CUSTODY AND VISITATION

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Materials include cases through December 31, 2018

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*, 437 So. 2d 1003, 1005 (Miss. 1983). In addition, several presumptions are applicable to the parent/parent custody action.

[A] 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 (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").

The court of appeals reaffirmed the rule of equality in 2018. A chancellor properly awarded custody of a three-year-old girl and two-year-old boy to their unmarried father. The chancellor found that the age and the sex of the children was a neutral factor. The court of appeals agreed, noting that "Mississippi law does not support the wife's argument that a child's mother, as opposed to the father, is the best caregiver by default." *Sellers v. Rinderer*, 248 So. 3d 930 (Miss. Ct. App. 2018).

[B] The *Albright* factors

[1] Child's age, health and sex

At one time, mothers were presumed to be the best custodians of girls and young children. Today, a court may not base custody solely on a child's age and sex or on a presumption that mothers are superior custodians. *See Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). The age of a child weighs in favor of a mother only in a child's early years. In several cases, the appellate courts have stated that a child of four is no longer of tender years. *See Lee v. Lee*, 798 So. 2d 1284, 1289 (Miss. 2001); *Woodham v. Woodham*, 17 So. 3d 153, 156 (Miss. Ct. App. 2009) (doctrine not applicable to a four-

year-old girl who was bottle fed, equally cared for by both parents, and received attention from her paternal grandmother and great-grandmother.); s*ee also Price v. McBeath*, 989 So. 2d 444, 454 (Miss. Ct. App. 2008) (doctrine not applicable to a child of five).

[2] Continuing care of the child prior to separation

In *Albright,* the supreme court directed chancellors to determine which parent had "the continuity of care *prior to the separation*." In recent cases, however, custody has been awarded to a parent based in part on care during separation. The court of appeals held that the factor should not have favored a father who provided more care prior to separation. Instead, the factor favored the mother who had continuous care of the children during the parties' eighteen-month separation – the father did not seek to take custody or provide support during that period**.** *Watts v. Watts*, 854 So. 2d 11, 13 (Miss. Ct. App. 2003) (father did not seek custody or provide financial support for year-and-a-half separation). In another case, the court of appeals upheld a chancellor's award of custody to a father primarily because he was the children's caretaker during separation. In affirming the award, the court stated that periods of caretaking both prior to and after separation should be considered. *See Caswell v. Caswell*, 763 So. 2d 890, 893 (Miss. Ct. App. 2000). And in a 2009 case, the court of appeals awarded custody to a father who had temporary custody, even though mother was the primary caregiver for several years during the marriage. The court stated that caregiving after separation should be given equal consideration. *Montgomery v. Montgomery,* 20 So. 3d 39, 41-45 (Miss. Ct. App. 2009) (during the fifteen months that the father had temporary physical custody of the children, the mother moved three times).

[3] Parenting skills

The factor of parenting skills encompasses a parent's ability to provide physical care, emotional support, discipline, and guidance. Parents may be rated favorably on parenting skills based on a showing that they are attentive to a child's personal hygiene and medical needs, engage the child in appropriate social and extracurricular activities, are a good disciplinarian, and spend their free time with the child. Attention to a child's special needs is important.

[4] Stability of the home environment

Attributes that contribute to a positive rating on this factor include household routines and activities, location, household composition and the stability of those relationships, personal habits of the parent and other household members, and proximity to extended family. In assessing the suitability of a parent's home, courts have considered whether the parent provides balanced meals and ensures proper hygiene. *See Brumfield v. Brumfield*, 49 So. 3d 138, 146 (Miss. Ct. App. 2010) (witnesses characterized mother's home as "messy" and "nasty"). Courts have also examined the extent of family religious and social activities. *See Montgomery v. Montgomery*, 20 So. 3d 39, 46 (Miss. Ct. App. 2009) (father who lived near extended family, took the children to church, and involved them in social activities, favored over a mother who moved several times, did not take the

children to church, and lived in a two-bedroom mobile home); *Hardin v. Hardin*, 172 So. 3d 748 (Miss. Ct. App. 2011) (factor favored father who remained in the same job and at the same home, where the child had a regular routine and attended church, over mother who had moved several times and had three jobs in nineteen months); *Carter v. Escovedo*, 175 So. 3d 583, 588 (Miss. Ct. App. 2015) (custody to father who held the same job and lived in the same home since child's birth; mother changed jobs four times and lived in four different locations); *Gateley v. Gateley*, 158 So. 3d 296, 301 (Miss. 2015) (custody to father who lived in the marital home; mother had moved twice and was living with her boyfriend and his two children); *cf. White v. White*, 93 So. 3d 33, 36 (Miss. Ct. App. 2011) (stability of employment and home favored father who remained in the marital home, while mother moved to Tennessee and was unemployed); *but cf. Speights v. Speights*, 126 So. 3d 76, 80 (Miss. Ct. App. 2013) (three moves did not weigh against mother; children remained in same school system).

