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DOMESTIC RELATIONS—APPLICATION OF THE PARENTAL PREFERENCE RULE—*Milam v. Milam*, 376 So. 2d 1336 (Miss. 1979).

Steve and Deborah Holcomb Milam were divorced on November 20, 1975. Their child, Shonda Michelle, was born October 9, 1975.[1] The divorce decree awarded the permanent care, custody, and control of the child to her mother and ordered Steve Milam to provide payments of $75.00 per month for child support.[2] Deborah Milam married Guy Patterson, Jr. on February 28, 1976. Deborah's child from her previous marriage lived with her mother and Patterson until her mother's death. Deborah Milam Patterson was killed and Shonda was injured in an automobile accident on April 7, 1978. Shortly after the accident Steve Milam filed a petition to modify the earlier divorce decree and also prayed for the issuance of a writ of habeas corpus to have Shonda placed in his custody.[3]

Charles Holcomb, a maternal uncle, with whom Shonda had lived while recovering from the accident, filed an answer and cross-petition seeking to be appointed guardian ad litem and to have temporary custody of the child. Guy Patterson, Jr., Shonda's stepfather, also filed an answer and cross-petition in which he averred that Milam was mentally and morally unfit and that he had abandoned his daughter. Patterson sought to be awarded the permanent care, custody and control of Shonda.[4]

During the trial Milam could prove only one child support payment. He testified that until Shonda's hospitalization after the accident he had visited the child only a few times and at no time had he visited her after her mother's remarriage, just months after the divorce.[5] He had never sent her the customary birthday and Christmas gifts, and the sum total of his visits with Shonda amounted to only about four hours in length.[6] Milam showed that he could financially support the child and that his grandmother, with whom he lived, would help care for her.[7]

Patterson testified that if he was granted custody of Shonda, she would be with her maternal grandparents during the day and that he

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[1]Milam v. Milam, 376 So. 2d 1336, 1340 (Miss. 1979).

[2]*Id.* at 1337.

[3]*Id.*

[4]*Id.* During testimony Guy Patterson, Jr. admitted that he and Charles Holcomb had made an agreement that custody of the child in either one of them would be better than allowing Milam to have custody. Brief for Appellant at 17, Milam v. Milam, 376 So. 2d 1336 (Miss. 1979).

[5]376 So. 2d at 1337.

[6]*Id.* at 1341.

[7]*Id.* at 1337.

would care for her each night.[8] Testimony showed that Patterson and Shonda had become affectionately attached, manifesting the same relationship that any father and daughter would develop over two and one-half years.[9] Shonda knew Guy Patterson, Jr. as her father and did not recognize Steve Milam when he visited her in the hospital.[10]

After a full hearing, the chancellor indicated that he felt it was highly significant that Milam had failed to contribute toward Shonda's support for over two years. The court refused to accept his excuse that he was not allowed to see the child and that Deborah had told him that visitation would cause problems between her new husband and herself. The lower court also stated in the decree:

> I find *no fault* in Steve Milam presently *except* for his failure and refusal to honor his obligation to support his youngster . . . .
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> Having for that period of time failed to provide support for the child, I would have some apprehension about his conduct should ever adverse situations develop in the future.
>
> At the same time, based upon the performance of Guy Patterson, Jr. in the past, I have confidence that he will continue to provide for the needs of this youngster.[11]

The chancellor then awarded "the exclusive care, custody, and control" of the child to her stepfather, Guy Patterson, Jr.[12]

The Mississippi Supreme Court reversed this decree holding that a natural parent must be granted custody of his child unless by clear proof it is shown that the natural parent has forfeited the right of custody by abandonment or immoral conduct. Finding the chancellor had failed to cite either abandonment or immoral conduct as a basis for his decision in the custodial hearing, the majority awarded custody of Shonda Michelle Milam to her natural father, Steve Milam.[13]

THE PARENTAL PREFERENCE PRESUMPTION

Section 93-13-1 of the Mississippi Code clearly charges the natural parents with the duty to provide for their children. Likewise it gives equal rights of custody of a child to the father and mother. The code also provides that upon death of a parent the remaining parent should assume all rights and duties. The courts are given statutory authority

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[8] *Id.* During cross-examination and questioning from the court Patterson admitted that he had used marijuana, but not within the last seven to nine months. He assured the chancellor that he would no longer use marijuana or associate with those who used it or any drugs. Brief for Appellant at 16, 376 So. 2d 1336 (Miss. 1979).

