IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 97-CA-00929-COA

M. L. B. **APPELLANT**

v.

S. L. J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S. L. J. AND M. L. J., AND HIS WIFE, J. P. J. **APPELLEES**

DATE OF JUDGMENT:	12/12/1994
TRIAL JUDGE:	HON. ANTHONY THOMAS FARESE
COURT FROM WHICH APPEALED:	BENTON COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	DANNY RAY LAMPLEY
ATTORNEYS FOR APPELLEES:	JAMES W. PANNELL
	WILLIAM R. FORTIER
	B. SEAN AKINS
NATURE OF THE CASE:	CIVIL - ADOPTION
TRIAL COURT DISPOSITION:	PARENTAL RIGHTS TERMINATED: ADOPTION GRANTED.
DISPOSITION:	REVERSED AND RENDERED - 05/18/99
MOTION FOR REHEARING FILED:	6/16/99; denied 09/21/99
CERTIORARI FILED:	10/08/99; granted 12/09/99
MANDATE ISSUED:	

EN BANC.

THOMAS, J., FOR THE COURT:

¶1. In June of 1992, M.L.B. and her husband, S.L.J., were divorced after eight years of marriage, agreeing to leave their two children, ages seven and nine, in S.L.J.'s custody. Additionally, M.L.B. was ordered to pay $40 a week child support beginning May 1, 1992, to maintain medical insurance on the children, and pay half of all medical bills not covered by the insurance policy. Less than three months after the divorce, S.L.J. remarried. Seventeen months later, on November 15, 1993, S.L.J. and his new wife, J.P.J., filed a complaint for adoption in the Chancery Court of Benton County seeking to terminate the parental rights of M.L.B. and to allow J.P.J. to adopt the minor children.

¶2. After holding hearings on August 18, November 2, and December 12, 1994, the chancery court issued an order terminating the parental rights of M.L.B. In accord with this decision, the order granted adoption of the minor children to J.P.J. M.L.B. timely filed her notice of appeal with the Mississippi Supreme Court on January 11, 1995. On July 10, 1995, in response to an order by the Mississippi Supreme Court stating that M.L.B. failed to prosecute her appeal due to the fact that she failed to pay the appeal costs to the lower court, M.L.B. corrected all deficiencies except she still did not have the funds to pay the remaining court costs including the cost for provision of a transcript which was estimated at $1,900.

¶3. On July 27, 1995, M.L.B. filed a motion with the Mississippi Supreme Court requesting leave to file *in forma pauperis* and leave to brief the issue of an *in forma pauperis* appeal in this case. On August 18, 1995, the Mississippi Supreme Court denied the motions and on August 31, 1995, the Mississippi Supreme Court dismissed the appeal.

¶4. M.L.B. filed a petition for a writ of certiorari to the United States Supreme Court concerning the right to an *in forma pauperis* appeal in a case of this nature. On April 1, 1996, the United States Supreme Court granted M.L.B.'s writ. After hearing oral arguments, the United States Supreme Court reversed the Mississippi Supreme Court's decision not to allow M.L.B. to file *in forma pauperis*. Where a fundamental interest is at stake, the Supreme Court mandated waivers of filing fees in civil cases. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

¶5. By order entered July 30, 1997, the Mississippi Supreme Court found that the appeal be reinstated, that M.L.B. was indigent, that she should be permitted to proceed *in forma pauperis*, and that the record in the case be prepared and transmitted.

¶6. After this lengthy procedural morass, M.L.B. asserts that the original decree allowing the termination of her parental rights and adoption of her two children was fatally flawed in the following manner:

I. WHETHER THE TRIAL COURT'S JUDGMENT TERMINATING THE PARENTAL RIGHTS OF M.L.B. IS SUPPORTED BY EVIDENCE SUFFICIENT TO MEET THE REQUIRED STANDARD OF PROOF, THAT IS, PROOF BY CLEAR AND CONVINCING EVIDENCE;

II. WHETHER THE TRIAL COURT MISAPPLIED THE STATUTORY AND CASE LAW IN SUPPORT OF ITS FINDING THAT M.L.B.'S CONDUCT CONSTITUTED ABANDONMENT OR DESERTION;

III. WHETHER THE TRIAL COURT MISAPPLIED THE STATUTORY AND CASE LAW IN SUPPORT OF ITS FINDING THAT M.L.B.'S CONDUCT PROVED HER MORALLY OR MENTALLY UNFIT SO AS TO JUSTIFY TERMINATION OF HER PARENTAL RIGHTS;

IV. WHETHER THE TRIAL COURT ERRED IN THE ADMISSION OF EVIDENCE OF OCCURRENCES DURING THE PARTIES' MARRIAGE UP TO THE TIME OF THE ENTRY OF A DECREE OF DIVORCE WHICH PROVIDED FOR SPECIFIC CUSTODY AND VISITATION RIGHTS, AND IS *RES ADJUDICATA*, RATHER THAN REQUIRE THE PLAINTIFFS TO SHOW WHAT SUBSEQUENT OCCURRENCES, IF ANY WOULD SUPPORT A CHANGE INCLUDING A TERMINATION OF PARENTAL RIGHTS;

V. WHETHER THE TRIAL COURT ERRED IN FAILING TO APPLY THE DOCTRINE OF UNCLEAN HANDS TO BAR THE RELIEF REQUESTED BY THE PLAINTIFFS.

¶7. Finding the chancellor incorrectly applied the law when he found a substantial erosion of the child/parent relationship, we reverse and render.

FACTS

¶8. In view of our disposition in this case, we present the facts verbatim by the chancellor so as to view the case from the actual eyes and ears of the fact finder.

¶9. "The first witness was S.L.J., who testified that he is the father of the two children, S.J. and M.J., the ex-husband of the defendant, M.L.B., and the present husband of J.P.J. He testified that he and his first wife became divorced on June 9, 1992, and he was awarded custody of his children. He testified that the divorce decree restricted the biological mother's rights to visitation. He testified that the defendant, biological mother, is delinquent in child support. That since the time of the divorce she has paid very little towards the support and maintenance of her children. He testified that he became married to J.P.J. on September 4, 1992, some three months after his divorce from the defendant. He stated that the defendant has always known his location, and the location of her children. He testified that the defendant has always known his telephone number until recent events occurred. He further testified that he usually had trouble locating his ex-wife, and he would have to go through her parents and relatives to try to find her. On one occasion he left the children with M.L.B.'s sister, (Joann Umberger), for approximately a week. The reason he did that was to give the defendant an opportunity to visit with her children out of the presence of her husband Mr. --

. . .

