3d 66, 68 at ¶5 (Miss. App. 2012). The court of appeals disregarded *LePori* (and numerous other substantial case authorities briefed on Jim's behalf).[2] Subsection 1 of the statute, with the exception of a single disjunctive clause, is otherwise plainly conjunctive, separated by commas, connecting the last triggering clause by a conjunctive "and":

> (1) When a child has **[a]** been removed from the home of its natural parents *and* **[b]** cannot be returned to the home of his natural parents within a reasonable length of time *because* **[i]** returning to the home would be damaging to the child or **[ii]** the parent is unable or unwilling to care for the child, **[c]** relatives are not appropriate or are unavailable, *and* **[d]** when adoption is in the best interest of the child, taking into account whether the adoption is needed to secure a stable placement for the child and the strength of the child's bonds to his natural parents and the effect of future contacts between them, **[e]** the grounds listed in subsections (2) and (3) of this section shall be considered as grounds for the termination of parental rights. The grounds may apply singly or in combination in any given case.

Miss. Code Ann. § 93-15-103(1) (emphasized bracketed [] letters and numbers interlineated) (emphasis supplied). Thus, under a plain reading of the termination statute, clauses [a]-[d] (Jim's interlineated letters) must be met before clause [e], which permits a court to consider subsections 2 and 3 of the statute, can be considered.

Here, the lower court did not find that the threshold requirements of subsection 1 were met, i.e., that Jim was "unable or unwilling to care for [Johnny]" or that Jim's "relatives are not

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[2] *Lepori*, following well-established legal canons of statutory construction, held that "the grounds for termination in section § 93-15-103(3) are to be considered only when the circumstances of section § 93-15-103(1) are met. . .." *Id.* (quoted subsection in footnote 2 omitted); (emphasis supplied). 9 of 10 Court of Appeals' judges concurred with following statement:

> It is clear from the plain language of section 93–15–103—as well as the cases that have applied this section—the concern of the statute is when a parent's rights may be terminated *in order for the child to be adopted*.

*LePori v. Welch*, 93 So.3d 66, 68, ¶6 (Miss. App. 2012) (emphasis in original); *see also In re A.M.A.*, 986 So.2d 999, 1011, ¶25 (Miss. App. 2007) (noting that the youth court found "the threshold requirements of Mississippi Code Annotated section 93-15-103 (1) to be satisfied").

appropriate or are unavailable" to care for Johnny. *See* Miss. Code Ann. § 93-15-103(1). Instead, both the lower court and court of appeals simply disregarded the threshold requirement of subsection 1. Moreover, because the lower court *did find that Jim's mother is appropriate and available to care for Johnny* and *that after six months of sobriety Jim could exercise supervised contact with Johnny*, **JRE028-29**, it effectively ruled that the threshold requirements of subsection 1 were not met, and accordingly was precluded from resorting to subsection 3 to terminate Jim's parental rights.

Furthermore, this was not an adoption proceeding, i.e., the fourth conjunctive clause "when adoption is in the best interest of the child" (the very purpose of the statute according to *Lepori*). It was the Legislature that chose to write subsection 1 in two sentences, the first a 100+-word conjunctive sentence with threshold conditions that must be met before resorting to subsections 2 and 3: it simply cannot be divorced from the statute as a whole as was done by the lower court (and wholly ignored by the court of appeals).

The termination decision also disregards the strong presumption that a natural parent should retain his or her fundamental rights to be a parent. As applied by this Court and other courts, the strong presumption flows from an undergirding principle easily drawn from binding case law: if a parent and child have a good relationship (i.e., not substantially eroded), absent a finding that the parent presents a danger to the child that cannot be ameliorated by a supervised visitation requirement, Mississippi courts have neither the authority nor the power to sever the fundamental constitutional rights created by natural law between a parent and a child.

The undergirding principle can be drawn from a straightforward reading and analysis of the cases of *Matter of Yarber*, 341 So.2d 108 (Miss. 1977), *Mayfield v. Braund*, 217 Miss. 514, 64 So 2d. 713 (Miss. 1953), and *Gunter*. In *Yarber*, the father shot the step-father four times in

front of the children, failed to financially support his children, visited the children once every six months, infrequently called them and sent Christmas presents. In *Mayfield*, the father was sentenced to ten years in the penitentiary, but was a model prisoner. In *Gunter*, the father assaulted the mother and the mother's daughter in front of his children, and was incarcerated at the time of the trial, but there was no proof that any abuse was ever directed towards the children—this Court noted the genuine and strong bond between the father and his children. In each of the foregoing cases this Court reversed the termination decision.

Here, there is not an iota, not a shred, much less clear and convincing evidence, that Jim ever abused his son Johnny. There was a single incident where Jim went to sleep while waiting in the drive-through line at McDonalds with Johnny in the car. With the exception of the McDonald's incident, there is a not an allegation, much less a shred of evidence that Jim otherwise committed any crime, abused alcohol, drugs, or otherwise acted as anything but a loving father in Johnny's presence after his and Abby's divorce. Again, even though the lower court terminated Jim's parental rights on the one hand, it held on the other hand that after six months of sobriety Jim could exercise supervised contact with Johnny. **JRE028-29**.

Moreover, the single, specific basis in the mother's pleading for termination of Jim's parental rights was the alleged substantial erosion of Jim's and Johnny's relationship.**R129**. The proof, however, overwhelmingly and undisputedly demonstrated the strong and genuine bond between Jim and Johnny, and lack of any, much less substantial, erosion. **TR125-26, 370** (Jim); **TR246** (Johnny's mother); **TR270** (Johnny's grandmother); **TR296** (Johnny's grandfather); **TR331-32** (Johnny's aunt); **TR495-496** (guardian ad litem); **TR156** (Johnny's stepfather). Even the GAL admitted on cross examination that Johnny has a very good relationship with Jim, loves

Jim, and that there had been no erosion (much less substantial erosion) of the father-son relationship. **TR495-496** (emphasis supplied).