[9] Brief for Appellee at 5, Milam v. Milam, 376 So. 2d 1336 (Miss. 1979).

[10] *Id.* at 5-6.

[11] 376 So. 2d at 1338 (emphasis added).

[12] *Id.*

[13] *Id.* at 1339.

to interfere with parental guardianship only in the event that a parent is shown to be unsuitable.[14]

Authoritative sources state that in all instances when the custody of a minor child is involved, the presiding court should seek to preserve the best interests of the child. In any case involving a natural parent and a non-parent, the primary presumption of the court is that because a child's parents love it best, it is for the best interest of the child that it should be in the custody of its parents.[15]

The "parental preference" presumption is well established and has long been followed in the State of Mississippi.[16] All recent child custody decisions involving a contest between a natural parent and a collateral relative or third person draw their support from the 1900 case of *Hibbette v. Baines*,[17] which stated:

> Because he is the father, the presumption naturally and legally is that he will love them most, and care for them most wisely. And, as a consequence of this, it is presumed to be for the real interest of the child that it should be in the custody of its father, as against collateral relatives . . . .[18]

This has been the presumption applicable to both the father and mother and has been followed in a long line of cases including *Milam*.[19]

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[14]MISS. CODE ANN. § 93-13-1 (1972).

> The father and mother are the joint natural guardians of their natural children and are equally charged with their care, nurture, welfare and education. The father and mother shall have equal powers and rights, and neither parent has any right paramount to the right of the other concerning the custody of the minor or the control of the services or the earnings of such a minor or any other matter affecting the minor. *If either father or mother die or be incapable of acting, the guardianship devolves upon the surviving parent.* Neither parent shall forcibly take a child from the guardianship of the parent legally entitled to its custody. *But if any father or mother be unsuitable to discharge the duties of guardianship, then the court, or chancellor in vacation, may appoint some suitable person, or having appointed the father or mother, may remove him or her if it appears that such person is unsuitable, and appoint a suitable person.* (emphasis added).

[15]J. BUNKLEY, & W. MORSE, BUNKLEY AND MORSE'S AMIS ON DIVORCE AND SEPARATION IN MISSISSIPPI § 8.01 (1957).

[16]*See* Moore v. Christian, 56 Miss. 408, 410 (1879) ("Nature gives to parents that right to the custody of their children which the law merely recognizes and enforces."); Foster v. Alston, 7 Miss. (6 Howard) 406, 461 (1842) ("the law presuming it to be for its [the child's] interest to be under the nurture and care of its natural protector, both for maintenance and education.") (quoting United States v. Green, 26 F. Cas. 30, 31 (C.C.D.R.I. 1824) (No. 51,256)).

[17]78 Miss. 695, 29 So. 80 (1900).

[18]*Id.* at 703, 29 So. at 81.

[19]Kees v. Fallen, 207 So. 2d 92 (Miss. 1968). "This rule has been accepted and is now firmly established as a part of the case law of Mississippi." *Id.* at 95. *See* Turner v. Turner, 331 So. 2d 903 (Miss. 1976); Simpson v. Rast, 258 So. 2d 233 (Miss. 1972); Pace v. Barrett, 205 So. 2d 647 (Miss. 1968); Stegall v. Stegall, 151 Miss. 875, 119 So. 802 (1929); Nickle v. Burnett, 122 Miss. 56, 84 So. 138 (1920).

The parental preference rule is not absolute. Early on, it was contemplated that in some cases the best interest of the child would not be served by the child being in the custody of the parent.[20] Recognizing this fact the *Hibbette* decision held that a showing of abandonment or that the parent was unsuitable would be sufficient to rebut the presumption.[21] Subsequent case law stated that the right of custody would be forfeited for immoral conduct.[22] In 1929, the Mississippi Supreme Court speaking about relinquishment of custody for abandonment or immoral conduct, said, "This view of the law is well settled in our jurisprudence."[23] It was later established that a parent may forfeit custody if he is found to be unfit mentally or otherwise.[24] The fact that a non-parent has had custody for a long period of time resulting in bonds of affection developing between the child and the non-parent party in custody, will not rebut the presumption unless abandonment or unfitness is shown.[25] Decisions based upon this principle of law indicate a strict adherence to a showing of abandonment or unfitness. The Mississippi Supreme Court in a 1973 case, reversed a chancellor's denial of custody to a child's natural mother because she had moved out-of-state and was about to take the child with her, which constituted in the chancellor's opinion a material change of circumstances. On appeal, the supreme court stated this was insufficient grounds for denying custody to a parent in favor of a third party, there being no showing of abandonment or unfitness.[26]