¶10. Apparently the mother did visit the children but only for brief periods of time. He testified that in August of 1992 the defendant called once to talk to the children. Other times she called him at his shop and she would ask how are the kids, to which he would reply, Okay, and that ended their conversation. He testified that the mother, defendant, had never sought visitation.

¶11. The divorce decree granted June 9, 1992 provides that the mother would have reasonable and liberal visitation rights with her children at such dates, times and places to be mutually agreed upon between the father and the mother, but in no event, and under no circumstances shall the mother exercise her visitation in the presence of J.B. The mother never sought a clarification or a modification of that custody provision in the June 1992 decree. He stated that from August 1992 to the present the defendant visited the children infrequently. In 1992 she -- about September, she sent the children two letters. She never sent her children birthday or Christmas cards. The child, S.J., had problems in the first grade. He is now in the third grade.

¶12. There was testimony by the father that during the time that he was married to the defendant, the defendant did very poor in everything that they did. That there was constant difficulty in the marriage -- adversely affecting the children's ability to study and concentrate. The children's report cards were received into evidence, S.J. 1992/1993 report card showed all A's and B's. The child got other rewards for his good grades. M.J., the younger child, her report card improved during the year -- she received A's and B's. Both

children are on the honor roll.

¶13. The plaintiff gives his present wife, J.P.J., a lot of credit for the children's record of improvement. He said that prior to their divorce, when the children were visiting their mother, her personal life was bad. She was living with J.B. an habitual drunkard. Alcohol was always present. There was sharp and heated conflict between M.L.B. and J.B. Verbal abuse, as well as physical abuse, all of which upset the children. S.L.J. testified that the reason he set up M.L.B.'s visitation at her sister's house was to keep the children away from the influence of J.B.

¶14. He testified that when he went to his lawyer in May of 1993 his lawyer suggested that he wait awhile before filing an adoption suit in order to give the mother a chance to visit her children. Eventually there was no contact. No effort was made by the natural mother to improve her situation and he decided to file suit. There was a period of time when the defendant disappeared completely. He could not locate her. Even her family did not know where she was.

¶15. There was testimony about Easter and Christmas and some gifts and by whom they were delivered and so forth; but it seems that from the testimony that the defendant, the mother, had problems in getting her gifts to her children.

¶16. He testified that the children looked to J.P.J. as their mother. The children gave Valentines, letters, Mother's Day, notes of affection, birthday cards to their stepmother.

¶17. After this lawsuit was filed on November 15, 1993, the defendant made two payments of child support, $40.00 and $50.00, all after suit was filed.

¶18. He believed that the last time that the defendant saw her children was on Friday, August 5, 1994, while the kids were at their aunt's house, that is Joann Umberger. But the defendant only spent approximately thirty minutes with the children.

¶19. The next witness to testify was Mr. Larry Dukes, pastor of the Canaan Baptist Church for the last two and a half years. He testified that before their divorce church attendance by the biological parents was spasmodic. The children were not disciplined. After the divorce, attendance became better. And even after S.L.J. married J.P.J. attendance became real good, and the children's discipline improved. He testified that he pastored at the Cannan Baptist Church just before the parties became divorced. He was aware of the children's behavior in the church services and the attendance of the family -- all of which improved after the divorce.

¶20. Incidentally, Mr. Duke's testimony was made during the testimony of S.L.J. By agreement of the parties, because of a prior commitment, the pastor was allowed to testify out of order, and the testimony of S.L.J. was stopped until Brother Duke's testimony was completed. After which the testimony of S.L.J. resumed.

¶21. During cross-examination by Mr. Lampley, and he testified that he moved to Mt. Pleasant about two years ago. The children traveled to and from school by school bus. They meet the bus at his shop and return via bus to the shop.

¶22. He testified that he -- at one time he gave the defendant a gold necklace, which she gave back to him -- it was valued at $250.

¶23. He testified on cross-examination that he left the children with Joann to visit with their mother. He instructed Joann that if the children's mother wanted to visit, allow her to do so if it was agreeable with the children. That the mother came by one time and stayed only about thirty minutes.

¶24. He testified that there was not any stability in the children's home life prior to the divorce. The children now live in a stable home. The question was asked, "Would you be surprised if you knew that you have a stable home?" To which he responded, "No, he would not be surprised because the defendant now knows that the children have a stable home." J.P.J. was twenty-one years old when they married, she is now twenty-three. The oldest child, S.J., has an attention deficient disorder. He is being treated by his family physician, who prescribed the drug Ritalin. Ritalin is a common prescription drug for that disorder.

¶25. He testified further that after the divorce he tried to establish contact between the mother and the children, and that's why he let the children stay a week with the mother's sister. He was concerned about what should happen if he were to die. He wanted to be sure that the children would be in a stable home. He felt and knew that would be the case with J.P.J. -- as the head of the household, but not so with M.L.B.

¶26. The next witness to testify was J.P.J.. She wants to adopt the children. She loves them just like her own infant child. M.J. loves the infant. She said she and S.L.J. met on August 1, 1992 and became married on September 4, 1992. She met S.J., the child, on August 1, 1992, and she met M.J. on August 8, 1992. Their child is named Sylvia Catherine. She was born on April 18, 1994. She testified that S.J. and M.J. made a confession of faith in their church. They are now saved. The children call her mother. She has never tried to turn the children against their natural mother. The children themselves expressed concern of what would happen to them if their daddy died. She explained to them that they would go to live with their mother, because, as the stepmother she has no legal rights to custody. At that time the children said they wanted to be adopted.

¶27. She said that one time in April of 1994, M.L.B. called to see her children, but because they were packing to go to her mother's home in Millington, Tennessee -- they had to deny the defendant that privilege. J.P.J. was in a very pregnant state and close to the date of the birth of their child. They went to her mother's house to await the birth of Sylvia. She stated that she loves her husband's children, they need stability, and she wants to adopt them. She stated that the children's manners have improved, as well as their school grades.

¶28. On cross-examination by Mr. Lampley, she stated that she and S.L.J. went to where M.L.B. worked and they asked her about adoption to which M.L.B. stated, "No." It is her opinion that the mother/child relationship between M.L.B. and S.J. and M.J. has deteriorated. At the present time she believes that the children have a stable, Christian home. They have a good place to live.

¶29. She stated that the children were hurt by the failure of their father and mother to continue to live together, and the failure of the mother to visit or check about them from time to time. That when she came into the picture, she gave the children a mother figure and stability.

¶30. Insofar as the telephone number was concerned, it was her testimony that the telephone number was changed because of harassment by a disgruntled employee.