Furthermore, no matter how many times, or from which direction, one examines the lower court's decision, one cannot find a single finding of fact by clear and convincing evidence as required by this Court and the U.S. Supreme Court. *Ethredge v. Yawn*, 605 So.2d 761, 764 (Miss. 1992) (reversing termination of parental rights); *N.E. v. L.H.*, 761 So.2d 956 (Miss. Ct. App. 2000) (reversing the instant Chancellor for want of clear and convincing evidence and explaining that "review of the record has left us troubled by the lack of supporting evidence"); Miss. Code Ann. § 93-15-109 (clear and convincing proof required); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Generously read, the lower court's decision consists of two pages of procedural history followed by 16 pages of a *scrivener's recitation of the trial testimony*, without a single finding of fact by clear and convincing evidence.**R3-17**. It contains the following conclusory legal finding:

> The court finds that Jimmy Ray Chism, Jr. *exhibits ongoing behavior which would make it impossible to return the* minor *child to* his *care and custody because* he *has a diagnosable condition,* specifically alcohol and drug addition, *unlikely to change within a reasonable time, which makes* him *unable to assume minimally, acceptable care of the child* and constituting ground for termination of his parental rights pursuant to Mississippi Code 93-15-103(3)(e)(i).

**R211** (*italics* indicates the verbatim language of the statute).

Jim again cries foul for a number of reasons. First, this Court has reversed decisions that merely state legal conclusions without providing any supporting legal analysis on much less grounded rights. *Owen v. Owen*, 798 So.2d 394 (Miss. 2001) (Ferguson factors). Second, there is not an iota of medical testimony to support a finding of addiction—the sole medical expert, a neuropsychiatrist, testified that he would not call it addiction and that Jim suffered from a previously undiagnosed condition of Bipolar Disorder. **TR412-413; 407.** The neuropsychiatrist

testified that "**with appropriate medication and therapy**, Mr. Chism is capable of becoming a contributing member of society, and **it will be possible for Mr. Chism to be an effective parent to his son**." **TR5, p.4.** The lower court improperly ordered that a substantial opinion reflected in the neuropsychiatrist's report be redacted such that it does not appear in the record: it is one thing to rule evidence inadmissible, but part of the record for appellate review, but quite another to refuse to permit the redacted proffer to be made part of the record. The redacted portion of the neuropsychiatrist's report (in bold below) stated:

> I would recommend that Mr. Chism receive psychiatric treatment for Bipolar Disorder. **I would further recommend that upon his release from incarceration and initiation of treatment, he be granted supervised visitation with his son. After a full year of sobriety, to include his period of incarceration and participation in treatment for bipolar disorder, I would recommend un-supervised visitation with his son.**

**JRE034**, **TE5**. When one considers that neither the lower court itself (nor any party or witness) had any concerns about Jim having supervised contact with his son after six months of sobriety, the significance of the improperly stricken medical opinion becomes apparent.[3]

Moreover, the lower court's "diagnosis" of alcohol and drug addiction is impermissible under *Lauderdale County Dept. of Human Services v. T.H.G.*, 614 So.2d 377, 384 (Miss. 1992), which held that "[o]nly with the assistance of expert testimony and opinion can the trier of fact reasonably determine whether the 'chronic' nature of the illness places it within the ambit of 'ongoing behavior' as specified in the statute, as well as the likelihood of any change in

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[3]Jim also asks the Court to take judicial notice of the Union County Drug Court proceedings pursuant to M.R.E. 201, which provides that judicial notice "may be taken at any stage of the proceeding". Even before the Rules were adopted, this Court on occasion took judicial notice of other cases that were "interwoven and interdependent". *Euclid-Mississippi v. Western Cas. & Sur. Co.*, 249 Miss. 547, 163 So.2d 676 (Miss. 1964) (taking judicial notice of another pending case) citing *McCandless v. Clark*, 172 Miss. 315, 159 So. 542 (Miss. 1935). In this instance, Jim recently successfully completed the very intense Regimented Inmate Discipline program, receiving high marks, and is back at home.

condition." *Id.* (internal punctuation modified; reversing and remanding); *compare* BLACK'S LAW DICTIONARY at 518 (9th ED. 2004) (defining diagnosis as the "determination of a medical condition (such as a disease) by physical examination or study of its symptoms.").

Third, the termination decision renders the statute unconstitutional as applied and *in futuro* by misconstruing the statutory requirement of "impossibile" to mean "improbable" and misconstruing the statutory phrase "minimally acceptable level of care" to mean "unsupervised visitation". Impossible does not mean improbable—it is plainly in the statute to preserve its constitutionality by requiring strict and literal application of the *least restrictive means test*. Not a single case (except the erroneous ruling in this case) stands for incredulous proposition that a parent must prove his or her ability to exercise unsupervised visitation to defend against a termination proceeding brought on the sole ground of substantial erosion. Stated another way, under the erroneous termination decision a Mississippi court can constitutionally terminate a parent's fundamental constitutional rights if she or he has a mental disorder, substance abuse problems, or other problems which render the parent incapable of exercising visitation without supervision. Such reasoning cannot stand muster; it is contrary to both constitutions, established precedent, the termination statute itself, and natural law.

For example, in the case of *In re V.M.S.*, 938 So.2d 829 (Miss. 2006), the parent had a history of drug abuse, addiction, had been diagnosed with Bipolar Disorder, and was precluded from exercising physical visitation. Similarly, in *J.J. v. Smith*, 31 So.3d 1271 (Miss. Ct. App. 2010), the mother had not seen her child for two years prior to the hearing because of a bipolar disorder and other factors. Both decisions were reversed by this Court and the Court of Appeals, respectively, the former noting that the mother was making rehabilitation efforts (as Jim in the instant case) and efforts to maintain contacts with her daughter by writing her letters and sending

Christmas presents (far less than Jim's contacts with Johnny), the latter explaining that termination of parental rights is not appropriate when a parent is seeking treatment and making attempts to stay in contact with his or her child. *J.J.*, 31 So.3d at 1276, ¶21. The Court of Appeals in *J.J.* made it explicit: although the mother's mental condition affected her ability to care for her child, the Court held that the mother's condition did not make her unable to assume "minimally, acceptable care of the child", **even if that care had to include some type of continuing supervision requirement**. *J.J*, 31 So.3d at 1276, ¶¶20-22. (noting that other permanent alternatives, including continuing supervision of visitation, should be considered).

