MISSISSIPPI LAW ON CUSTODY AND VISITATION

These materials set out the basic tests that apply in custody actions between natural parents, between parents and third parties, between third parties, and in actions to modify custody and visitation.

I. Custody actions between natural parents

Custody actions between natural parents are governed by the "best interest of the child" standard. In determining the child's best interest, courts are guided by factors set out in *Albright v. Albright*. In addition, several presumptions are applicable to the parent/parent custody action.

[A] Presumptions

[1] Parental equality. It is presumed that mothers and fathers are equally entitled to custody of their children. In 1983, the Mississippi Supreme Court replaced the maternal preference with a presumption of parental equality. *See Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983); *see also Blevins v. Bardwell*, 784 So. 2d 166, 172-73 (Miss. 2001) (tender years doctrine has continuing validity as a factor for consideration in custody matters). The court's holding was based in part on a Mississippi statute providing that neither parent "has any right paramount to the right of the other concerning custody." *See* MISS. CODE ANN. § 93-13-1 (2004) (parents are "the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare, and education, and the care and management of their estates").

[2] Presumption against custody to violent parent. In 2003, the Mississippi legislature created a rebuttable presumption that custody should not be granted to a parent with a history of family violence. *See* MISS. CODE ANN. § 93-5-24 (2004). A "history" of family violence includes a pattern of violence or one incident resulting in serious bodily injury. If the presumption is raised and not rebutted, custody should be awarded to the nonviolent parent without consideration of the *Albright* factors. The presumption may be rebutted by showing that, notwithstanding the violence, the child's best interests are served by placing custody with the parent accused of violence. Factors that may be considered as rebuttal evidence include adverse circumstances of the nonviolent parent, such as mental illness or substance abuse; the violent parent's completion of a treatment or substance abuse program or parenting class; compliance with a restraining order; and whether the violence has discontinued.

If both parents have a history of violence, the court may (1) award custody to the parent least likely to continue violent behavior; (2) order a treatment program for the custodial parent; and/or (3) award custody to a third party and limit access to the violent parent(s). Courts are directed to order payment of all costs and attorneys' fees by a party who makes frivolous allegations of family violence. *See* MISS. CODE ANN. § 93-5-24 (2004). In a 2008 case, the presumption was applied to award custody to grandparents as against a married couple, based on proof that a husband was abusive to his wife. *J.P. v. S.V.B.*, 987 So. 2d 975 (Miss. 2008).

[3] Presumption in favor of joint custody upon request. If both parents request joint custody, it is presumed that joint custody is in the best interests of the child.

[B] Determining custody: the *Albright* analysis

[1] The factors. In *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983), the Mississippi Supreme Court abandoned the maternal preference, holding that a child's age is but one of several factors for consideration in a custody award. The court stated, "the polestar consideration in child custody cases is the best interest and welfare of the child." The court set out twelve factors for courts to weigh in awarding custody:

- the age, health and sex of a child
- which parent had continuing care of the child prior to separation
- which parent has the best parenting skills
- which has the willingness and capacity to provide primary child care
- the employment responsibilities of both parents
- the physical and mental health and age of parents
- emotional ties of the parent and child
- the parents' moral fitness
- the child's home, school and community record
- the preference of a child at the age of twelve
- stability of the home environment and employment of each parent
- and other relevant factors

The *Albright* factors guide chancellors in reviewing evidence relevant to custody. They are not, as the supreme court has noted, a mathematical formula. Although

chancellors are instructed to weigh parents' relative merits under each factor, a parent who "wins" on more factors is not necessarily entitled to custody. In some cases, one or two factors may control an award. *See Divers v. Divers*, 856 So. 2d 370, 3765 (Miss. Ct. App. 2003) (one factor may weigh so heavily that it controls award). Furthermore, a chancellor's ultimate decision is guided by additional considerations – the credibility of witnesses, the weight of their testimony, and the weighing of evidence capable of more than one interpretation. *Johnson v. Gray*, 859 So. 2d 1006, 1013-14 (Miss. 2003) (chancellor has ultimate discretion to weigh evidence).

The list is not exhaustive – courts may consider other relevant factors. If the presumption against custody to a violent parent is raised and not rebutted, custody should be awarded to the non-violent parent. An *Albright* analysis is not required.