¶31. Incidentally, the first hearing was held on Thursday, August 18, 1994, and at the conclusion of the testimony from J.P.J., further hearing on the case was continued to Wednesday, November 2, 1994, at

which time the first witness to testify was Mark Poff -- testifying for the plaintiff. He testified that he knows S.L.J. and M.L.B.. He had been around S.L.J. and M.L.B., as well as S.L.J. and J.P.J. When S.L.J. and M.L.B. were married the children were undisciplined and unruly. They screamed, hollered -- they were screamed at and hollered at by their mother, M.L.B.. He heard her say that she "would beat their ass." On one occasion he saw M.L.B. slap one child because the child spilled Coca-Cola. He stated the situation with the children is now much better. J.P.J. is now the mother figure, and the children are well behaved. He stated that there's an incredible difference for the better as far as the children are concerned.

¶32. The next person to testify was Mrs. Freddie Connor, who was acquainted with the parties through their church activities at the Cannan Baptist Church. The difference between the behavior of the children before and after was evident. With M.L.B. the children were undisciplined, nervous, scared, unruly. Under their present situation they are now disciplined and well adjusted. She believes that J.P.J. loves the children and they love her. J.P.J. and the children have visited in her home.

¶33. On cross-examination she testified that she didn't know anything about M.L.B., other than her church attendance occasionally prior to the divorce.

¶34. The next witness to testify was Mrs. Joann Faulkenberry. She, too, knows the parties through their church activities. She said the children clung to their daddy, and he brought the children to church on some occasions -- M.L.B. would be with them. Once she heard a slap. She turned around -- M.L.B. had hit one of her children. The witness did not know why. There is a difference in the behavior of the children now and then. The difference is now to the better, as far as it pertains to the children.

¶35. The next witness was Mr. Kevin J. who is related to S.L.J. They are in business together. They own and operate a cabinet shop. S.L.J. lives ext to the cabinet shop. Mr. James testified that M.L.B. never showed kindness to her children. She cussed at them -- jerked them around by the arm. Spanked them, and the children were afraid of her. They were also rambunctious in the presence of others. He says now the children are treated with respect by their stepmother, and they have changed as the result thereof.

¶36. On cross-examination he testified that the shop burned before the divorce, it's now been relocated at Shady Grove. He testified further that M.L.B. often called the shop, by telephone, checking on her children. At that point the plaintiff rested.

¶37. This morning the case began with the testimony on behalf of the defendant. Joann Umberger was the first witness. Joann is the sister of M.L.B. Joann said that her sister tried to see her children. She would call from Joann's house. She said the defendant, M.L.B., had visitation with her children during Halloween of 1993. She had seen M.L.B. buy Christmas gifts for her children. She stated that she had the children three or four times since the divorce of the children's parents. That sometimes the children called their mother.

¶38. In response to questions propounded by the Court, Joann testified that she went to the seventh grade; and M.L.B. went to the 11th grade. They are sisters. She testified about keeping the children at her house on weekends, and that she called M.L.B. and told her that the children were at her house. She, Joann, has two children about the same age as S.J. and M.J. She testified that the last time she kept the children was just before the plaintiff filed this adoption suit. She said each time that she had the children staying with her she would call their mother, M.L.B. That M.L.B. always called S.L.J. at his cabinet shop telephone number. She knew S.L.J. home phone number but she never gave it to her sister, M.L.B. She testified that M.L.B. came by her house to get the Christmas gifts to deliver to the children. That M.L.B. had her own

presents to deliver. She testified that M.L.B. has remarried -- to J.B.. M.L.B. works at the Ripley Manor Nursing Home and has room for her children.

¶39. On recross she testified that M.L.B. and J.B. separated from time to time. Once in the last six months. She testified that J.B. is a convicted felon. He served time in the state penitentiary. She was unfamiliar with what he was convicted of. Her testimony indicated that the relationship between M.L.B. and J.B. is tumultuous to say the least.

¶40. M.L.B. then testified in her own behalf. She stated that she and her husband one time were separated for about a year. He drank heavily. They are now living together again. From her divorce all she got was a couple of quilts and an automobile. She was twenty-five years of age at the time that they were divorced. After her divorce she worked in several different places -- Wilbank's Bar-B-Que, Timber Craft, Rest Haven and Ripley Manor. She is now a certified nurse assistant -- CNA. She said she and S.L.J. were married for about ten years. The divorce decree requires her to pay $40.00 a week child support. She acknowledges delinquency in some of the payments. She stated that the last time she had the children with her was on October 15, 1993, and about three months ago she visited the children at her sister's house. She believed that she was delinquent in child support about $1700. She further testified that she gave her ex-husband a gold chain valued at $250. She directed him to apply that toward her delinquent child support. There was some testimony about her income earnings at the present. She also testified she has no medical insurance for herself or her children. That child support and medical insurance is a requirement of the divorce decree. She bought Easter presents for her children in 1994, and Christmas presents in 1993. That S.L.J. would not allow her to deliver the gifts to the children, so she dropped them off at his shop. She didn't know whether the children got the gifts or not. In 1992 S.L.J. refused to allow her to deliver the children's gifts, so she kept them in her car for about four months. She later testified, that she bought those gifts at Bill's Dollar Store and she went back to get a refund. They would not give her a refund, but they would allow her to exchange the gifts for other purchases. She claims that she bought clothing for her children. On numerous occasions when she called her children the telephone was hung up. Shortly after their divorce the plaintiff asked her to sit with the children while he went to the doctor, and when he came home she stayed in the house with him, slept with him and they had intercourse. There was some testimony from her about notes from the children and a copy of a note from the Sheriff's log, both of which were admitted into evidence. She said she was taking medication because of her nervous condition. She admitted spanking the children and saying, "I'm going to whip your ass." She and the children's father have spanked the children, but not excessively. She testified that when she did call the children via telephone, S.L.J. was the one that hung the telephone up -- not her. S.L.J. testified that she was the one that hung up. (Their testimony is conflicting on this point). She testified that while she was separated from S.L.J. and before and after the divorce she lived with J.B. She also testified about Mulay Plastics employment for one night. She explained that the axle in her automobile broke, because she had no transportation, she could not go back.

¶41. She testified that the reason that she quit paying child support was because the plaintiff would not allow her visitation. She further testified that her husband, J.B., was sent to the penitentiary upon his conviction for assault of a police officer. She also testified that J.B. has hit, slapped and cursed her, and that is why she left. She returned to J.B. about seven months ago -- June or July of 1994. She married J.B. on October of 1992, and that they had various separations, one of which lasted approximately a year. There was some testimony about her child support delinquency which is in the approximate amount of $4470. She further testified about carrying the Christmas gifts in her car and exchanging them for other things. She said she never sent Christmas cards or birthday cards to the children.