Finally, it is apparent from the lower court's decision that it unconstitutionally imposed its own view that Johnny would be better off with Abby's 23-year old husband as a father figure than with his natural father, Jim:

> The Court finds that based on all the testimony and evidence presented to the Court, and the Court's due consideration to the Guardian ad litem's independent report and recommendation to the Court and the best interest of the minor child, that **the parental rights of Jimmy Ray Chism, Jr. should be terminated so that a permanent and stable father may assume the role and that the minor child will be eligible for adoption.**

**R211-12** (emphasis supplied). "So that" reveals it all. Courts are not in the business of imposing their views in violation of natural and constitutional law, of imposing their own conclusions in violation of the natural order of the Creator, and deciding that a particular person (rightly or wrongly on the objective facts) would be a better substitute parent than a natural parent. Our courts simply cannot elevate their own perceived wisdom as to *who would be the better father* above the federal and state constitutions and the strict requirements of the termination statute as was done in the instant matter. *See Simpson v. Rast*, 258 So.2d 233 (Miss. 1972) (reversing a lower decision for that very reason and explaining that "natural parents . . .

have the natural right to the nurture, care and custody of their children" which is a "rule of all nature as well as a rule for man").

While Jim may not have been the model citizen, there has never been a dispute about the genuine and loving bond between him and his son Johnny, and, with the exception of the single McDonald's incident, not an iota of proof that Jim has ever placed Johnny in any danger or exposed him to any illegal activity after the divorce. The decision to terminate Jim's rights on the one hand, while holding on the other that he could exercise supervised contact after six months' sobriety, is a manifest abuse of discretion (the only standard of review remotely suggested by the court of appeals) and wholly inconsistent with the broad protection afforded to parental rights. The termination decision disregards case precedents, the termination statute itself and the federal and Mississippi constitutions. Not a single reported parental termination decision can be located in which an undisputed good and loving relationship between the parent and child existed (as it undisputedly does in this case) which could be preserved by supervised visitation, that gave the final death-knell of termination—they have all been reversed by this Court or the Court of Appeals on facts much less compelling than the facts of this case. Jim pleads for relief from this honorable Court, for granting of the writ, reversal of the decision, and a judgment rendering reinstatement of his constitutionally-fundamental parental rights.

Respectfully submitted, this the 9th day of January, 2014.

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Attorneys for Jimmy Ray Chism, Jr., Petitioner

## CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January 2014, I electronically filed the foregoing Petition for Writ of Certiorari with Appendices A and B with the Clerk of the Court using the MEC system which upon information and belief will automatically send notification of such filing to the following:

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

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## CERTIFICATE OF FILING

The undersigned hereby certifies that on January 9, 2014, he electronically filed the foregoing original Petition for Writ of Certiorari with Appendices A and B with the Clerk of the Court using the MEC system:

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

**NO. 2011-CA-01472-COA**

**JIMMY RAY CHISM, JR.** **APPELLANT**

**v.**

**ABBY GALE MORRIS CHISM BRIGHT** **APPELLEE**

| | |
|---|---|
| DATE OF JUDGMENT: | 09/08/2011 |
| TRIAL JUDGE: | HON. C. MICHAEL MALSKI |
| COURT FROM WHICH APPEALED: | UNION COUNTY CHANCERY COURT |
| ATTORNEYS FOR APPELLANT: | JAK MCGEE SMITH |
| | GREGORY M. HUNSUCKER |
| ATTORNEYS FOR APPELLEE: | J. MARK SHELTON |
| | JANA L. DAWSON |
| NATURE OF THE CASE: | CIVIL - DOMESTIC RELATIONS |
| TRIAL COURT DISPOSITION: | TERMINATED APPELLANT'S PARENTAL RIGHTS |
| DISPOSITION: | AFFIRMED - 05/21/2013 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

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

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

1.¶ Jimmy Ray Chism Jr. (Jim) appeals the Union County Chancery Court's judgment terminating his parental rights pursuant to Mississippi Code Annotated section 93-15-103 (Rev. 2004). The chancellor terminated Jim's parental rights upon finding Jim unfit for any form of custody or visitation with his son, Johnny,[1] and upon finding such termination served Johnny's best interest due to Jim's diagnosed condition that was unlikely to change within a reasonable period of time, rendering him unable to assume minimally acceptable care of Johnny.[2] Finding no error, we affirm.

2.¶ On September 3, 2012, the appellant, Abby Gale Morris Chism Bright (Abby) filed a motion to

APPENDIX A

strike portions of Jim's brief, alleging that Jim included facts that occurred after the conclusion of the hearing and thus failed to constitute part of the record on appeal. Jim filed a response, asserting that he wanted this Court to take judicial notice of these particular facts. The facts at issue include (1) Jim's statement in his brief that at the time of the appeal, he was participating in a drug-rehabilitation program and had been released from jail and (2) information taken from redacted portions of the expert witness's report. We note that Jim acknowledged in his brief that he quoted from a redacted portion of the expert witness's report. We thus grant Abby's motion to strike portions of Jim's brief referring to facts not established in the record below. Therefore, none of the facts at issue in the motion to strike were considered upon review or included in this opinion.

**FACTS**

3.¶ The record shows that Abby and Jim married on October 17, 2003. Their marriage produced one child, Johnny, born on March 17, 2004. Jim and Abby divorced on March 10, 2008. Under the divorce decree, Jim and Abby shared joint legal custody of Johnny, with Abby receiving primary physical custody and Jim receiving liberal visitation.

4.¶ On July 25, 2008, Abby filed an emergency petition for modification of custody. The chancellor entered an order modifying visitation, requiring Jim’s mother, Terri Chism, to supervise Jim’s visitation with Johnny. Then, on September 14, 2009, Jim filed a complaint for contempt, seeking to restore unsupervised visitation with Johnny and to require Abby to execute a quitclaim deed on the martial home the chancellor awarded him as part of the initial divorce decree.

5.¶ On October 14, 2009, Abby filed a counter-complaint seeking termination of Jim’s parental rights, alleging a substantial erosion of the relationship between Johnny and Jim caused by Jim’s serious neglect of and lack of concern for Johnny. Abby submitted that she had remarried and her present husband, Charles Bright, desired to adopt Johnny following the successful termination of Jim’s parental rights. Procedurally, Jim’s complaint for contempt, for restoration of his unsupervised vitiation, and for execution of a quitclaim deed were before the chancellor. Additionally, Abby’s counterclaim seeking termination of Jim’s parental rights was also before the chancellor.