[2] Other relevant factors

[a] Separation of siblings. There is a strong preference in Mississippi law for keeping siblings together unless unusual circumstances justify their separation. *See Sellers v. Sellers*, 638 So. 2d 481, 484 (Miss. 1994) (no separation of siblings in the absence of some unusual and compelling circumstance dictating otherwise). The preference, which predates *Albright*, continues to be recognized as an important consideration in custody decisions. For example, the court of appeals reversed an order separating eleven- and twelve-year-old sisters; one daughter's slightly greater attachment to her mother did not justify their separation. *See Sootin v. Sootin*, 737 So. 2d 1022, 1026-278 (Miss. Ct. App. 1998). However, the preference should be overridden if it would place a child in danger or in adverse circumstances. *See Carson v. Natchez*

Children's Home, 580 So. 2d 1248, 1258 (Miss. 1991) (no error to separate siblings where both had been sexually abused and acted out sexually together).

[b] Parental interference. In several cases, custody has been denied to a parent based on interference with the other parent's relationship with a child. *See Ferguson v. Ferguson*, 639 So. 2d 921, 932 (Miss. 1994) (father belittled mother and encouraged child to disobey her); *see also Mabus v. Mabus,* 890 So. 2d 806, 818 (Miss. 2003) (mother's interference with children's relationship with father one reason supporting award of legal custody to father); *Masino v. Masino,* 829 So. 2d 1267, 1271 (Miss. Ct. App. 2002) (interference and failure to attend parenting classes as ordered negated tender years factor).

In a 2006 case, the court of appeals affirmed modification of custody based on expert testimony that a mother's interference and daughter's attitude toward her father reflected parental alienation syndrome. Two experts testified that the mother's conduct had resulted in the child's alienation from her father. They stated that the girl suffered from depression, showed an excessive dependency on her mother, and exhibited a "shallow" animosity toward her father and his relatives without being able to explain why – conduct described as consistent with parental alienation syndrome. The case was the first to discuss the syndrome in detail. *See Ellis v. Ellis,* 952 So. 2d 982, 997 (Miss. Ct. App. 2006).

II. Joint custody

Parents may also be awarded joint legal or joint physical custody, or both. Joint legal custody gives the parties shared decision-making authority with regard to a child's health, education, and welfare. Parents who share joint legal custody are obligated by

statute to exchange information related to the child and to confer with each other in making decisions. MISS. CODE ANN. § 93-5-24 (5)(e) (2004). Parents must confer regarding a child's education, activities, medical and psychological care, religious training, discipline, and summer activities.

Joint physical custody allows each parent to have significant, although not necessarily equal, time with a child. Joint physical custody may be structured in a variety of ways. Time with a child may be divided in any number of ways -- on a weekly basis or by alternating weeks, months, half-years, or years. *See Elliott v. Elliott*, 877 So. 2d 450, 452 (Miss. Ct. App. 2003) (custody to mother three days a week and twenty-four weekends; father two days a week and twenty-eight weekends); *Mercier v. Mercier*, 717 So. 2d 304, 305 (Miss. 1998) (alternating every other week); *Morrow v. Morrow*, 591 So. 2d 829, 830 (Miss. 1991) (alternating custody of school age child every two years); *Daniel v. Daniel*, 770 So. 2d 562, 567 (Miss. Ct. App. 2000) (alternating every two weeks); *McKree v. McKree*, 723 So. 2d 1217, 1218 (Miss. Ct. App. 1998) (alternating months with reasonable visitation during month).

As in any custody action, a court should consider the *Albright* factors in making an award of joint custody. No precise test has been articulated to determine when an award of joint rather than sole custody is appropriate. Certainly, however, both parents should be fit custodians for joint custody to be awarded. And ability to cooperate is an important consideration in an award of joint custody. Proximity is also important. As a general rule, joint physical custody is feasible only if the parties live in close proximity. However, parents may share joint legal custody at a distance. The importance of

proximity in joint physical custody is reflected in the fact that appellate courts routinely affirm modification of joint physical custody when one parent moves.