¶42. On cross-examination by the guardian ad litem she testified she was not seeking custody, only visitation. She testified she was not complaining about the children living with their father, she knows that they are being well taken care of. She was concerned about the telephone calls and having the right to converse with her children. She said she had no doubt that J.P.J. loves the children and she loves them also. It used to bother her for the children to call J.P.J. "mother," but she now understands. She is willing to pay child support, provide medical insurance, but she wants to have visitation.

¶43. The next party to testify was Mrs. Linda DeCanter, who was a friend and relative of M.L.B. She said M.L.B. had used her telephone to call her ex-husband. At about that point the defendant rested.

¶44. The plaintiff called S.L.J. as a rebuttal witness. He testified that he knew that M.L.B. and her husband had drinking problems. They constantly fought with one another. At one time they ran into a tree when they were coming back from some joint in an intoxicated condition. He said he left his children at Joann Umberger's house because of J.B.'s drinking and fighting. He did not want to give the defendant visitation privileges with J.B. being present. He did not want the children to witness the fussing between their mother and J.B. or get hurt. He still hoped that the mother would visit; however, he testified also about the one week visit when he let the children stay with Joann Umberger. It was his understanding that their mother only visited about twice during that week. Before the divorce and during the time that the defendant and J.B. were separated he let the children spend a week with the defendant while he went to Oklahoma. At the conclusion of S.L.J.'s rebuttal testimony, both sides rested."

¶45. After discussing the applicable law on adoption, and thereafter, discussing pertinent case law on the subject the chancellor went to further find:

> In the case now before this Court it's apparent that the mother has not fulfilled her obligations necessary for the best interest of the children. It is sad that the relationship between the mother and her children have become deteriorated. Her testimony and the testimony of her sister and her other witnesses, as well as the testimony from the plaintiffs, indicate that there was very little effort on her part to attempt to maintain a relationship between her and her children. She apparently became more interested in her relationship with J.B. than with her children. This sometimes happens. A mother has to make a decision as to whether she wants to live with her paramour or she wants to have custody or visitation privileges with her children. In this case M.L.B. became married to her paramour. Her relationship with the paramour began while she was still married to S.L.J. Her relationship with J.B. continued after her divorce, until subsequently they became married as husband and wife. It's interesting to observe that the provisions of the divorce decree, indicates that the parties became divorced on the grounds of irreconcilable differences. That means that they entered into an agreement which was approved by the Court. It was clear that under no circumstances shall the wife exercise her visitation with J.B. in the presence of the children. Now, the mother subsequently married J.B., what is she to do? What she needed to do was to come back into court as she testified and convince the Court that J.B. has rehabilitated his life. He's no longer a drunk. He's no longer physically abuses her. That J.B. himself should testify before this Court to convince the Court that he has had a revelation in his life where he wants to live a wholesome life with his lady love and her offspring. J.B. is not present. J.B. never testified in this case. The mother says he's on the wagon, has been on the wagon for some

period of time; that's been uncontradicted. The mother's interest in this case as is the father's pertains to their own wants. They see from their eyes not the whole picture but just the part of the picture that seems pleasing to them, which is probably a natural reaction in these type of cases. The mother could have done a lot of things to maintain a balance between her and the father as it pertained to her children. She said she loves the children in her way and in her view, and giving her the benefit of the doubt I'm sure she does. But her problem is lack of parenting skills. She doesn't have very good parenting skills. She is not a high school graduate. She would have difficulty helping her children with their homework. She would have difficulty in doing other things necessary to maintain a substantial relationship with her children. She plans on getting a GED, which is a paper that's tantamount to a high school diploma. She is certified to work in a nursing home. The problem is she's married to J.B. Could he be trusted to be sober? Could he be trusted and not becoming physically abusive? The children have had a sad experience with him already. There is not one indication of abuse, physical or mental, to the children living with their father and stepmother. The Plaintiffs' proof and the lack of proof from the Defendant indicates just the opposite if the children were living with their biological mother and her paramour/husband.

This Court adjudicates that the best interest of these children requires that the natural rights of the mother be terminated and that the Petition For Adoption be granted. The actions of the mother as recited in this opinion and as reflected by the proof and testimony presented, indicate that she has wholly and completely failed to fulfill her obligations. Also it's necessary for the adopting parties to prove their case by clear and convincing evidence. The Court finds that they have sustained the burden of proof.

It's the judgment of this Court that the mother has just totally failed to sustain a relationship between her and her children. It's the judgment of this Court that the best interest of the children are promoted and enhanced by adoption.

Factors recited in *Natural Mother v. Paternal Aunt*[(1)] to be considered in determining the child's best interest are stability of environment. As between the biological parents the father can provide that, the mother cannot. Ties between prospective adopting parents and the children. The children's grades have increased because of the interest and concern of their stepmother. The proof indicates that there is a love between the children and their stepmother. The biological mother, herself, stated that the children are better off living with their father and stepmother. The testimony is that the children love their stepmother and the testimony from the stepmother herself is that she loves the children -- just as she loves Sylvia, the new infant, born into her union with S.L.J. The moral fitness of the parent speaks for itself. The mother had a relationship with J.B. during the time that she was married to S.L.J., their relationship continued after the divorce was granted until finally it was consummated by marriage. She would now have J.B. in her home; and, although, the mother may be convinced that he is free of his alcohol addiction, this Court has been in this business long enough to understand that one of the most difficult things for a man or woman to do is to free themselves from the addiction of alcohol or drugs. It requires continual efforts, attendance to AA facilities; and for the mate to attend similar facilities to assist the addicted one.

The home, school and community record of the child. Uncontradicted testimony from uninfluenced, non-biased and unrelated parties about the life style and living conditions of the children during the time they were living with their biological mother and father, and after the divorce as they live with

their father and their stepmother. Vast improvements were made.

In applying the applicable statutory factors and case law to all of the proof received during trial, this Court is convinced that the petition to adopt the children should be granted. And could this Court apply the facts of this case to the Natural Mother case, the children were once unruly, undisciplined, but now they are settled and well adjusted. They now attend church and Sunday School. They are now in the process of bonding with Sylvia. The children receive medical care regularly. They are both in school doing well. Prior to the union between their father and stepmother, as the result of the tumultuous life style of their biological mother, they were not doing too well, but they are now settled in. They've made the honor roll. The relationship between the children and others is very, very good. It appears that their stepmother, J.P.B., has done an excellent job in her role model as mother to these children. There is no deficiency in the care offered by the father or the stepmother to these children. Such being the case, as I've stated, the adoption will be granted.