6.¶ A trial was held on October 18, 2010, continued on July 12-13, 2011, and concluded on July 14, 2011. The chancellor heard testimony from Jim; Abby; Abby’s husband, Charles; Jim’s father, Dr. Jimmy Chism Sr.; Jim’s mother, Terri; Jim’s sister, Katie Chism; Jim’s girlfriend, Reagan Graham; the guardian ad litem (GAL); and Dr. Samuel Fleming III, a licensed clinical neuropsychologist, who provided the sole expert testimony.

7.¶ Jim and Abby testified regarding a specific incident that occurred on July 5, 2008. The night before that date, Jim and Abby separately attended a party, where they both consumed alcohol. Jim admitted drinking to the point of intoxication, but Abby denied being intoxicated.[3] On the morning of July 5, 2008, Jim woke up and picked up Johnny from his parents' cabin. Jim then borrowed a car from a neighbor so that he could drive Johnny to McDonald's. While they were in the drive-thru line at McDonald's, with the car in park, a witness observed Jim asleep at the wheel and called the police. The police ticketed Jim for public drunkenness, and called Terri to pick Johnny up at McDonald's.

8.¶ Abby testified that in August 2008 she began dating Charles, who was twenty years old at the time. The GAL provided testimony that Abby purposely interfered with Jim's visitation with Johnny.

9.¶ Jim testified that as a result of not being able to see Johnny, he became depressed. Jim tested positive for marijuana use in May 2010, and he admitted that he used cocaine and marijuana in February, March, and April 2010. In May 2010, Jim became intoxicated and broke into his neighbor's house. Afterwards, Jim checked into a treatment facility. Upon release in October 2010, Jim claims he kept in touch with his sponsor, began attending church, and met his current girlfriend, Reagan. Jim admitted that on November 19, 2010, he left Reagan's home and began drinking and ingested numerous Xanax pills. That night, Jim broke into the home of his parents' neighbors. Another neighbor discovered Jim, who was unresponsive, and the neighbor called 911. Jim was arrested and remained incarcerated through the last day of trial. Jim admitted to numerous criminal charges, many of which were filed against him prior to his marriage to Abby and prior to the trial. Jim also admitted to tampering with test samples he provided for a drug screen.

10.¶ While Jim was incarcerated, Dr. Fleming, a licensed neuropsychologist, met with Jim and conducted an interview and an assessment using the Minnesota Multiphasic Personality Inventory, and ultimately diagnosed Jim with bipolar disorder related to Jim's drug and alcohol use. In his report, which was admitted into evidence,[4] Dr. Fleming opined that "with appropriate medication and therapy, [Jim] is capable of becoming a contributing member of society, and it will be possible for [Jim] to be an effective parent to his son." Dr. Fleming also opined that he did not believe Jim had an alcohol addiction, because, to his knowledge, Jim had not "gone through withdrawals."

11.¶ Abby testified that she believed her new husband, Charles, would serve as a steady and better father to Johnny than Jim. Abby stated that she felt it was unhealthy for Johnny that Jim kept "popping in and out of rehab" and "in and out of jail." Abby admitted that no erosion of the relationship between Jim and Johnny had occurred, and testified that even if the chancellor terminated Jim's parental rights,

she would have no problem with Jim visiting Johnny in the presence of Jim's parents, as long as Jim remained sober for six months.

12.¶ The GAL ultimately recommended termination of Jim's parental rights based upon his understanding that termination was proper if it was impossible for Jim to exercise anything more than supervised visitation. The GAL explained that his interpretation of the statutory phrase "minimally acceptable care" was unsupervised visitation.

13.¶ On September 8, 2011, the chancellor entered an opinion and judgment terminating Jim's parental rights and awarding grandparent visitation to Jim's parents.[5] The chancellor found that "a review of Jim's history shows a troubling pattern of substance abuse increasing in intensity, risk, and severity of consequences" and determined that "[Jim] exhibits ongoing behavior which would make it impossible to return the minor child to his care and custody because he has a diagnosable condition, specifically alcohol and drug addiction, unlikely to change within a reasonable time."

14.¶ Jim now appeals, asserting the following assignments of error, which we quote from Jim's appellate brief:

> Whether the lower court erred by terminating Jim's parental rights where the evidence was undisputed that Jim and Johnny had a good relationship, that Jim's visitation with Johnny had never caused any problems for Johnny[,] and that other than possibly a single incident where Jim fell asleep in the drive-thru of a McDonald's, there was no evidence that Jim had ever put Johnny in harm's way[.]
>
> Whether the lower court erred in terminating Jim's parental rights when the moving party, Abby, failed to prove by clear and convincing evidence that it was impossible for Jim and Johnny to have a relationship in which Jim could exercise minimally acceptable care[.]
>
> Whether the lower court erred by basing its decision to terminate Jim's parental rights in part upon Abby's speculative "fear" as to what might happen if Jim's rights were not terminated on the one hand, while Abby freely admitted on the other hand that she would have no objection to Jim spending supervised time with Johnny after certain conditions were met[.]
>
> Whether the lower court erred by finding that Jim, who had an undiagnosed bipolar disorder until after these proceedings began and made very substantial efforts to rehabilitate himself, including inpatient treatment, and is now successfully participating in the Union County Drug Court program, had a diagnosable alcohol and drug addiction, unlikely to change within a reasonable time, in contradiction to the testimony of the sole expert, the neuropsychologist who first diagnosed Jim with bipolar disorder.
>
> Whether the lower court's decision to terminate Jim's parental rights is erroneous as a matter of law[.]

> Whether the lower court's decision to terminate Jim's parental rights is based upon sufficient evidence[.]
>
> Whether the lower court erred by basing its decision to terminate Jim's parental rights in part upon its view that Jim's ex-wife's twenty-three[-]year[-] old husband would make a better father.

For the purposes of clarity, we will combine these issues in our discussion.