[5] Emotional ties of parent and child

In most cases, courts find that children have close emotional ties to both parents. In some cases, however, the parent-child bond plays a significant role in a custody decision. For example, the close bond between a father and son was a primary reason for awarding custody to the father. *See Torrence v. Moore*, 455 So. 2d 778, 780 (Miss. 1984). However, the factor did not weigh in favor of a mother when her child's attachment was based on her attempt to alienate the child from her father. *Wilson v. Wilson*, 70 So. 3d 551, 568 (Miss. Ct. App. 2012) (neither party was favored on emotional ties; girls' attachment to their mother was a result of the mother's attempts to alienate them from their father); *see also Smith v. Smith*, 206 So. 3d 502, 514 (Miss. 2016) (finding that mother's conduct prevented husband from developing close relationship with son).

[6] Home, school, and community environment of child

Under this factor, parents have been rated favorably for involvement in a child's activities and for ensuring prompt regular school attendance. A chancellor properly awarded custody to a father based on evidence that his daughters attended school more regularly and were better behaved in his custody. *See Myers v. Myers*, 814 So. 2d 833, 835 (Miss. Ct. App. 2002). The fact that one parent's home is near friends and extended family is sometimes considered under this factor, as well as under the "stability of home environment" factor. *See Jones v. Jones*, 19 So. 3d 775, 779 (Miss. Ct. App. 2009) (father who remained in marital home, near his parents, favored).

[7] Moral fitness

Until twenty years ago, a parent who committed adultery was considered unfit and not entitled to custody except in unusual circumstances. Similarly, it was not uncommon for a court to modify custody based on a parent's post-divorce sexual conduct or cohabitation. In 1985, the Mississippi Supreme Court held that custody decisions may not be based on sexual behavior alone. Instead, a parent's sexual conduct should be considered under the *Albright* factor of moral fitness along with other relevant factors.

Carr v. Carr, 480 So. 2d 1120, 1123 (Miss. 1985). Today, a parent's adultery, cohabitation, or other sexual conduct is not in itself a reason to deny custody unless the conduct is shown to have an adverse impact on a child. See *Borden v. Borden*, 167 So. 3d 238 (Miss. 2014) (supreme court reversed and remanded a chancellor's award of custody of two boys to their father, holding that the court placed too much emphasis on the mother's inappropriate sexual conduct); *Nichols v. Nichols*, 74 So. 3d 919, 922 (Miss. Ct. App. 2011) (awarding custody to father who cohabited with girlfriend over mother who used abusive corporal punishment and lived with unstable family members); *Holcomb v. Holcomb*, 164 So. 3d 1053 (Miss. Ct. App. 2014) (chancellor did not err in awarding custody of a two-year-old girl to mother who had an affair during the marriage; mother was child's primary caregiver and had a closer bond with the girl).

However, moral fitness is still a factor that may be considered. *see Rolison v. Rolison*, 105 So. 3d 1136, 1140 (Miss. Ct. App. 2012) (awarding custody to father over mother who slept with her boyfriend in the children's presence, smoked marijuana, and violated a court order regarding her boyfriend, even though she was favored on continuity of care); *Kimbrough v. Kimbrough*, 76 So. 3d 715, 725 (Miss. Ct. App. 2011) (although post-separation affairs should not "receive undue weight," the mother's relationships were merely one factor considered by the chancellor).