III. Modification of custody

Often, a guardian ad litem is appointed in an action to modify an existing custody order. It is important to understand the different tests applicable to modification actions. There may also be important jurisdictional issues that arise in custody modification actions**.**

[A] The traditional test: Material change in circumstances

The traditional test for modification of custody requires a finding that a material change of circumstances has occurred in the custodial parent's home since the date of the decree, that the change adversely affects the child, and that modification is in the child's best interests, as determined by application of the *Albright* factors. A court may find a material change in circumstances but conclude that a change in custody is not warranted under the *Albright* factors. *McBride v. Cook*, 858 So. 2d 160, 163 (Miss. Ct. App. 2003).

The first prong of the test – a material change in circumstances -- requires proof of a serious material change in the home of the custodial parent. A change in the noncustodial parent's home does not satisfy the test. Whether a material change has occurred depends on the totality of circumstances. Events which would not, alone, be a sufficient material change may in combination provide a basis for modifying custody. *Hill v. Hill*, 942 So. 2d 207, 210-11 (Miss. Ct. App. 2006); *Duke v. Elmore*, 956 So. 2d 244 (Miss. Ct. App. 2006).

In some cases, custody may be modified even if the adverse conduct or circumstance has ended. For example, a chancellor properly modified custody of a two-

year-old based on her mother's drug use, even though she had been drug-free for some months at the time of the hearing. *McSwain v. McSwain*, 943 So. 2d 1288, 1293 (Miss. 2006) (mother did not complete treatment program and still associated with former drug partner).

Even if a material change is shown, custody should not, ordinarily, be modified unless the change adversely affects the child. A court erred in modifying custody based on a mother's cohabitation that did not adversely affect her children. *Forsythe v. Akers*, 768 So. 2d 943, 948 (Miss. Ct. App. 2000). However, if circumstances in the custodial parent's home create a strong likelihood that the child will be damaged, a court may change custody without a showing that adverse effects have already occurred. The supreme court has stated that "where a child living in a custodial environment clearly adverse to the child's best interest, somehow appears to remain unscarred by his or her surroundings, the chancellor is not precluded from removing the child for placement in a healthier environment." *Riley v. Doerner*, 677 So. 2d 740, 744 (Miss. 1996); *cf. Duke v. Elmore*, 956 So. 2d 244, 250 (Miss. Ct. App. 2006) (*Riley* does not require the presence of dangerous or illegal behavior such as drug use be shown in order to find an adverse environment).

[B] Child's choice

A child's preference to shift custody does not in itself constitute an adverse material change in circumstances. The court of appeals reversed a modification based primarily on a child's wishes: "While a child's expression of preference must be afforded weight by the chancellor, this Court is unaware that it has ever held that such an expression, supported by nothing more, constitutes the type of adverse material change in

circumstance that would warrant a custody modification." The court did note that a child's preference would support modification if the child "could articulate compelling reasons" to support the request. *Best v. Hinton*, 838 So. 2d 306, 308 (Miss. Ct. App. 2002).

[C] Alternate test for modification: Ongoing adverse circumstances

The traditional test for modification usually achieves a satisfactory balance between protecting children and ensuring the stability of custodial arrangements. However, it hampers courts' ability to protect children in the unfortunate situation in which both parents were questionably fit custodians at the time of divorce. In 1996, the supreme court in *Riley v. Doerner* addressed this deficiency. The court held that custody may be modified when the environment provided by a custodial parent is adverse to a child's best interests and the noncustodial parent has changed positively and can provide a more suitable home. *See Riley v. Doerner*, 677 So. 2d 740, 744 (Miss. 1996) ("A child's resilience and ability to cope with difficult circumstances should not serve to shackle the child to an unhealthy home, especially when a healthier one beckons") (evidence also showed multiple moves, sporadic employment, and several live in partners). The alternate "adverse environment" test applies only when a child is living in genuinely adverse circumstances. The test is not a vehicle for parents to relitigate the *Albright* factors. *Hoggatt v. Hoggatt*, 796 So. 2d 273, 274 (Miss. Ct. App. 2001).

[D) Modification of joint custody

Modification of joint custody does not require proof that one of the parents is providing inadequate care. The triggering event is more likely to be a change that makes the arrangement unworkable, such as one parent's relocation or serious parental conflict.