ANALYSIS

¶46. Our standard of review on appeal is quite limited. "The chancellor's findings of fact are viewed under the manifest error/substantial credible evidence test." *Vance v. Lincoln County Dept. of Pub. Welfare*, 582 So. 2d 414, 417 (Miss. 1991) (citing *Bryant v. Cameron*, 473 So. 2d 174, 179 (Miss. 1985); *Veselits v. Cruthirds*, 548 So. 2d 1312, 1316 (Miss. 1989)). In passing upon the adoption of the children, the chancellor must first determine that one of the grounds for adoption is present: (1) desertion or abandonment or (2) moral unfitness. *Natural Mother v. Paternal Aunt*, 583 So. 2d 614, 618 (Miss. 1991) (citing *In the Matter of Yarber*, 341 So. 2d 108, 110 (Miss. 1977)). "We ask not how we would have decided the case *ab initio* but whether there be credible proof from which a rational trier of fact may have found abandonment by clear and convincing evidence." *Ethredge v. Yawn*, 605 So. 2d 761, 764 (Miss. 1992) (citations omitted). "On the other hand, where on review it is apparent the court below has misapprehended the controlling rules of law or has acted pursuant to a substantially erroneous view of the law, we will proceed *de novo* and promptly reverse." *Id.* In termination of parental rights cases, the burden of proof in such a case is by clear and convincing evidence. Miss. Code Ann. § 93-15-109 (Rev. 1994). Once the clear and convincing burden has been met, the best interest of the child is to be considered. *Vance*, 582 So. 2d at 417. The chancellor found that it had been established by clear and convincing evidence that there existed "a substantial erosion of the relationship between . . . [M.L.B.] and the minor children, . . . which had been caused at least in part by [M.L.B.'s] serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with her minor children, as specified by Section 93-15-103(3)(e) of the Mississippi Code . . . ."

¶47. It is well settled that a parent's right to raise her children is of a fundamental nature, and is entitled to great protection, but that parental rights may be terminated when the welfare of the children is threatened. *Vance*, 582 So. 2d at 417. Mississippi Code Annotated § 93-17-7 (Rev. 1994) sets forth the criterion for termination of unfit parents's rights. In pertinent part the statute reads:

No infant shall be adopted to any person if either parent, after having been summoned, shall appear and object thereto before the making of a decree for adoption, unless it shall be made to appear to the court from evidence touching such matters that the parent so objecting had abandoned or deserted such infant or is mentally, or morally, or otherwise unfit to rear and train it, including, but not limited to, being within any grounds requiring termination of parental rights as set forth in subsections

> (2) and (3)(a), (b), (d) or (e) of Section 93-15-103 in either of which cases the adoption may be decreed notwithstanding the objection of such parent, first considering the welfare of the child, or children, sought to be adopted. . . .

Miss. Code Ann. § 93-17-7.

¶48. The statute in which the chancellor relied to terminate M.L.B.'s parental rights reads in part:

> (3) Grounds for termination of parental rights shall be based on one or more of the following factors:
>
> . . . .
>
> (e) When there is an extreme and deep-seated antipathy by the child toward the parent or when there is some other substantial erosion of the relationship between the parent and child which was caused at least in part by the parent's serious neglect, abuse, prolonged and unreasonable absence, unreasonable failure to visit or communicate, or prolonged imprisonment; . . . .

Miss. Code Ann. § 93-15-103(3)(e) (Rev. 1994).[(2)]

¶49. At the outset we must note that both parties argue the merits of the chancellor terminating M.L.B.'s parental rights based on moral or mental unfitness. However, it is clear from the chancellor's order that moral or mental unfitness was not the grounds for termination. The chancellor specifically delineated the section under which the termination was occurring, Miss. Code Ann. § 93-15-103(3)(e), "when there has been some other substantial erosion of the relationship between the parent and child which has caused at least in part by the parent's serious neglect, abuse, prolonged and unreasonable absence, unreasonable failure to visit or communicate . . . ."

¶50. To better understand Miss. Code Ann. § 93-15-103(3)(e) and what is required to terminate parental rights under this section a look at how the Mississippi Supreme Court has interpreted, or not interpreted as the case may be, this section is helpful. In 1980 the Mississippi Legislature amended § 93-17-7 by directly indicating that to terminate parental rights, among other additional requirements, the court may look toward § 93-15-103(3)(e) for guidance. Prior to the amendment this section read:

> No infant shall be adopted to any person if either parent, after having been summoned to sign the petition for adoption, shall appear and object thereto before the making of a decree for adoption, unless it shall be made to appear to the court from evidence touching such matters that the parent so objecting had abandoned or deserted such infant or is mentally, or morally, or otherwise unfit to rear and train it, in either of which cases the adoption may be decreed notwithstanding the objection of such parent, first considering the welfare of the child, or children, sought to be adopted. Provided, however, the parents shall not be summoned in the adoption proceedings nor have the right to object thereto if, within one year prior to the adoption proceedings, the parental rights of the parent or parents have been terminated by the procedure set forth in sections 93-15-1 to 93-15-11, Mississippi Code of 1972, and such termination shall be res judicata on the question of parental abandonment or unfitness in the adoption proceedings.

Miss. Code Ann. § 93-17-7 (1980).

¶51. In construing this section, the Mississippi Supreme Court held that this statute "require[d], in an

adoption proceeding, either abandonment or desertion of the child preliminary to granting an adoption." *In re Adoption of a Female Child*, 412 So. 2d 1175, 1178 (Miss. 1982).

¶52. Commenting on the 1980 amendment, the Court stated that the revision "with its additional requirements for abandonment or desertion *did not alter the previous requirement* . . . [t]he preceding statutes were merely supplemented by additional requirements." *Id.* (emphasis added). "The earlier statutes had been held by this court to require, in an adoption proceeding, either abandonment or desertion of the child preliminary to granting an adoption." *Id.* Therefore in 1982 the Mississippi Supreme Court interpreted Miss. Code Ann. § 93-17-7's reference to Section 93-15-103(2) and (3)(a), (b), (d) or (e) as incorporating abandonment and desertion.