[8] Capacity to provide child care and employment responsibilities

The fact that one parent's work schedule allows more time with children may weigh in favor of that parent. *See Wells v. Wells*, 35 So. 3d 1250, 1255 (Miss. Ct. App. 2010) (favoring physician father with flexible schedule and clinic near home over mother who traveled in several counties). A homemaker-mother was favored over a working father because of her ability to provide primary childcare. *Cavett v. Cavett*, 744 So. 2d 372, 377 (Miss. Ct. App. 1999). Similarly, a father was awarded custody in part because his employment allowed him to work from home and to provide primary care for a young child. *See Rinehart v. Barnes*, 819 So. 2d 564, 565 (Miss. Ct. App. 2002). Proximity of employment to home is also important. In other cases, however, this factor has favored an employed parent over one who is unemployed, recognizing their work ethic and contribution to support the family. *See Dobson v. Dobson*, 179 So. 3d 27, 31-33 (Miss. Ct. App. 2015) (favoring father who took child to daycare until he finished work at 3:00 over unemployed mother.)

[9] Child's preference

Until 2006, the Mississippi Code provided that a child of twelve or older "shall have the privilege" of choosing to live with a parent if the choice is also in the child's best interests. The statute was amended to provide instead that chancellors "may consider" the preference of a child twelve or older. MISS. CODE ANN. § 93-5-24 (Supp. 2010). Today, a child's preference is simply one of many factors for consideration and does not appear to be given substantially greater weight than other *Albright* factors. *See Anderson v. Anderson*, 961 So. 2d 55, 59 (Miss. Ct. App. 2007).

[10] Physical and mental health of parents

Physical disability or poor health should not in itself be a reason to deny custody or to find against a parent on this factor unless the parent's ability to care for a child is affected. Evidence of serious mental or emotional illness may support a denial of custody. *O'Briant v. O'Briant*, 99 So. 3d 802, 807 (Miss. Ct. App. 2012) (affirming award of custody to mother; while father had made progress after mental health hospitalization, he needed ongoing treatment through medication and therapy); *Mitchell v. Mitchell*, 180 So. 3d 810, 817-18 (Miss. Ct. App. 2015) (father favored on mental health over mother who took multiple prescription drugs and pain medications, gave conflicting testimony, and behaved oddly, including having a friend break into her husband's office); *Gateley v. Gateley*, 158 So. 3d 296, 298-99 (Miss. 2015) (father favored over mother who suffered from trichotillomania, which caused her to spend several hours a day pulling out her hair; also favored on stability of the home environment).

On the other hand, the fact that a parent has experienced mental or emotional problems is not a bar to custody unless the parent's present ability to care for a child is affected. *See Desselle v. Desselle*, 53 So. 3d 854, 857-858 (Miss. Ct. App. 2011) (custody to mother in spite of post-Katrina institutionalization and struggle with depression and anxiety).

[C] Additional factors

[1] Separation of siblings

While this factor is not listed in *Albright*, it is frequently considered by courts as an important factor. There is a 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 a 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).

[2] Extended family in the area

This factor is also not listed in *Albright* but is often considered as a positive factor for the parent who has supportive extended family in the area.

[3] Interference with parental rights

In several cases, custody has been denied to a parent or modified 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); *Martin v. Stevenson*, 139 So. 3d 740 (Miss. Ct. App. 2014) (chancellor properly modified custody of a girl from her mother to the father based on the mother's interference with visitation, including filing an unsubstantiated report of physical abuse).

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. *See Ellis v. Ellis*, 952 So. 2d 982, 997 (Miss. Ct. App. 2006). *See also Strait v. Lorenz*, 155 So. 3d 197 (Miss. 2015) (chancellor properly modified custody from a father to a girl's mother (on her fifth petition for modification) based on his interference with visitation rights).

[D] Application of the 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.

[E] 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. 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. MISS. CODE ANN. § 93-5-24.

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.

In two cases, the presumption was applied to award custody to grandparents as against a married couple, based on proof that one spouse was abusive to the other. See *J.P. v. S.V.B.*, 987 So. 2d 975 (Miss. 2008); *Randallson v. Green*, 203 So. 3d 1190, 1197 (Miss. Ct. App. 2016) (custody to grandparents over son and daughter-in-law, based on daughter-in-law's history of family violence against their son and her former husband).

II. TYPES OF CUSTODY

Custody of a child includes both physical and legal custody. Physical custody is the period of time during which a child resides with or is under the care of one of the parents, while legal custody means the decision-making rights related to a child's health, education, and welfare.