Upon finding a material change, a court is to apply the *Albright* factors to determine which parent should have primary custody. *McKree v. McKree*, 723 So. 2d 1217, 1220 (Miss. Ct. App. 1998). As with modification of sole custody, joint custody may be modified based only on events occurring since the original decree. *Lackey v. Fuller*, 755 So. 2d 1083, 1086-87 (Miss. 2000).

[E] Modification of visitation

To modify a visitation order, a petitioner must prove that the visitation order is not working and that it is in the child's best interest to modify the order. *See Christian v. Wheat*, 876 So. 2d 341, 345 (Miss. 2004); *Shepherd v. Shepherd*, 769 So. 2d 242, 245 (Miss. Ct. App. 2000). It is not necessary to prove a material change in circumstances. *Sistrunck v. McKenzie*, 455 So. 2d 768, 769 (Miss. 1984) (announcing rule); *see also Suess v. Suess*, 718 1126 (Miss. Ct. App. 1998) (reversing chancellor's order denying change of custody because no material change).

[F] Military service

A new custody provision was added to the code in 2008 to address custody and visitation when a parent is deployed or transferred. If the noncustodial parent seeks a change of custody, the deployment and disruption to the child's schedule shall not be factors in determining whether a material change of circumstances has occurred. A temporary order of custody for the deployment period shall end no later than ten days after the custodial parent returns. This does not restrict the court's ability to conduct emergency hearings based on allegations of harm to the child. MISS. CODE ANN. § 93-5-34. If a noncustodial parent is deployed, the court may delegate that parent's visitation rights to a family member with a close relationship to the child. MISS. CODE ANN. § 93-5-

34(4).

IV. CUSTODY BETWEEN NATURAL PARENTS AND THIRD PARTIES

In a custody dispute between a parent and a third party, there is a presumption in favor of the natural parent as custodian. The traditional test for awarding custody to a third party requires a showing of parental unfitness. However, recent decisions create several exceptions to the presumption.

[A] Presumption in favor of natural parents

Biological parents are presumed to be the best custodians of their children. When a third party seeks custody, the best interest/*Albright* analysis does not apply. As a general rule, a third party must prove that a parent has abandoned the child, is unfit to have custody, or has engaged in conduct so immoral as to be detrimental to the child. *See Sellers v. Sellers*, 638 So. 2d 481, 484 (Miss. 1994); *Carter v. Taylor*, 611 So. 2d 874, 876 (Miss. 1992). The court of appeals emphasized that because of the strong presumption in favor of natural parents, third-party custody should be granted only when there is a clear showing "that the natural parent has relinquished his parental rights, that he has no meaningful relationship with his children, or that the parent's conduct is clearly detrimental to his children. *In re Brown*, 902 So. 2d 604 (Miss. Ct. App. 2004).

[B] Unfitness

To award custody to a third party based on parental unfitness, a court must find that the parent engaged in conduct presenting a genuine serious danger to the child. Proof that a parent was occasionally intoxicated or had a past history of drug use was not sufficient to justify third party custody. *See Sellers v. Sellers*, 638 So. 2d 481 (Miss. 1994) (use of marijuana discontinued); *Westbrook v. Oglesbee*, 606 So. 2d 1142, 1145

(Miss Ct. App. 2003). A parent who exhibits some undesirable behavior or lacks exemplary parenting skills is not necessarily unfit. Awarding custody to grandparents based on a finding that a father was "unprepared" to take custody as opposed to "unfit" was reversible error. *See Sellers v. Sellers*, 638 So. 2d 481 (Miss. 1994) (use of marijuana discontinued).

[C] Abandonment

Third party custody may also be awarded upon proof that a natural parent abandoned a child. Abandonment is "any course of conduct on the part of a parent evincing a settled purpose to forgo all duties and relinquish all parental claims to the child." It may consist of a single act or a series of actions. Failure to provide financial support for a child is not, in itself, abandonment. Abandonment must be proven by clear and convincing evidence. *Ethredge v. Yawn*, 605 So. 2d 761, 765 (Miss. 1992). In a case of first impression, the court of appeals held in 2011 that when a parent has been found to be unfit and custody awarded to a third party, the natural parent presumption no longer applies. In order to regain custody, the parent must prove a material change in circumstances in the home of the child's custodian. *Adams v. Johnson*, 33 So. 2d 551 (Miss. Ct. App. 2010).