**STANDARD OF REVIEW**

15.¶ "Appellate review in a case to terminate parental rights is limited to reviewing the chancellor's findings under the manifest error/substantial credible evidence test." *A.C.W. v. J.C.W.*, 957 So. 2d 1042, 1044 (¶10) (Miss. Ct. App. 2007) (citing *S.N.C. v. J.R.D.*, 755 So. 2d 1077, 1081 (¶11) (Miss. 2000)). "On appeal, the court will ask whether there was 'credible proof sufficient for the trier of fact to find abandonment by a parent based on clear and convincing evidence.'" *Id*. However, we review questions of law under a de novo standard. *Id.*

**DISCUSSION**

16.¶ Jim argues that the chancellor erred in terminating his parental rights. Specifically, he asserts that Abby failed to provide clear and convincing evidence showing that he exhibited ongoing behavior that would make it impossible to return Johnny to Jim's care and custody. Jim also argues that the chancellor's decision to terminate Jim's parental rights lacked support by substantial evidence.

17.¶ Mississippi Code Annotated section 93-15-103(3) lists various grounds for involuntary termination of parental rights. This statute clarifies that any one factor listed can justify the termination of parental rights; the party seeking termination of parental rights must prove "at least one of the grounds enumerated" by clear and convincing evidence. *S.R.B.R. v. Harrison Cnty. Dep't of Human Servs.*, 798 So. 2d 437, 443 (¶24) (Miss. 2001); Miss. Code Ann. § 93-15-103(3); Miss. Code Ann. § 93-15-103(3). Even where the ground for termination is proven by clear and convincing evidence, the chancellor must still consider whether "termination is in the best interests of the child." *S.R.B.R.*, 798 So. 2d at 443 (¶24). A chancellor's finding that "the best interest of the [child] favors termination" must be supported by "substantial evidence." *J.C.N.F. v. Stone Cnty. Dep't of Human Servs.*, 996 So. 2d 762, 767 (¶17) (Miss. 2008).

18.¶ In the present case, the chancellor cited section 93-15-103(3)(e)(i) as the basis for his decision to

terminate Jim's parental rights. Section 93-15-103(3)(e)(i) allows for the termination of parental rights if:

> (e) The parent exhibits ongoing behavior which would make it impossible to return the child to the parent's care and custody:
>
> (i) Because the parent has a diagnosable condition unlikely to change within a reasonable time such as alcohol or drug addiction, severe mental deficiencies or mental illness, or extreme physical incapacitation, which condition makes the parent unable to assume minimally[] acceptable care of the child[.]

19.¶ The chancellor stated that "[a] review of Jim's history shows a troubling pattern of substance abuse increasing in intensity, risk[,] and severity of consequences." The chancellor also found that Jim

> exhibits ongoing behavior which would make it impossible to return [Johnny] to his care and custody because he has a diagnosable condition, specifically alcohol and drug addiction, unlikely to change within a reasonable time which makes him unable to assume minimally[] acceptable care of [Johnny] and constituting grounds for termination of his parental rights.

20.¶ The chancellor concluded:

> [B]ased on the testimony and evidence presented to the court, and the court's due consideration to the guardian ad litem's independent report and recommendation to the court and the best interest of [Johnny], . . . the parental rights of [Jim] should be terminated so that a permanent and stable father may assume the role[,] and . . . [Johnny] will be eligible for adoption.

21.¶ The supreme court has established that "[an appellate court] will affirm a chancellor's findings of fact if there is substantial evidence to support them[.]" *J.C.N.F.*, 996 So. 2d at 765 (¶10) (citation omitted). "This standard of review is highly deferential to the chancellor, who has the opportunity to hear all the testimony and observe the demeanor of all witnesses firsthand." *Id*. at 766 (¶10),

22.¶ In turning to examine the record before us, we again acknowledge that the chancellor heard testimony from Jim; Abby; Abby's husband, Charles; Jim's father, Dr. Chism; Jim's mother, Terri; Jim's sister, Katie; Jim's girlfriend, Reagan; Jonathan Martin, the GAL; and Dr. Fleming, a licensed clinical neuropsychologist.

23.¶ During the hearing, Jim admitted to consuming alcohol frequently during the period September 2008 and on July 15, 2009, and he acknowledged that he has suffered from an alcohol addiction since 2005. Jim testified that he attempted to enlist in the United States Army, but the Army rejected him because of an arrest for driving under the influence. Jim also admitted to several criminal charges, but

he testified that Johnny was not present for any encounter with law enforcement other than on July 5, 2008. Jim testified that he sought alcohol treatment in July 2009, May 2010, and June 2010.

24.¶ However, Jim admitted to testing positive for marijuana after a urine test in May 2010. Jim also testified that he used cocaine and marijuana in February, March, and April 2010, during the course of the present litigation. He further admitted to using drugs and alcohol again in November 2010, and he acknowledged the November 19, 2010 incident where he broke into his next-door neighbor's home, where the neighbors later found him unresponsive. Jim was arrested as a result of the incident, and remained incarcerated during the hearing. Jim testified that Dr. Fleming recently diagnosed him as bipolar, and Jim stated that with proper treatment, he could control himself.

25.¶ In his order, the chancellor acknowledged Jim's testimony that he loves Johnny but that he struggles to stay sober. The chancellor also noted Dr. Chism's testimony that Johnny and Jim "worship" one another, as well as testimony from Jim's sister, mother, and girlfriend expressing their belief that Jim would remain sober and that Jim posed no threat to Johnny.

26.¶ The chancellor's order also reflects that Abby testified that although she frequently drank alcohol to the point of intoxication during her marriage to Jim and took Xanax and Valium during that time, she has used no illegal drugs since her divorce from Jim. The chancellor noted that Abby "expressed sorrow for her past lifestyle." Abby testified that she did not find it to be in Johnny's best interest for him to have visitation with Jim, citing Johnny's bad attitude and bad behavior after he returns from visits with Jim.

27.¶ The chancellor also heard testimony from Dr. Fleming, whom the chancellor described in his order as "a licensed neuropsychologist whose practice includes patients in need of substance abuse treatment." Dr. Fleming opined that Jim possessed no alcohol addiction because he has never suffered withdrawal symptoms. However, as discussed previously, Dr. Fleming met with Jim and performed tests during April and May 2011, after which he diagnosed Jim as bipolar, primarily depressive rather than manic. The chancellor noted that "chronic chemical abuse" was the possible primary cause of Jim's bipolar disorder. Dr. Fleming testified that Jim's parents likely enabled Jim's condition. Dr. Fleming opined, and the chancellor's order reflects, that if Jim followed his treatment plan, "there is no reason to think that Jim could not completely change."