Custody may be awarded solely to one parent or parents may be made joint custodians. Joint physical custody means that a child spends significant periods of physical custody with each parent. When joint legal custody is awarded, parents share decision-making rights with regard to the child. A court may award joint physical and legal custody; joint physical custody, with sole legal custody in one parent; joint legal custody, with sole physical custody in one parent; or physical and legal custody to one parent. *See* MISS. CODE ANN. § 93-5-24.

[A] Joint custody

Although the irreconcilable differences divorce statute states that a court may award joint custody on the application of one parent, the supreme court has held that a chancellor may award joint custody any time the parents ask the court to rule on custody, whether or not they request joint custody. *See Easley v. Easley*, 91 So. 3d 639, 641 (Miss. Ct. App. 2012) (chancellor was not barred from awarding joint custody to parents who

did not specifically request joint custody in irreconcilable differences divorce); *Clark v. Clark*, 126 So. 3d 122, 125 (Miss. Ct. App. 2013) (remanding for court to consider joint custody as option, including a determination of whether the parents could work cooperatively); *but cf. White v. White*, 166 So. 3d 574, 581 (Miss. Ct. App. 2015) (chancellors are not required to address joint custody as an option if the parents do not request it).

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). Parents must confer regarding a child's education, activities, medical and psychological care, religious training, discipline, and summer activities.

If both parents request joint custody, it is presumed that joint custody is in the best interests of the child. MISS. CODE ANN. § 93-5-23. It should be noted, however, that some chancellors are wary about awarding joint custody without clear indications that the parties are able to work cooperatively.

[B] Factors for joint custody

In addition to considering the *Albright* factors discussed above, courts typically consider the ability of parents to cooperate and proximity of their locations in awarding joint physical custody.

[1] Ability to cooperate

Joint custodial parents' inability to agree on even small matters (such as the length of their children's hair) was a material change in circumstances that justified modifying joint custody to sole custody in the mother. *Tidmore v. Tidmore*, 114 So. 3d 753, 760 (Miss. Ct. App. 2013). And the supreme court reversed a court of appeals decision that had instructed a chancellor to award joint custody to parents, even though the chancellor had found that joint custody was not in the children's best interest. The court stated that joint custody is not usually in a child's best interest when substantial animosity exists between the parents. *Cuccia v. Cuccia*, 90 So. 3d 1228, 1235-36 (Miss. 2012). However, the court of appeals affirmed a chancellor's award of joint legal and physical custody to parents whose acrimonious divorce included allegations of manipulative and damaging behavior on both sides. The boy needed to rebuild his relationship with his mother and to maintain a strong relationship with his father. *Watts v. Watts*, 99 So. 3d 751, 761 (Miss. Ct. App. 2012) (rejecting father's argument that joint custody should not be awarded because of parents' hostility).

[2] Proximity

A mother's post-divorce move warranted modifying joint physical custody to sole custody in the father. After the divorce, she moved from the town where the children attended school. The chancellor found a material change in circumstances based upon the mother's move and found that continued joint physical custody was impractical. *Pogue v.*

Pogue, 126 So. 3d 967, 972 (Miss. Ct. App. 2013) (also finding a material change in actual custody; children were living with their father and visiting their mother on weekends); *Jackson v. Jackson*, 82 So. 3d 644, 646-47 (Miss. Ct. App. 2011) (joint custody should not be awarded if it is impractical or burdensome to children).

[C] Relocation

One important difference in sole and joint custody is the effect of relocation. A move by a parent with sole physical custody is not in itself a material change in circumstances. However, a move by one joint custodian will almost always be a material change in circumstances warranting a change to sole physical custody in one parent. *See Lackey v. Fuller*, 755 So. 2d 1083, 1088-89 (Miss. 2000) (mother's move to New York made exchange of custody every two weeks impractical). As the court of appeals recently noted, a "shared custody agreement between parents of a child of school age, living in two different states, would be quite difficult to maintain." *Elliott v. Elliott*, 877 So. 2d 450, 455 (Miss. Ct. App. 2003). The material change triggers an *Albright* best-interest analysis that often favors the joint custodial parent who remains in the place where the child has lived.

III. 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

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] Visitation with incarcerated parent

In a recent case, the supreme court held that while incarceration is not in itself a reason to deny visitation, a chancellor property denied an incarcerated mother's request for visitation under the best interest test. The mother, a high school teacher, was sentenced to fifteen years in prison for sexual battery of a minor, for having sexual relationships with four of her students. Her two eldest daughters knew that she was in prison, but the two younger children believed that she was ill. The visit required an eight-hour round trip. Visiting her would involve a pat-down search of the children and a visit in a common room in which violent offenders might be present. The chancellor found that under these circumstances, the requested bi-monthly visitation was not in the children's best interest.