[D] Exceptions

The Mississippi appellate courts have created three exceptions to the traditional rule to provide chancellors with some discretion under these circumstances.

[1] Constructive abandonment. First, a parent's long absence from a child's daily life may be considered constructive abandonment. In 2002, the court of appeals held that the natural parent presumption does not apply when a parent "constructively

abandons" a child. The court of appeals defined constructive abandonment as "voluntary abandonment of parental responsibility" and removal from "active participation in a child's life" for so long that the effect is the same as actual abandonment. A parent who has constructively abandoned a child may regain custody only by showing by clear and convincing evidence that it is in the child's best interests. *Hill v. Mitchell*, 818 So. 2d 1221, 1226 (Miss. Ct. App. 2002).

[2] Relinquishment of legal custody. The Mississippi Supreme Court held in 2000 that the natural parent presumption does not apply when parents "voluntarily relinquish custody of a minor child, through a court of competent jurisdiction." A mother sought to regain custody of children after she and her husband relinquished custody to his parents. The court held that parents who voluntarily relinquish legal custody of their children can reclaim custody only upon showing by clear and convincing evidence that the change in custody is in the child's best interests. *Grant v. Martin*, 757 So. 2d 264, 266 (Miss. 2000).

[3] Desertion. In a 2010 case, the court of appeals appeared to recognize a new circumstance in which a parent forfeits the natural parent presumption – by deserting a child. Desertion may involve behavior different from abandonment or constructive abandonment. If a parent is found by clear and convincing evidence to have deserted a child, the court should determine the child's best interest under *Albright*. Applying this test, a father who allowed his daughter to remain with her grandmother for four years, visiting sporadically, deserted her. Vaughn v. Vaughn, 36 So. 3d 1261, 1265-66 (Miss. 2010).

[4] Third parties in loco parentis. The in loco parentis doctrine (see below) may allow some third parties to be treated as natural parents for purposes of custody disputes. The doctrine has been applied to men who believed themselves to to be the father of a child. However, the court of appeals has declined to extend the doctrine to a grandmother who cared for a child since her birth.

V. Custody between third parties

Custody is occasionally litigated between two parties neither of whom are the child's natural parents. In an action between third parties, the *Albright* factors apply to determine which of the parties should have custody. *See Worley v. Jackson*, 595 So. 2d 853, 855 (Miss. 1992) (custody dispute between maternal and paternal grandparents after mother was imprisoned for killing child's father); *Loomis v. Bugg*, 872 So. 2d 694, 697 (Miss. Ct. App. 2004).

VI. The new paternity cases

The accuracy and ease of DNA testing to prove paternity has produced a conflict with no easy resolution. Men who have assumed – sometimes for years – that a child is their biological offspring are learning that the child is not, in fact, theirs in the traditional sense. Often, the issue arises at divorce, when a divorcing mother alleges that one of the children of the marriage was fathered by another. In some cases, the presumed father is fighting to maintain the relationship with the child; in others, he may seek to end a relationship with the child, including child support. Until recently, Mississippi cases followed biology. A man who was not the biological father, and who had not adopted a child, was not the child's father. A man who was genetically unrelated to a child could not be required to pay child support.

Then, in a 2004 case, the Supreme Court adopted a new approach to this scenario, holding that a man who has acted in loco parentis to a child he believed to be his may have rights with regard to the child and may have obligations of support. The case involved a husband who believed himself to be the father of a child born prior to his marriage but while he was living with his wife-to-be. First, the court rejected a best interest defense to a paternity action, holding that paternity actions are "about biology." Second, the court held that determination of paternity in another does not require termination of the legal father's rights: "Merely because another man was determined to be the minor child's biological father does not automatically negate the father-daughter relationship." The court noted that under the doctrine of in loco parentis, a person who assumes the status and obligations of a parent may be ordered to pay child support and may be awarded custody or visitation. Third, the court suggested that legal recognition of the biological father did not necessarily require that he be accorded visitation or custody rights with regard to the child. The court remanded the case for a determination of custody and support, noting that these issues should be determined in a divorce or separate custody action, rather than in a paternity action. The court instructed the chancellor to appoint a guardian ad litem for the child and to make a determination of the child's best interest, using the *Albright* factors. *Griffith v. Pell*, 881 So. 2d 184 (Miss. 2004).