¶53. Beyond this decision however, never has the Mississippi Supreme Court set out to articulate the definition of Miss. Code Ann. § 93-15-103(3)(e)'s reference to "substantial erosion." The only case which *cites* Miss. Code Ann. § 93-15-103(3)(e), as the reason to terminate parental rights, is *Vance v. Lincoln County Dept. of Pub. Welfare*, 582 So. 2d 414 (Miss. 1991). However, the issues before the *Vance* Court were whether § 93-15-103(3)(e) was unconstitutionally vague; whether the termination of the mother's parental rights in part because of the mother's criminal acts and resulting imprisonment amounted to cruel and unusual punishment; and whether there was a denial of the mother's equal protection rights on the ground that a proportionately higher number of blacks's parental rights are terminated than are whites's. *Id.* at 414-20. The Court in *Vance* found that none of the mother's arguments were meritorious. *Id.* In discussing whether § 93-15-103(3)(e) was unconstitutionally vague the Court stated, "A person of common intelligence should be aware under § 93-15-103(3)(e), that the result of facts such as are provided [in Vance's case] could well be the termination of one's parental rights." *Id.* at 419. The Court further stated, "If the statute were more specific, then the cases in which it could be applied could be so drastically reduced as to make it ineffective in protecting the children it was meant to serve." *Id.*

¶54. Therefore, the Court choose not to define what "substantial erosion" is in a parent/child relationship. However in *Petit v. Holifield*, 443 So. 2d 874, 878 (Miss. 1984), the Court interpreted § 93-15-103(3)(e)'s "substantial erosion" to mean abandonment or desertion as had been defined earlier by the Mississippi Supreme Court. Although the Court did not state that it was relying on § 93-15-103(3)(e), it was the only section under which Gene Petit's parental rights could have been terminated by the chancellor. The father in *Petit* had seen his children two months before the adoption petition was filed, therefore falling outside the criterion of § 93-15-103(3)(a), failure to see a child over the age of three or older for a period of one year. *Id.* at 876. Petit's conduct did not fall among any of the other grounds which may be considered for termination of parental rights. *Id.* at 876-78. The Court found that under the definitions of abandonment and desertion as promulgated by earlier case law in termination of parental rights, Gene Petit did not abandon or desert his children. *Id.* at 879.

¶55. Abandonment has been defined "as importing any conduct on the part of the parent which evinces a settled purpose to forego all duties and relinquish all parental claims to the child." *Id.* at 878 (citing *Ainsworth v. Natural Father*, 414 So. 2d 417 (Miss. 1982)). "It may result from a single decision by a parent at a particular point in time. It may arise from a course of circumstances. The test is an objective one: whether under the totality of the circumstances, be they single or multiple, the natural parent has manifested [her] severance of all ties with the child." *Ethredge*, 605 So. 2d at 764 (citing *Bryant v. Cameron*, 473 So. 2d 174, 178-79 (Miss. 1985); *Petit*, 443 So. 2d at 878; *Ainsworth*, 414 So. 2d at 417).

¶56. The term "desert" is defined as "foresaking one's duty as well as a breaking away from or breaking off associations with some matter involving a legal or moral obligation or some object of loyalty." *Petit*, 443 So. 2d at 878 (citation omitted). "We noted that abandonment has to do with the relinquishment of a right or claim whereas desertion involves an avoidance of a duty or obligation." *Id.*

¶57. In *Petit*, the Mississippi Supreme Court reversed and rendered the chancellor's grant of a petition for adoption. *Id.* at 879. Gene Petit was married to Addie Lee Petit and they had two children. *Id.* at 876. The couple divorced as a result of an adulterous affair by Gene. Addie remarried six months later to John Holifield, an ordained minister. Eleven months later, on September 10, 1981, the Holifields filed a petition for adoption alleging that Gene had abandoned or deserted the children and was otherwise unfit to rear or train them. *Id.* at 875. At the time of the trial, Gene was over $7,000 in arrears in support payments. *Id.* at 876.

¶58. Gene was a professional wrestler and traveled frequently. He was not granted visitation under the original divorce decree and any visits were with Mrs. Holifield's consent. According to Mrs. Holifield, Gene visited the child no more than five times in one and one-half years. Mrs. Holifield testified that she refused visitation only one time. Gene sent the eldest child a birthday gift, sent Christmas gifts, and called home on numerous occasions. *Id.*

¶59. The chancellor found that Gene had abandoned and deserted the children to the extent that they should be adopted by Mr. Holifield; that their best interest would be served by granting the adoption; and that Gene was not a fit and suitable person to be a father to the children. He found him to be unfit on the basis that he was living in an open adulterous affair with his present wife for a long period of time. *Id.*

¶60. The Mississippi Supreme Court determined that the evidence was insufficient to support a finding that Gene either abandoned or deserted his children based on the infrequency of visits and the father's failure to pay child support. *Id.* at 878. The Mississippi Supreme Court noted that even though his attempts, feeble as they were, would not produce a normal parental relationship, it could not say that this alone was sufficient to constitute abandonment. *Id.* In applying the definition of desertion, the Court found that the father had clearly not fulfilled his obligation of paying child support, but that failure alone to pay child support was insufficient to constitute abandonment or desertion. *Id.* The Court concluded:

> [Gene] is hardly an ideal parent and perhaps not even the best parent for these children as between himself and Mr. Holifield, but under the evidence we have before us, we are unable to say that the Holifields have proven by clear and convincing evidence that Mr. Petit has abandoned or deserted the children . . . .

Id.

¶61. What is important to remember about this case is that M.L.B. was not seeking custody of her children in this proceeding nor asking for custody with J.B. present. Rather, viewing the record in the light most favorable to the father and stepmother, M.L.B. at most wanted to continue to see and be a part of her children's lives. The chancellor always has discretion to restrict, modify, and/or set conditions on visitation.

¶62. The facts of M.L.B., with regard to Mississippi precedent, fail to show that M.L.B.'s parental rights should have been terminated. Although M.L.B.'s visits with her children were very infrequent, it was not shown that she wished to "relinquish all parental claims to the children" constituting an abandonment of her

children. M.L.B.'s conduct did not imply a conscious disregard of all the obligations owed by a parent to the child, leading to the destruction of the parent-child relationship. In other words, there was not shown a relinquishment of any parental claim to her children and a laying aside by M.L.B. of all contact with them. Even though M.L.B.'s efforts to visit or contact her child were few and far between, her conduct was insufficient to constitute abandonment under our statutory and case law.

¶63. **THE JUDGMENT OF THE BENTON COUNTY CHANCERY COURT IS REVERSED AND RENDERED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.**

KING, P.J., BRIDGES, DIAZ, IRVING, LEE, AND PAYNE, JJ., CONCUR. SOUTHWICK, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY McMILLIN, C.J., AND COLEMAN, J.