The supreme court agreed with the mother that incarceration in itself does not overcome the presumption that a noncustodial parent is entitled to visitation. The chancellor must find that the presumption is rebutted based on the specific circumstances, and not simply because a parent is incarcerated. The court found that the chancellor properly found the presumption to be rebutted, and also property left the door open for visitation in the future. *Griffin v. Griffin*, 237 So. 3d 743 (Miss. 2018).

IV. CUSTODY BETWEEN UNMARRIED PARENTS

The *Albright* best-interests test governs custody determinations between unmarried parents. An unmarried father is "on equal footing" with a mother in an initial custody proceeding. *S.B. v. L.W.*, 793 So. 2d 656, 659 (Miss. Ct. App. 2001) (awarding custody to father) (citing *Law v. Page*, 618 So. 2d 96, 101 (Miss. 1993)). The Mississippi Supreme Court rejected an unmarried mother's argument that she was entitled to custody unless the child's father could prove that she had abandoned the child or was unfit. *See Hayes v. Rounds,* 658 So. 2d 863, 866 (Miss. 1995).

An unmarried father is entitled to an *Albright* custody analysis even if he has previously been adjudicated a child's father and ordered to pay child support. The court of appeals held that an unmarried father's suit for custody of his seven-year-old child should be treated as an original action for custody. The court rejected the mother's argument that she was implicitly granted custody in the earlier paternity and child support action. The court noted that DHS was the petitioner in the proceeding; the mother was not even a party. *Romans v. Fulgham,* 939 So. 2d 849, 852-53 (Miss. Ct. App. 2006) (en

banc); *see also Brown v. Crum,* 30 So. 3d 1254, 1259 (Miss. Ct. App. 2010) (father awarded custody).

Unmarried parents may share joint physical custody. A chancellor did not err in awarding unmarried parents joint legal and physical custody of their eight-year-old son. The couple briefly cohabited after their son's birth. At the time of the hearing, the father had been married for six years and had two children. The mother had married twice and was expecting her third child. The court rejected the mother's argument that the chancellor erred in awarding joint physical custody between unmarried parents. Chancellors have discretion to award joint physical custody if it is in the children's best interest. *Roberts v. Eads,* 235 So. 3d 1425 (Miss. Ct. App. 2017).

V. 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. Third parties are not on an equal footing with the parent unless they (1) rebut the presumption or (2) are recognized as having the rights of parents. If either of those occur, the court conducts an *Albright* analysis to determine the child's best interest.

[A] Rebutting the presumption

To overcome the natural parent presumption, 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). If the natural parent presumption is rebutted, the chancellor applies the *Albright* test to determine custody between the parent and the third party.

[1] Unfitness

To overcome the presumption 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).

[2] Abandonment

The presumption may also be overcome by 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).

[3] 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).

[**4] Exceptional circumstances**

In a 2016 custody action between a father and a maternal grandmother, the supreme court created a new test for determining whether the natural parent presumption has been rebutted. The court stated that in limited exceptional circumstances, rigid adherence to the traditional test is insufficient to protect children. The court held that the presumption may also be overcome by proof of exceptional circumstances in which "actual or probable, serious physical or psychological harm or detriment will occur to the child" so that third party custody is "substantially necessary" to prevent that harm. A chancellor who grants custody to a third party under this test must make "very specific" findings.

The court noted that a number of states have similar standards, citing as examples a case in which an aunt was awarded custody of a child with cystic fibrosis based on evidence that she was skilled in caring for the child and a case in which a deaf child's stepmother received custody because she and her children regularly used sign language. *Wilson v. Davis,* 181 So. 3d 991 (Miss. 2016).

[B] Third parties recognized as parents

In some cases, third parties may be accorded the rights of parents because of their relationship to the child or the natural parent's conduct. In Mississippi, courts have applied the doctrines of *in loco parentis* and equitable estoppel to recognize third parties as parents.