The person seeking to deny custody to the natural parent has the burden of rebutting the presumption of parental preference by a clear showing of abandonment or unsuitable character.[27] However, the showing need not be so strong as to prove criminal abandonment or child desertion.[28] The "character" of proof presented may also be determinative of the ultimate outcome. A mere showing, based on gossip and hearsay of a mother's unsavory reputation and her indictment for the murder of her husband, without hard evidence, was held insufficient to prove moral unfitness.[29] The evidence must be of a positive

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[20]*See* Moore v. Christian, 56 Miss. 408, 410-11 (1879); Foster v. Alston, 7 Miss. (6 Howard) 406, 460 (1842).

[21]78 Miss. at 703, 29 So. at 81.

[22]Nickle v. Burnett, 122 Miss. 56, 66, 84 So. 138, 140 (1920).

[23]Stegall v. Stegall, 151 Miss. 875, 879, 119 So. 802, 803 (1929).

[24]Simpson v. Rast, 258 So. 2d 233, 236 (Miss. 1972); *See* Turner v. Turner, 331 So. 2d 903 (Miss. 1976); Rodgers v. Rodgers, 274 So. 2d 671 (Miss. 1973).

[25]Nickle v. Burnett, 122 Miss. 56, 66, 84 So. 138, 140 (1920).

[26]Rodgers v. Rodgers, 274 So. 2d 671, 674 (Miss. 1973). *See generally* Smith, *Psychological Parent v. Biological Parent*, 17 J. FAM. L., 545, 548-49 (1979).

[27]78 Miss. at 703, 29 So. at 81.

[28]Governale v. Haley, 228 Miss. 271, 281, 87 So. 2d 686, 690 (1956).

[29]Stegall v. Stegall, 151 Miss. 875, 880-81, 119 So. 802, 803-04 (1929); *Accord*, Rodgers v. Rodgers, 274 So. 2d 671 (Miss. 1973) (allegations and circumstantial evidence of immoral conduct not sufficient for a showing of moral unfitness).

nature.[30]

The court has long upheld the natural relationship of parent and child and any attempt to disturb this institution requires that the court must be strongly convinced that the parent has forfeited all possible right to custody. However, on at least two occassions the court has awarded custody to a non-parent with no showing of abandonment or mental or moral unfitness.

In the first of these cases, *Forbes v. Warren*,[31] the mother died in childbirth and the maternal grandparents took custody of the child. The father worked for a railroad and traveled, providing virtually no support for the child. Thirteen years later, after he had married and purchased a farm, the father initiated a habeas corpus proceeding to regain custody of his daughter. Although the girl testified that she preferred to remain with her grandparents, the lower court awarded custody to her father because no abandonment or unfitness had been proven. The Mississippi Supreme Court reversed and granted custody to the grandparents holding that the wishes of a child of sufficient capacity should be given consideration. The court ruled that in cases such as this the child's welfare must prevail over any mere preponderance of legal right to a natural parent.[32] A strong dissent argued that this holding was contrary to the entire *Hibbette* line of cases.[33] *Forbes* may be distinguished because the child in question was fourteen years old and had lived with her grandparents continuously for fourteen years. The court felt that she was of sufficient capacity to decide with whom she desired to live.

In *Drew v. Drew*,[34] a father sought custody of his two children who had remained with his wife after his separation from her. The chancellor found the mother to be morally unfit and would not allow her to retain custody. Although the chancellor found the father to be a suitable person and found further that he had not abandoned his children, the chancery court awarded custody to a local orphanage. The decision was based upon a deficiency of evidence supporting the father's ability to provide a suitable home for his children. He offered only uncorroborated testimony that his home for the children would be with his sister in another state. In affirming this decision the supreme court concluded that denial of custody was for the best interest

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[30]Newman v. Sample, 205 So. 2d 650, 652 (Miss. 1968); Hendrix v. Hendrix, 226 Miss. 110, 119, 83 So. 2d 805, 809 (1955).

[31]184 Miss. 526, 186 So. 325 (1939).

[32]*Id.* at 532, 186 So. at 326.