SOUTHWICK, P.J., DISSENTING:

¶64. The majority has written a thorough and informative opinion regarding what occurred below. I disagree with the majority's conclusions, however. I find that the chancellor had sufficient evidence before him to order a termination of parental rights, but that he applied multiple improper legal standards in analyzing that evidence. Therefore I would reverse and remand for further proceedings and not render judgment here.

¶65. The first question for us is what grounds were used by the chancellor to support his decision. If we are going to give deference to fact-findings, we must know what those facts ultimately are said to support. The majority states that the parties on appeal erroneously interpreted the chancellor's opinion as being based on the moral unfitness of the mother. Instead, the majority concludes that the only grounds for the termination of rights are found in the Decree of Adoption, where the chancellor specifically refers to the statutory section on substantial erosion of the relationship between the parent and child. Miss. Code Ann. § 93-15-103 (3)(e) (Rev. 1994), as incorporated by § 93-17-7 (Rev. 1994). I agree that the relatively brief final decree only refers to that section and states that the erosion resulted from the mother's "serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate" with the children. However, in addition the court's lengthy bench opinion rests on other factors. In my view there is no incorporation doctrine applicable to bench opinions, such that anything not repeated in the final decree is considered abandoned. The chancellor explained his reasoning at considerable length, and most of that analysis is quoted in the majority's opinion here. We must deal with all the stated grounds.

¶66. Fact-finding by a chancellor on issues such as these are peculiarly beyond meaningful review by an appellate court. Our main task, though certainly not relinquishing all review of the evidence, is to determine whether the proper legal standard was used. The chancellor's legal analysis as applied to the facts is quoted in the majority's opinion at paragraph 45. I find the chancellor to have ordered termination for these reasons:

1) The "mother has not fulfilled her obligations necessary for the best interest of the children."

2) The "relationship between the mother and her children have become deteriorated," in large part because the mother made little effort to maintain relations. The mother ignored custody and visitation with the children in order to focus on a boyfriend.

3) The mother maintained adulterous relations with her boyfriend, whom she later married. He was

violent, a drunkard, and otherwise a harmful influence on the children. The chancellor acknowledged that the father during the parents' marriage strayed far from the moral life as well. There was evidence that the mother's new husband had reformed, which the chancellor stated he accepted since it was unrebutted. However, the "reformation" was actually weighed very lightly since the chancellor rhetorically asked "could he be trusted to be sober" and not become "physically abusive?" The chancellor found that the mother did not maintain a balance between her relations with her children and with the man who became her next husband.

4) The mother has no parenting skills. She was not a high school graduate and therefore could not help with the children's homework; she yelled at the children and spanked them. The natural father was also said to have physically disciplined the children.

5) "There is not one indication of abuse, physical or mental, to the children living with their father and stepmother. The [father's] proof and the lack of proof from the [mother] indicates just the opposite if the children were living with their biological mother and her paramour/husband."

¶67. The chancellor used those findings to state "that the best interest of these children requires that the natural rights of the mother be terminated" and that adoption be ordered. He then stated, as if to reiterate the specific reason for the decision, that the mother "has wholly and completely failed to fulfill her obligations. . . . It's the judgment of this Court that the mother has just totally failed to sustain a relationship between her and her children. It's the judgment of this Court that the best interest of the children are promoted and enhanced by adoption."

¶68. There is more to the chancellor's decision, but I wish to summarize this section first. Though my numerical grouping of grounds is somewhat arbitrary, I believe the list fairly indicates everything relied upon by the chancellor up to that point in his opinion. As the majority accurately states, the statutorily authorized grounds for termination of parental rights are quite focused. This is not a general "best interest of the child" standard:

It is therefore made clear that the court does not reach the issue of what is to the best welfare of the child or children sought to be adopted until it shall first appear from the evidence that the parent so objecting has abandoned or deserted the child or children, or is mentally or morally unfit to rear and train it or them, when the contest is between a natural parent and third persons.

In re Adoption of a Female Child, 412 So.2d 1175, 1178 (Miss. 1982), *quoting Mayfield v. Braund*, 217 Miss. 514, 64 So.2d 713 (1953). The majority in the present case discusses a new ground: has there been a "substantial erosion" of a relationship? I agree with the majority that this still requires abandonment or desertion. Therefore, we must decide if the chancellor ever found that there had been abandonment, desertion, or that the mother was morally unfit. In my enumeration, items 1-3 have some relevance. If the mother did not attempt to maintain a relation, did she do so for such an extended period of time as to constitute abandonment? There was evidence that the mother had not contacted the children for a 14 month period beginning with the parents' divorce, and what stopped the period was a 30-minute visit, followed by another extended absence. This could be seen as a "prolonged and unreasonable absence" and unreasonable failure to visit, that constitutes "substantial erosion" of a relationship that is akin to desertion and abandonment. Miss. Code Ann. § 93-15-103 (3)(e). The mother denied that this long gap in contact occurred.

¶69. Though I have indicated my agreement with the majority's ultimate interpretation of substantial erosion, I should clarify that I believe that one authority is of more assistance on the meaning than is shown in the majority's opinion. It is true that the precedent addresses issues of equal protection, cruel and unusual punishment, and unconstitutional vagueness. *Vance Lincoln County Dept. of Public Welfare,* 582 So. 2d 414, 419 (Miss. 1991). As the *Vance* court stated, though, also alleged was that there was insufficient evidence to support termination. *Id.* at 416. The evidence to support "substantial erosion" is discussed. *Id.* at 416-18. It would appear that erosion includes the indifference expressed by the parent, a long absence (5 years), another child's loss of any memory of the mother, and in summary, the allowing of "a bad relationship to [become] one that is practically nonexistent." *Id.* at 418. The lengthy imprisonment of the mother was said to be a significant but not controlling factor. *Id.* That combination of factors constitutes "abandonment-plus," as also shown in *Petit v. Holifield,* 443 So. 2d 874, 878 (Miss. 1984). The limiting of the "substantial erosion" standard to the traditional lengthy period of desertion may indicate a reluctance on the part of the judiciary to find that discretion exists to terminate a parent's rights just because there is a bad relationship.

¶70. Therefore in my listing of the chancellor's findings, factor 1 and 2 arguably rely on evidence of extended absence, but they do not do so explicitly. Finding 3 addresses the moral choices of the mother, but never reaches a finding of moral unfitness. The problem seems more the boyfriend/second husband, not the moral fitness of the mother. Visitation limits may permit the second husband's influence from harming the children so long as his habits remain questionable or his marriage continues. Factors 4 and 5 deal with custody issues, not termination of rights. Whether the mother has good parenting skills and can help with homework, or whether the father and his second wife provides a warmer home atmosphere, though important considerations for custody, are irrelevant to whether the mother is to have no rights to further contact with her children.