[1] Third parties *in loco parentis.* The in *loco parentis* doctrine has been used in Mississippi to grant equal parental rights to men who believed themselves to be

the father of a child that in fact was not their biological child("defrauded fathers"). In a 2004 case, the supreme 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 i*n 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. *Griffith v. Pell*, 881 So. 2d 184 (Miss. 2004).

For several years, it appeared that the doctrine might be extended to third parties other than defrauded fathers. However, in 2012 the Mississippi Supreme Court held that the *in loco parentis* doctrine should not be used to elevate the rights of third parties to those of parents. In a custody dispute between a mother and maternal grandparents, the chancellor found that a mother's long absences and failure to fulfill her parental duties caused the grandparents to stand *in loco parentis* to the child. The supreme court reversed, holding that the natural parent presumption may be overcome only by clear and convincing evidence that a parent has abandoned or deserted a child, is unfit, or is so immoral as to be detrimental to the child. The court distinguished the "defrauded father" cases in which a husband was granted custody of a child whom he believed to be his. *In re* Custody of Brown, 66 So. 3d 726, 728-29 (Miss. Ct. App. 2011) (not proper for court to use *Albright* factors in third party – parent dispute). *See also Davis v. Vaughn*, 126 So. 3d 33 (Miss. 2013).

Then, in a confusing series of cases: (1) the supreme court held in 2014 that even defrauded fathers are not entitled to parental rights under the *in loco parentis* doctrine. I*n re* Waites, 152 So. 3d 306, 314 (Miss. 2014). (2) In 2015, however, the court of appeals held that *Waites* applies only if the biological father has appeared to claim parental rights. If not, a third party (in this case, a stepfather) can be treated as a parent. Welton v. Westmoreland, 180 So. 3d 738, 745-48 (Miss. Ct. App. 2015). (3) In 2017, the supreme court reaffirmed the rule stated in *Waites*, but without discussing *Welton*. *Miller v. Smith*, 229 So. 3d 100 (Miss. 2017). The court state that *in loco parentis* status may be a factor in rebutting the natural parent presumption but is not alone sufficient to rebut the presumption. According to *Waites*, a court "may not consider giving custody to a third party, including one standing *in loco parentis*, unless and until the third party rebuts [the natural parent] presumption." *Id*. at 311

The current status of the *in loco parentis* doctrine appears to be in flux as a result of these decisions, as well as the court's emphasis on *in loco parentis* in Strickland, discussed below.

[2] Third parties as parents based on estoppel

In a case of first impression, the Mississippi Supreme Court addressed the parental rights of anonymous sperm donors and same-sex spouses regarding a child born to a woman during a marriage through assisted reproduction. Christina and Kimberly were married in Massachusetts in 2009, although living in Mississippi. In 2010, they

explored having a child through artificial insemination with an anonymous donor. After both were tested, it was decided that Kimberly would serve as the gestational mother. The child was born in Mississippi in 2011. Only Kimberly's name was put on the birth certificate. Both acted as parents. Christina was a stay-at-home caregiver for the child during the first year of his life. Both children call her "Mom." In 2013, the couple separated. Christina paid child support and had regular visitation with both children. In August 2015, Kimberly married again. Christina filed for divorce, seeking to be named a parent of the second child. The chancellor found that Christina had acted *in loco parentis* to the child but held that she could not be recognized as a parent because, under Mississippi law, the sperm donor was the legal parent.

A four-judge plurality opinion reversed. First, the court held that anonymous sperm donors have no parental rights. Second, the court held that Kimberly was equitably estopped from denying Christina's parental status. She made representations that they would be joint parents, on which Christina relied in changing her position, by participating in assisted reproduction, supporting and caring for the child, giving him her name, and forming a parent-child relationship with him. To deprive her of the relationship would not only be to her detriment, but to the child's. Christina, "with an inferior *in loco parentis* status" would otherwise be unable to prevent adoption of the child by another.

Five judges concurred in part and in the result, urging the legislature to address the issue of sperm donor rights. Four judges dissented, arguing that the issue of equitable estoppel was raised for the first time on appeal and should have been remanded to the trial court. The dissent did state, however, that the evidence supported the chancellor's finding that Christina was entitled to the benefits and burdens of parenthood based on her *in loco parentis* standing. *Strickland v. Day*, 239 So. 3d 486 (Miss. 2017).