28.¶ The chancellor's order reflects that the GAL[6] fully participated in the hearing. The transcript also reflects that the GAL participated in the examination of all witnesses that offered testimony during the hearing. The GAL testified that he received his appointment as GAL for Johnny on November 20, 2009,

and that in performing his duties, he interviewed the parties on many occasions, and also interviewed their witnesses. The GAL also met with Johnny's court-appointed counselor and Johnny's teacher. The GAL met with the director of the National Council on Alcoholism and Drug Dependence in Tupelo, Mississippi, who administered a substance abuse screening on Jim in May 2010 and accordingly recommended inpatient treatment.

29.¶ The GAL testified that he did not believe it was in Johnny's best interest to have a father figure who was absent for periods of time, and he opined that Jim had failed to make every available effort to see Johnny during the period between July 4, 2008 and October 14, 2009 (the date Abby filed the complaint seeking termination of Jim's parental rights). The GAL noted that Jim "has had an inability to secure and maintain meaningful employment throughout his adult life," and that as a result, "his parents have paid his court-ordered child support on his behalf." The GAL, citing section 93-15-103(3), opined that the record contains "more than clear and convincing evidence" to show that Jim "has a diagnosable condition of alcohol and drug addiction, unlikely to change within a reasonable time, and that condition makes him unable to assume minimal[ly] acceptable care of [Johnny]." The GAL testified that he believed "the statutory requirements have been overwhelmingly met as to grounds for termination," and that Johnny's best interest required "termination be ordered." The GAL clarified that his interpretation of the phrase "minimal acceptable care" in section 93-15-103(3) was that it meant unsupervised visitation.

30.¶ The chancellor also acknowledged the August 18, 2008 order modifying visitation, imposed as a result of the July 5, 2008 incident where Jim drove to McDonald's while intoxicated, with Johnny in the car, and then fell asleep at the drive-thru. The police arrived and arrested Jim in front of Johnny. That order provided that Terri would strictly supervise any visitation between Jim and Johnny. Jim testified at the hearing that "he did not believe [Johnny] was in any danger" during the incident.

31.¶ After hearing the testimony of the parties, witnesses, and GAL, the chancellor ultimately found that pursuant to section 93-15-103(3):

> [Jim] exhibit[ed] ongoing behavior which would make it impossible to return [Johnny] to his care and custody because he has a diagnosable condition, specifically alcohol and drug addiction, unlikely to change within a reasonable time which makes him unable to assume minimally[] acceptable care of [Johnny] and constituting grounds for termination of his parental rights.

The chancellor then ordered the termination of Jim's parental rights.

32.¶ After our review of the record, we find that the testimony of the parties and witnesses, as well as

the GAL's report and recommendation, supports the chancellor's finding that Abby proved "at least one of the grounds enumerated" in section 93-15-103(3) by clear and convincing evidence. *S.R.B.R.*, 798 So. 2d at 443 (¶24). The chancellor further found the termination of Jim's parental rights to be in Johnny's best interest "so that a permanent and stable father may assume the role." *See id*. Upon our review, and acknowledging our standard of review, we accordingly find "credible proof" sufficient to support the chancellor's decision finding that Abby proved one of the grounds enumerated in section 93-15-103(3) for termination of parental rights by clear and convincing evidence. We therefore find no abuse of discretion[7] and affirm the judgment of the chancellor.

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

**LEE, C.J., GRIFFIS, P.J., BARNES, ISHEE, MAXWELL AND FAIR, JJ., CONCUR. IRVING, P.J., AND JAMES, J., DISSENT WITHOUT SEPARATE WRITTEN OPINION. ROBERTS, J., NOT PARTICIPATING.**

1We use fictitious names as necessary to protect the minor child's identity.

2Miss. Code Ann. § 93-15-103(3).

3The transcript reflects that Jim and his sister both testified that they saw Abby intoxicated the night of the party.

4The record reflects that the chancellor required Jim's counsel to redact portions of Dr. Fleming's report.

5The chancellor acknowledged that the GAL recommended that the grandparents' visitation be without restriction. However, the chancellor stated that since "Dr. Chism periodically engaged in [the consumption of marijuana with Jim,] an illegal activity[,]" the court required Terri to be present during any visitation with Johnny. We further note that the chancellor's award of grandparent visitation is not an issue on appeal.

6The chancellor's judgment establishes that the GAL "is a practicing attorney, qualified as a [GAL], and is frequently appointed to serve in that capacity."

7*A.C.W.*, 957 So. 2d at 1044 (¶10) (citation omitted) (manifest-error/substantial-credible evidence standard of appellate review is applied to chancellor's findings in a termination-of-parental rights case).

**2011-CA-01472**

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

Jimmy Ray Chism, Jr., Appellant

v.

Abby Gale Morris Chism Bright, Appellee

*On Appeal from the Chancery Court of Union County, Mississippi*
(Cause No. 2006-0549-73-MM)

Honorable Michael Malski, Chancellor

# APPELLANT'S MOTION FOR REHEARING


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# APPENDIX B

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### CASES



### STATUTE

## SUMMARY OF THE ARGUMENT

The panel's decision markedly deviates from existing Mississippi law. It disregards *Lepori*, rewrites Miss. Code Ann. § 93-15-103 by disregarding the entire legislative-mandated threshold subsection 1, and creates a precedent rendering the statute subject to constitutional attack on Fourteenth Amendment grounds. The decision also markedly deviates from Mississippi case law insofar as it disregards the strict scrutiny standard governing review of fundamental constitutional interests, which requires the compelling interest to be met by a narrowly tailored, and, in this case, the least restrictive means test. Finally, the panel's decision markedly deviates from the entire course of case law and logic as far as these writers can determine: not a single reported case can be found in which an undisputed good and loving relationship existed between the parent and child, which could be preserved by supervised visitation, was subjected to the death-knell of termination.

## ARGUMENT

### I. The panel's decision rewrites Miss. Code Ann. § 93-15-103 in direct conflict with binding Mississippi case law.

The panel's decision (citing a total of 5 case authorities regarding the standard of review only[1]) misapprehended Miss. Code Ann. § 93-15-103(3)(e)(i) in several respects and rewrites Miss. Code Ann. § 93-15-103 in direct conflict with binding Mississippi Supreme Court decisions.