In a 2006 case, the Supreme Court applied the *in loco parentis* doctrine to affirm a chancellor's award of custody to a divorcing husband, even though genetic testing showed that he was not the child's father. The chancellor relied on cases from other states, holding that "equitable fatherhood" may be established if the parties were married

when the child was conceived and born, the man believed that he was the child's father, he established an actual father-child relationship, and equitable fatherhood by judicial order is in the child's best interests. The court affirmed the custody award, based on *in loco parentis* rather than the equitable parent doctrine. Justice Cobb concurred, but urged the court to consider substituting the equitable parent doctrine for the *in loco parentis* doctrine. *J.P.M. v. T.D.M.*, 932 So. 2d 760, 785 (Miss. 2006) (en banc). In another 2006 case, the Supreme Court affirmed a chancellor's order of genetic testing, rejecting the legal father's argument that the chancellor should have held a best interest hearing first. The paternity suit was filed by the appellant's cousin, who claimed that one of the defendant's four children was possibly his child. The legal father objected to genetic testing, arguing that the court should have conducted a hearing to determine whether it was in the child's best interest to proceed. The Supreme Court looked to the mandatory language of the paternity statute, which provides that, upon a motion by any party, the court "shall" order genetic test. The wife was pregnant when the couple married, and for the five years of their marriage and a year of the divorce proceedings, the husband believed himself to be the child's father. Just before trial, the mother revealed to her attorney that the child was not her husband's. *Thoms v. Thoms*, 928 So. 2d 852, 854-55 (Miss. 2006).

In 2011, the legislature amended the paternity statutes, providing nonmarital fathers with more limited rights to disestablish paternity than under the 2007 version. A legal father may file a petition to disestablish his paternity. In order to grant relief, the court must find that evidence of non-paternity came to the petitioner's attention after the paternity determination, that the testing was properly conducted, and that the petitioner

did not prevent the biological father from asserting his rights. Paternity may not be set aside if the petitioner (1) married or lived with the mother and voluntarily assumed the parental obligation knowing that he was not the child's father; (2) signed the birth certificate or executed an acknowledgement of paternity and did not withdraw consent within one year, unless he can prove fraud, duress, or mistake of fact; (3) signed a stipulated court-approved agreement of paternity; (4) was named father or ordered to pay support after declining genetic testing; or (5) failed to appear for a scheduled genetic testing required by court order. MISS. CODE ANN. § 93-9-10(b)(i).

VII. Visitation

[A] Standard visitation

A noncustodial parent has a right to continued significant contact with a child under circumstances that foster a close relationship. The Mississippi Supreme Court stated the test for awarding visitation as follows: "The best interests of the minor child should be the paramount consideration . . . while respecting the rights of the non-custodial parent and the objective of creating an environment conducive to developing as close and loving a relationship as possible between parent and child." *Chalk v. Lentz*, 744 So. 2d 789, 792 (Miss. Ct. App. 1999); *see Dunn v. Dunn*, 609 So. 2d 1277, 1286 (Miss.1992). Except in unusual circumstances, a noncustodial parent is entitled to unrestricted standard or liberal visitation. *Cox v. Moulds*, 490 So. 2d 866, 870 (Miss. 1986) (error to restrict father's overnight visitation with daughter because she had to sleep on the couch). The Mississippi Supreme Court defines standard visitation as two weekends a month until Sunday afternoon and at least five weeks of summer visitation,

see Messer v. Messer, 850 So. 2d 161, 167 (Miss. Ct. App. 2003), plus some holiday visitation, *see Fields v. Fields*, 830 So. 2d 1266, 1269 (Miss. Ct. App. 2002).