VI. 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).

In a recent case, the supreme court affirmed a chancellor's award of joint physical and legal custody to a child's maternal great-grandparents and paternal grandparents. The court properly found the parents unfit, based on the father's history of drug use, mental health issues, and history of physical violence and the mother's drug use. The supreme court rejected the paternal grandmother's argument that joint custody is not appropriate between unrelated third parties. *Darby v. Combs*, 229 So. 3d 108 (Miss. 2017).

In some cases, one third party may have rights superior to the other. The supreme court has stated that one who acts *in loco parentis* has greater rights than other third parties, even if they are not entitled to status equal to the natural parents. In a custody action between a father and maternal grandmother, the supreme court affirmed a chancellor's finding that the grandmother's *in loco parentis* status did not confer on her rights equal to a parent. The court clarified, however, that the *in loco parentis* status does protect third-party custody against other third parties. *Davis v. Vaughn*, 126 So. 3d 33, 37 (Miss. 2013).

VII. THIRD PARTY VISITATION

In some states, third parties may be entitled to limited visitation. Mississippi allows grandparent visitation by statute. The Mississippi appellate courts have declined to expand the statute to other third parties, including siblings, great-grandparents, and step-parents.

[A] Types of grandparent 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 of the grandparents 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(1) (2004). The supreme court held in 2013 that grandparents' attempt to establish a viable relationship with a child was not sufficient, even if the parents thwarted their attempts – the statute requires an actual relationship. *Aydelott v. Quartaro,* 124 So. 3d 97 (Miss. Ct. App. 2013).

[B] Factors

To determine the appropriate amount of grandparent visitation, courts apply the *Martin v. Coop* factors. *Martin v. Coop*, 693 So. 2d 912, 916 (Miss. 1997). 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. *Id.* However, in a 2013 case, the court approved parent-like visitation to grandparents who had cared for and supported a child extensively. *Arrington v. Thrash*, 122 So. 3d 144 (Miss. Ct. App. 2013). *See also Smith v. Martin*, 222 So. 3d 255 (Miss. 2017) (en banc)(grandparent visitation is not a right but is based on the child's best interest).

[C] Other third parties

The appellate courts have rejected the requests of other third parties for visitation. The court of appeals held that great-grandparents have no standing to seek visitation with a child under the grandparent visitation statute. The statute provides that "either parent of the child's parents" may petition for visitation. The term grandparent is used throughout the statute. The term great-grandparent does not appear. The statute is strictly construed, since grandparents have no rights to custody or visitation at common law. *Lott v. Alexander*, 134 So. 3d 369 (Miss. Ct. App. 2014). The supreme court also 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). *See also In re* S.L.B., 122 So. 3d 1239, 1241 (Miss. Ct. App. 2013) (foster parents have no right to visitation; DHS was not required to prove a material change in circumstances in order to terminate foster parents' visitation with a child); *Neely v. Welch*, 194 So. 3d 149, 160 (Miss. Ct. App. 2015) (man who cared for his stepdaughter as his own and put his name on her birth certificate was not entitled to visitation with her after her mother died).

VIII. CUSTODY MODIFICATION

[A] Between natural parents

[1] 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).

[2] Alternate test: 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 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).

[3] Modification of joint physical 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).

[4] Modification of joint legal custody

In 2014, the court of appeals held that legal custody may be modified only by finding a material change in circumstances that adversely impacts the child. A chancellor erred in modifying legal custody based on minor disputes between the parents that did not adversely affect the children. *Hickey v. Hickey*, 166 So. 3d 43 (Miss. Ct. App. 2014).

[5] 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); *see also Suess v. Suess*, 718 1126 (Miss. Ct. App. 1998) (reversing chancellor's order denying change of custody because no material change).

[B] Between parents and third parties

When parents and third parties have litigated custody, the test used for modifying the resulting decree depends on who was successful and whether the judgment was agreed or court-ordered.

[1] Voluntary relinquishment of legal custody

The Mississippi Supreme Court held in 2000 that the natural parent presumption is lost 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); *see also Wright v. Bishop*, 160 So. 3d 737 (Miss. Ct. App. 2015) (mother who agreed to give legal custody to relatives forfeited the natural parent presumption; to regain custody, she must prove by clear and convincing evidence that a change in custody is in the child's best interest). However, a young mother who agreed to temporary custody in her mother, which did not lead to a final court order, did not forfeit the natural parent presumptions. *In re C.B.F.*, 246 So. 3d 928 (Miss. Ct. App. 2018).