---

[1]With the utmost respect, the panel's decision appears to have failed to address a single legal or factual issue raised by Jim on appeal. Out of respect for the Court's time and for the sake of brevity, rather than re-presenting the lengthy arguments in Jim's principal and reply briefs, Jim makes the contention to preserve this matter for further appellate review should he be denied the relief he is entitled to under binding precedent.

First, the panel's decision unhinges the threshold requirements of subsection 1 from subsection 3—neither the panel nor the lower court addressed the legislative-mandated threshold requirements of subsection 1. Second, the panel's decision disregards not only binding and well-established general judicial canons of statutory construction, *see*, *e.g.*, *Lawson v. Honeywell Intern., Inc.*, 75 So.3d 1024, 1027, ¶7 (Miss. 2011) (citing cases and summarizing canons), but also binding Mississippi Supreme Court precedent specifically holding that Miss. Code Ann. § 93-15-103 is to be strictly construed. *Gunter v. Gray*, 876 So.2d 315, 319, ¶18 (Miss. 2004). Finally, if left standing, the panel's decision would render Miss. Code Ann. § 93-15-103 unconstitutional under the Due Process clause of the United States Constitution.

**A. The panel's decision directly conflicts with *LePori v. Welch*, 93 So.3d 66 (Miss. App. 2012) and rewrites Miss. Code Ann. § 93-15-103 by unhinging subsection 3 from the legislative-mandated threshold requirements of subsection 1.**

Although Jim briefed *LePori v. Welch*, 93 So.3d 66 (Miss. App. 2012) (along with 38 other substantial case authorities) the Court failed to address *Lepori*'s holding that the threshold requirements of subsection 1 of Miss. Code Ann. § 93-15-103 must be met before termination may be considered by any court under subsection 3. *Id.* at 93 So.3d at 68, ¶5. *Lepori*, following well-established legal canons of statutory construction, held that "**the grounds for termination in section § 93-15-103(3) are to be considered only when the circumstances of section § 93-15-103(1) are met**. . .." *Id.* (quoted subsection in footnote 2 omitted); (emphasis supplied); *accord In re A.M.A.*, 986 So.2d 999, 1011, ¶25 (Miss. App. 2007) (explaining that "the threshold requirements of Mississippi Code Annotated section 93-15-103 (1) [were] satisfied").

Here, neither the lower court nor the panel considered subsection 1. Neither decision contains a single citation or reference to the threshold requirements of subsection 1. Instead, both courts erroneously went directly to subsection 3 without mention, much less any analysis, of

the threshold requirements of the governing statute. Stated another way, no court has made a judicial finding under subsection 1 that Jim was "unable or unwilling to care for [Johnny]" or that Jim's "relatives are not appropriate or are unavailable" to care for Johnny. Miss. Code Ann. § 93-15-103(1). Indeed, the lower court specifically found that Jim's parents were appropriate and available to care for Johnny and that after six months of sobriety Jim could exercise supervised contact with Johnny. **JRE028-29**.

Moreover, subsection 1 also requires a pleading for adoption of the child: "*and* when adoption is in the best interest of the child. . .." Miss. Code Ann. § 93-15-103(1). This was not an adoption proceeding. No pleading was ever filed in this case seeking adoption. Abby's entire theory for termination was based upon an allegation of substantial erosion. Abby not only failed to prove her theory, but effectively negated it (and arguably abandoned it) when she testified, along with every other testifying witness, that Jim and Johnny have a very good father-son relationship. **TR246** (Abby); **TR125-26, 370** (Jim); **TR495-496** (GAL); **TR270** (Terri Chism); **TR296** (Dr. Chism); **TR331-32** (Katie Chism); **TR156** (Charles).

**B. The panel's interpretation of Miss. Code Ann. § 93-15-103(3)(e), defining the legislative phrase "minimally acceptable care" to require unsupervised visitation, is inconsistent with binding Mississippi case law implicitly rejecting unsupervised visitation as a condition of maintaining one's fundamental parental rights and directing that supervised visitation be explored as an alternative to termination of one's fundamental parental rights.**

Under the specific termination subsection at issue, Miss. Code Ann. § 93-15-103(3)(e)(i), a lower court must find that a parent exhibits ongoing behavior which would make it "impossible" to return a child to the parent's care and custody for a condition that "makes the parent unable to assume minimally, acceptable care of the child." *Id.* (emphasis supplied). The Mississippi Legislature did not define minimally acceptable care, but common sense and

Mississippi case law dictate that it does not require unsupervised visitation as required by the lower court and affirmed by the panel.

For example, the Mississippi Supreme Court reversed a lower court's decision terminating the parental rights of a parent who had a history of drug abuse, addiction, and diagnosed with Bipolar Disorder, who was precluded from exercising physical visitation. *In re V.M.S.*, 938 So.2d 829 (Miss. 2006). The Court explained that although the mother "may not be fit to be awarded custody, the termination of her parental rights [was] inappropriate and . . . not justified from the record before us and the applicable law." Explaining its conclusion, the Court noted that the mother was making rehabilitation efforts (as Jim in the instant case) and made efforts to maintain contacts with her daughter by writing her letters and sending Christmas presents (far less than Jim's contacts with Johnny).

Similarly, the Court of Appeals has held that minimally acceptable care does not require unsupervised visitation. In *J.J. v. Smith*, 31 So.3d 1271 (Miss. Ct. App. 2010), the mother had not seen her child for two years prior to the hearing because of a bipolar disorder and other factors. *Id*. (reversing and rendering a chancellor's termination of parental rights). During that two-year period, the child's grades improved while under the care of the parties seeking to terminate the mother's parental rights and adopt the child. The Court explained that termination of parental rights is not appropriate when a parent is seeking treatment and making attempts to stay in contact with his or her child. *J.J.*, 31 So.3d at 1276, ¶21. Although the Court agreed that the mother's mental condition affected her ability to care for her child, the Court held that the mother's condition did not make her unable to assume "minimally, acceptable care of the child", **even if that care had to include some type of continuing supervision requirement**. *J.J*, 31

So.3d at 1276, ¶¶20-22. (noting that other permanent alternatives, including continuing supervision of visitation, should be considered).