¶71. My analysis of the chancellor's findings is that there was both evidence and a hint of a finding of abandonment or desertion, but the finding is too nebulous. Regardless, there were other factors used for determining whether the mother's rights should be terminated. They were improper and cannot be ignored. The chancellor did not have to terminate the mother's parental rights because of her lengthy absences and seeming cavalier attitude toward her children. He must find that those absences, and not bad parenting skills to use one example, justified terminating rights.

¶72. I now turn to the last part of the chancellor's opinion. To some extent it just emphasizes the problem I have with the earlier part of his opinion, namely, that he let custody issues control his decision on termination. It is true that the case law requires consideration of the best interests of the children *after* finding grounds for termination, but I am unconvinced that these considerations came after as opposed to being a thread throughout the determination. The most significant problem is the chancellor's discussion of *Natural Mother v. Paternal Aunt*, 583 So. 2d 614 (Miss. 1991) (quoted at paragraph 45 of the majority's opinion). The chancellor's discussion applies one section of *Natural Mother* as his principal guideposts. In my view the chancellor misread the supreme court's explanation of the law. In the section of this precedent upon which the chancellor relied so heavily, the supreme court was addressing the final, not the initial, requirement that the termination must be in the child's best interest. *Id.* at 619. The court had already evaluated the evidence and upheld the fact-finding of abandonment. *Id.* at 618-19. Only then did the court apply the ultimate standard for all decisions regarding minor children by looking to whether terminating the mother's parental rights was in the children's best interest.

¶73. One of t he cases relied upon in *Natural Mother* made this point clearly. The chancellor had made a fact-finding that the father had not deserted nor abandoned the child. The supreme court, through Acting Justice Leslie Darden, held after its review that the evidence compelled the opposite finding. However, that did not end the analysis:

> The chancellor held that Roe's objection to the adoption should be sustained and, therefore, never reached the matter of considering the welfare of the child. He did find that the petitioners have looked after and reared the child to his present age in a proper manner. However, the statute, as we view it, requires a definite adjudication that the welfare of the child will be promoted or enhanced by the proposed adoption, and the case should be remanded for a determination of that question.

Ainsworth v. Natural Father, 414 So. 2d 417, 420-21 (Miss. 1982). One of the other authorities relied upon in *Natural Mother* more clearly revealed that these considerations must be used only after grounds for termination of rights are found. The court used the foundational authority for *child custody* decisions during divorce as a reference for what it meant by best interest of the child. *Albright v. Albright*, 437 So. 2d 1003, 1004 (Miss. 1983), cited in *Natural Mother,* 583 So. 2d at 619. The factors for child custody should never be used to determine whether a natural parent is to lose all of his or her rights to visit or have other contact with a child. They should only be used after proper grounds for termination have been proven to exist.

¶74. The supreme court closed the *Natural Mother* decision by reiterating the point that I find became secondary in the chancellor's decision in our case:

> In order to sever the rights of a natural parent objecting to an adoption, the burden is on the party seeking to adopt to show by clear and convincing evidence that the objecting parent has either abandoned or deserted the child or is mentally, morally or otherwise unfit to rear or train the child.

Natural Mother, 583 So. 2d at 619-20.

¶75. Therefore the best interests of the child are the ultimate considerations after grounds for termination have been proven, but they do not permit termination of rights in the absence of finding grounds. Otherwise the danger that often lurks in decisions regarding custody and parental rights becomes omnipresent; namely, that substantial financial resources possessed by one party and their absence with the other can lead to termination of parental rights. The chancellor's view is represented by a statement during testimony that among the matters that "the Court must consider in terminating parental rights involves the -- some of the elements of *Albright v. Albright*, as well as the statutory grounds of desertion, abandonment, or otherwise unfitness. The lady's life style and the daddy's life style is very important to help the Court to make a determination." It appears he did not keep separate the custody-related issues from the decision on termination of rights.

¶76. Where I disagree with the majority is that in fact the chancellor was presented with evidence adequate to find abandonment, desertion, and its closely related principle of substantial erosion of relations. The testimony included that the mother went for a 14 month period without seeing the children, though this was contested. Attempted telephone call contacts with the children were made to the father's business at a time when the mother would have known the children would be at school, though the mother says she for a time did not know the home number. The father testified that she would not call back at better times or try to call at home. She did not seek to visit with the children for long stretches of time, sent only two letters, and no

cards or gifts for special occasions. She tried to re-enter the children's life only after the adoption process started to be discussed. On the other hand, the mother testified as to much more frequent efforts to see the children, more actual visits and contacts, and interference by her former husband.

¶77. The evidence of the actual relationship between the mother and the children was fairly limited. There was testimony that the children referred to their father's second wife with maternal names, and that they were quite happy and well-adjusted. The father testified that the children were "balls of nerves" after seeing their natural mother. The chancellor would have been interpreting such evidence fairly generously to have concluded that there was a "deep-seated antipathy by the child toward the parent" such as to constitute a substantial erosion of relations. Miss. Code Ann. § 93-15-103 (3)(e). Nonetheless, evidence tending towards such a conclusion was introduced, though the chancellor never specifically found such antipathy.

¶78. There was also evidence that was intended to show the mother's moral fitness. It demonstrated that the mother realized that her new husband should not be around the children, that he was an alcoholic and had beaten her several times but allegedly never harmed the children, that she had totally failed to maintain the child support that she had been ordered to pay in the 1992 divorce decree, and that the children were better off with the father and his new wife. The mother testified that she refused to pay support because the father allegedly would not let her see the children. She had been rough with the children at times during the marriage. I cannot find that any of that evidence constituted moral unfitness justifying termination of parental rights but at most would permit provisions limiting visitation.

¶79. A fair reading of the chancellor's findings would support that desertion or substantial erosion was in fact part of the reason for termination of rights. However, the findings were so inextricably tied to improper considerations that I would reverse and remand for additional proceedings in which a sifting of the evidence through the proper legal filters is undertaken.

McMILLIN, C.J. AND COLEMAN, J., JOIN THIS SEPARATE OPINION.

1. 583 So. 2d 614 (Miss. 1991).

2. In 1998 the legislature amended Miss. Code Ann. § 93-15-103(3) (Supp. 1998). Miss. Code Ann. § 93-15-103(3) has a new subsection and the old Miss. Code Ann. § 93-15-103(3)(e) remains unchanged as § 93-15-103(3)(f).