[2] Modification after contested custody action

When a parent seeks to regain custody of a child after litigated, court-awarded custody to a third party, a different test applies. The Mississippi Court of Appeals held that a natural parent who seeks to modify court-awarded third-party custody must prove a material change in circumstances in the third-party custodian's home. The fact that the mother had undergone rehabilitation, was working, attending church, and lived in a nice home, was not a basis for modifying custody. The court distinguished the situation in

which a parent voluntarily relinquishes custody, in which case the *Grant v. Martin* standard applies. *Adams v. Johnson,* 33 So. 3d 551 (Miss. Ct. App. 2010).

[3] Modification when parent was awarded custody

When a custody action between a parent and third party resulted in custody to the parent, and the third party files a subsequent custody action, the third party must prove that (1) a material adverse change in circumstances has occurred; (2) the natural parent presumption has been rebutted; and (3) the best interest of the child is served by the custody award. After their son's death, paternal grandparents of two children sought custody against the mother. The action was settled by an agreement in which the grandparents took custody of the boy and the mother kept custody of the girl. Two months later, DHS temporarily removed the girl from the mother's custody. The grandparents sought and were granted custody based on the chancellor's finding that the natural parent presumption was overcome and that the award was in the child's best interest. The supreme court held that, when third parties re-litigate custody, they must also prove that a material change in circumstances has occurred. *Irle v. Foster*, 175 So. 3d 1232 (Miss. 2015).

IX. JURISDICTION

[A] Original orders

[1] Home state jurisdiction

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which governs custody awards, places jurisdiction over most custody disputes in a child's home state. Courts in other states may exercise jurisdiction only if the child has no home state, the home state has declined to exercise jurisdiction, or on a temporary basis because of an emergency. MISS. CODE ANN. § 93-27-201(1). Home state jurisdiction is defined as follows: A court has home state jurisdiction over a child who lived in the state with a parent or "person acting as a parent" for at least six consecutive months preceding the action or, if the child is under six months old, since birth. Temporary absences during the six-month period are counted as part of the six months. MISS. CODE ANN. § 93-27-102(g). A court has home state jurisdiction if (1) this definition is met on the date the proceeding commences or (2) the state was the child's home state within the last six months and a parent remains in the state. MISS. CODE ANN. § 93-27-201(1). In effect, if one parent moves with a child from the family's home state, the parent who remains has six months to exercise home state jurisdiction.

[2] Significant connections jurisdiction

A court may exercise jurisdiction under the significant connections test if no state has home state jurisdiction or if the child's home state declines to exercise jurisdiction. A court has significant connections jurisdiction if (1) the child and at least one contestant

have a significant connection with the state other than "mere physical presence" and (2) substantial evidence related to the action is available in the state. MISS. CODE ANN. § 93-27-201(1)(b).

[3] Emergency jurisdiction

A state may exercise temporary emergency jurisdiction over a child who is physically present in the state and who has been abandoned or needs protection because of an emergency related to mistreatment or abuse of the child or a sibling or parent of the child. MISS. CODE ANN. § 93-27-204(1); *see In re* Adoption of D.N.T., 843 So. 2d 690, 704 (Miss. 2003) (Mississippi had jurisdiction to issue initial order under UCCJA emergency provision, even though Arizona was the child's home state; mother's consent to an adoption in Mississippi constituted abandonment).

[4] Personal jurisdiction

Under the UCCJEA and the decisions of most courts, custody actions are regarded as an adjudication of status similar to an adjudication of divorce. Personal jurisdiction over the child and the defendant is not required. MISS. CODE ANN. § 93-27-201(3).

[B] Jurisdiction to modify

Under the UCCJEA, a court issuing an initial custody decree has continuing subject matter jurisdiction over the action and continuing personal jurisdiction over the parties. No other court may modify the decree so long as one party remains in the state. However, even if one party remains in the state, a second state may modify the order if the issuing court finds that the parties no longer have a significant connection with the state and that substantial evidence is no longer available in the state. Only the issuing state may make this determination. MISS. CODE ANN. § 93-27-202.

After all parties have moved from the issuing state, jurisdiction lies in the child's home state unless the home state declines jurisdiction or the child has no home state. A court without home state jurisdiction may also exercise jurisdiction to enter temporary orders in emergencies. MISS. CODE ANN. § 93-27-202, 204.