Here, notwithstanding its termination of Jim's fundamental parental rights, the lower court ruled that after 6 months of sobriety, Jim could have contact with Johnny while at Jim's parents' home.[2] Under *In re V.M.S.* and *J.J.*, if a parent can continue his or her relationship with their child under supervision, a court cannot constitutionally or statutorily terminate that parent's fundamental constitutional rights as a parent. The panel's decision creates precedent under which the fundamental constitutional rights of a parent with a mental illness (whether drug-induced, genetic, or induced by the ravages of war) or alcohol or drug addiction, who is seeking treatment, whom a Chancellor might rightly conclude that his or her visitation should be supervised, can be terminated simply because he or she cannot care for the child without supervision. That conclusion cannot stand statutory or constitutional muster.

---

[2]As Jim noted in his principal brief, there is not simply a lack of medical evidence supporting the Court's finding of a diagnosable condition unlikely to change within a reasonable time, but said conclusion was made notwithstanding uncontroverted medical evidence to the contrary regarding Jim's condition and prognosis. Dr. Fleming, the sole testifying expert, testified extensively,**TR398-450**, testifying in pertinent part that "**with appropriate medication and therapy**, Mr. Chism is capable of becoming a contributing member of society, and **it will be possible for Mr. Chism to be an effective parent to his son**." **TR5, p.4** (emphasis supplied). Dr. Fleming's report recommended as follows:

> I would recommend that Mr. Chism receive psychiatric treatment for Bipolar Disorder. **I would further recommend that upon his release from incarceration and initiation of treatment, he be granted supervised visitation with his son. After a full year of sobriety, to include his period of incarceration and participation in treatment for bipolar disorder, I would recommend un-supervised visitation with his son.**

**JRE034**, **TE5** (the lower court incorrectly required Jim's counsel to redact the portions of Dr. Fleming's recommendations that appear above in bold typeface).

**II. The panel's interpretation of Miss. Code Ann. § 93-15-103(3)(e), defining the legislative phrase "minimally acceptable care" to require unsupervised visitation, is also inconsistent with the strict scrutiny standard applicable to fundamental liberty interests such as parental rights.**

The panel's decision to interpret the legislative phrase "minimally, acceptable care" to require the ability to exercise unsupervised visitation runs afoul of the Mississippi Constitution and the United States Constitution. It cannot be reasonably disputed that both the Mississippi Constitution and the United States Constitution jealously guard the fundamental, substantive due process rights of natural parents and require clear and convincing evidence to overcome the strong presumption in favor of those fundamental rights. *Simpson v. Rast*, 258 So.2d 233 (Miss. 1972) (reversing lower court) (parental rights to nurture and care for children is a "rule of all nature as well as a rule for man"); *McKee v. Flynt*, 630 So.2d 44, 46-47 (Miss. 1993); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625 (1923) (Due Process liberty interest); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388 (1982) (fundamental liberty interest); *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060 (2000) (parental liberty interest one of the oldest of the fundamental liberty interests recognized by the United States Supreme Court.).

One of our sister states, Alabama, recently reversed its own Court of Appeals in a grandparent's visitation case and struck its own statute as violative of fundamental constitutional parental rights. *Ex parte E.R.G.*, 73 So. 3d 634 (Ala. 2011). Therein, the Alabama Supreme Court applied the familiar strict scrutiny standard and reasoned that the State could only interfere with parental rights by showing a compelling interest narrowly tailored to achieve the compelling interest by the least restrictive means. *Id.* at 645, n.9.

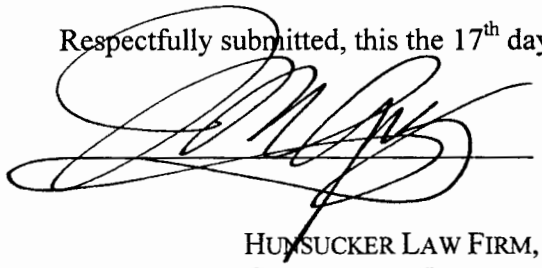
In this state, the Mississippi Supreme Court decision of *In re V.M.S.* and the Mississippi Court of Appeals decision of *J.J.*, *supra*, implicitly recognize that the least restrictive means test must be employed to meaningfully uphold the strong presumption in favor of parental rights

when considering termination of parental rights. Here, the lower court found that Jim could exercise supervised contact after 6 months' sobriety. That, coupled with the undisputed good and loving relationship between Jim and Johnny, ends the inquiry and dictates the reasonable outcome of this case on appeal—reversal and rendering with reinstatement of Jim's fundamental constitutional rights as a parent.

## CONCLUSION

The panel's decision rewrites Mississippi statutory law and disregards Mississippi and Federal constitutional law. The undersigned writers cannot find a single reported parental termination decision in which an undisputed good and loving relationship between the parent and child, which could be preserved by a supervised visitation component, was given the death-knell of termination. With the utmost respect, the panel's decision creates an unwise precedent that will open the floodgates to termination proceedings and subject the Mississippi statute to federal constitutional challenge. Jim respectfully requests that the court reconsider its decision and reverse and render the decision of the lower court by reinstating his parental rights.

Respectfully submitted, this the 17th day of June, 2013.



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## CERTIFICATE OF SERVICE

The undersigned certifies that on June 17, 2013, he forwarded a true and correct copy of the foregoing document by depositing same in the U.S. mail, postage prepaid, addressed to:

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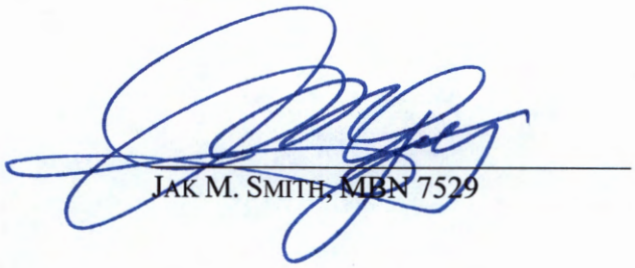

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## CERTIFICATE OF FILING

The undersigned does hereby certify that on June 17, 2013, the foregoing original Appellant's Motion for Rehearing and eleven (11) copies of the same, along with an electronic copy of the same on optical disk in PDF format, were sent by Federal Express for overnight delivery, postage prepaid, for filing to:

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