[**B] Restricted visitation**

However, visitation can, and should, be restricted when a parent's behavior or home environment places the child in danger. Restriction on visitation has been held appropriate based on

- a parent's abusive behavior toward the child
- a parent's history of spousal violence
- abuse by someone in the parent's household or visiting the parent
- drug or alcohol abuse
- a parent's mental illness
- emotional or verbal abuse
- danger of kidnapping
- sexual conduct that has an adverse impact on the child

[C] Grandparent and other third-party visitation

The Mississippi statute permits grandparent visitation in two situations. First, when a parent dies, loses custody, or loses parental rights, his or her parents may petition for visitation [Type 1]. Visitation may be granted if the court finds that it is in the child's best interests. Second, grandparents may petition for visitation if (1) the grandparent had a viable relationship with the child (either grandparent provided some financial support for at least six months and had frequent visitation, including overnights, for at least one year); (2) the parent or custodian unreasonably denied visitation; and (3) visitation would be in the child's best interests [Type 2]. MISS. CODE ANN. § 93-16-3(2)-(3) (2004); *see*

Dearman v. Dearman, 811 So. 2d 308, 314-15 (Miss. Ct. App. 2001) (upholding visitation to grandparents who had custody for six years, based on a viable relationship with child; no express finding that parent unreasonably denied visitation).

In addition to finding that a grandparent meets the statutory requirements set out above, a court must consider the factors in *Martin v. Coop* to determine whether visitation is in a child's best interest. These include (1) potential disruption in the child's life; (2) suitability of the grandparents' home; (3) the child's age; (4) the age and physical and mental health of the grandparents; (5) the emotional ties between grandparent and child; (6) the grandparents' moral fitness; (7) physical distance from the parents' home; (8) any undermining of the parents' discipline; (9) the grandparents' employment responsibilities; and (10) the grandparents' willingness not to interfere with the parents' rearing of the child. *See Martin v. Coop*, 693 So. 2d 912, 916 (Miss. 1997). Visitation awards and denials have been reversed because a chancellor did not consider these factors in determining grandparent visitation. *See Townes v. Manyfield*, 883 So. 2d 93, 97 (Miss. 2004); *T.T.W. v. C.C.*, 839 So. 2d 501, 505 (Miss. 2003) (reversing denial of visitation for failure to consider factors); *Morgan v. West*, 812 So. 2d 987, 992 (Miss. 2002) (reversing award for failure to consider the amount of potential disruption, the suitability of the grandparent's home and their moral fitness, the distance from the child's home, and whether the grandparent undermined the parent's discipline or interfered with their rearing of the child); *Givens v. Nicholson*, 878 So. 2d 1073 (Miss. Ct. App. 2004). ; *T.T.W. v. C.C.*, 839 501 (Miss. 2003) (reversing denial of visitation for failure to consider factors)

Except in unusual circumstances, grandparent visitation should not be not the equivalent of noncustodial parent visitation. The supreme court held that grandparent visitation every other weekend, four weeks in the summer, and various holidays was excessive. *See Martin v. Coop*, 693 So. 2d 912, 916 (Miss. 1997) ("natural grandparents do not have a right to visit their grandchildren that is as comprehensive as the rights of a parent").

The Mississippi Supreme Court has refused to judicially extend visitation to third parties other than grandparents. The supreme court rejected a sister's petition for visitation with her half-brother after their mother died. The court held that the creation of visitation rights is a legislative function. *See Scruggs v. Saterfiel*, 693 So. 2d 924, 926 (Miss. 1997).

VIII. Restrictions on custodial parent

A court may impose restrictions or conditions on either parent to prevent harm to a child. Courts have ordered parents to refrain from drinking alcohol in a child's presence and ordered parents to take monthly drug tests. *See Turner v. Turner*, 824 So. 2d 652, 657 (Miss. Ct. App. 2002); *McLemore v. McLemore*, 762 So. 2d 316, 322 (Miss. 2000). In one case, a chancellor concerned about a custodial parent's home environment ordered the Department of Human Services to make periodic unannounced visits. *Marascalco v. Marascalco*, 445 So. 2d 1380, 1382 (Miss. 1984) (concern over mother's serious drinking problem).

Restrictions may include ordering supervised visitation as well as ordering a parent to enter counseling or a treatment program. Parents may be ordered to refrain from

using drugs or alcohol, to submit to drug tests, or to refrain from visitation in the presence of certain third parties. A court may order a parent's time with a child supervised by a responsible third party or agency, or, in extreme cases, suspend visitation altogether. A court may also restrict visitation in the presence of others who pose a genuine threat to a child. Courts may also order that all parties undergo physical or psychological examinations in connection with custody cases. A parent with a history of violence may be ordered to attend counseling sessions as a condition of visitation or to refrain from alcohol or drug consumption for twenty-four hours prior to visitation.