[33]*Id.* at 536, 186 So. at 327-28 (Etheridge, J., dissenting). *See* Turner v. Turner, 331 So. 2d 903 (Miss. 1976); Simpson v. Rast, 258 So. 2d 233 (Miss. 1972); Kees v. Fallen, 207 So. 2d 92 (Miss. 1968); Pace v. Barrett, 205 So. 2d 647 (Miss. 1968); Stegall v. Stegall, 151 Miss. 875, 119 So. 802 (1929); Nickle v. Burnett, 122 Miss. 56, 84 So. 138 (1920); Hibbette v. Baines, 78 Miss. 695, 29 So. 80 (1900).

[34]249 Miss. 26, 162 So. 2d 652 (1964).

of the children, but noted that its holding was not a final and complete bar to the rights of the father if he could later show provision of a suitable home for his children.[35] The *Drew* holding has been limited to the facts of the case and did not change the rule concerning a showing of abandonment or unfitness to deny a parent the custody of his child in a contest with a third party.[36]

REQUISITES FOR A SHOWING OF ABANDONMENT

The obvious first impression one receives upon a reading of the facts of *Milam* is that the natural father, Steve Milam, had abandoned his child. For approximately twenty-five months he furnished no support for her, bestowed upon her no gifts, and virtually never saw her during her life. The proper inquiry then becomes: Did this constitute such conduct as has been determined by the Mississippi Supreme Court to amount to "abandonment"?

One case in which such conduct was found to exist involved a father, who had given his fourteen day old son to a friend of his deceased wife. He was found to have abandoned his son, when twelve years later he sought the boy's return, having never visited him nor contributed to the child's support.[37] In *McAdams v. McFerron*,[38] a father was denied custody after leaving his child with his maternal grandparents for ten years. The father seldom visited his child, never showed any special affection for him, contributed nothing to his care or support, and bestowed no attention on the boy.[39] The court defined abandonment in the *McAdams* decision.

> [W]here a parent, *without just cause or excuse*, forsakes or deserts his or her infant child, *for such a length of time* and under such circumstances, as to show an intent to shirk or evade the duty, trouble or expense of rearing it, or a callous indifference to its wants, or a reckless disregard of its welfare, he or she is guilty of such an abandonment . . . .[40]

In an adoption proceeding a mother was found to have abandoned her illegitimate child, having concealed the fact that she was the child's mother for five and one-half years, having contributed no support and exhibited little if any interest in the child.[41] In another instance, a mother who gave her illegitimate child to a couple at birth

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[35]*Id.*

[36]Rogers v. Rogers, 274 So. 2d 671, 674 (Miss. 1973).

[37]Morgan v. Shelly, 111 Miss. 868, 72 So. 700 (1916).

[38]180 Miss. 644, 178 So. 333 (1938).

[39]*Id.* at 653, 178 So. at 335.

[40]*Id.* at 654, 178 So. at 335-36 (quoting A. AMIS, THE LAW OF DIVORCE AND SEPARATION IN MISSISSIPPI § 216 (1935)). *See, e.g.*, Governale v. Haley, 228 Miss. 271, 87 So. 2d 686 (1956).

[41]Wright v. Fitzgibbons, 198 Miss. 471, 21 So. 2d 709 (1945).

was adjudged in a habeas corpus proceeding held when the child was three years old, to have abandoned that child. She had participated in a fraud to show the receiving couple as the parents on the birth certificate, showed no interest in the child, provided no support, and made no move to reclaim the child at one year old when her new husband sought to gain custody.[42]

In a later case the court further defined abandonment as "any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child . . . ."[43] In *Governale v. Haley*,[44] a mother gave her child to her sister when the child was only a few months old. She once expressed a desire to regain custody of the child, and actually had custody for nearly a year. Denying the mother custody in a habeas corpus hearing when the child was ten years old, the court held: "The right of the mother to the custody of her child, which was paramount in the beginning, has been compromised by her long acquiescence in a separation that was brought about by her own voluntary surrender of the custody to her sister."[45] One other recorded case since 1956 has denied custody to a parent because of abandonment.[46] This is apparently due to the further strengthening of and the complete adherence to the parental preference rule by the court. It appears that only in the most glaring cases of parental abuse and abandonment of duty does the court feel justified in denying a parent the custody of his or her child, in favor of a nonparent.

It should be noted that there is a long line of cases in which no abandonment was found;[47] however, only a few need be discussed to assist in the present analysis. In *Pace v. Barrett*,[48] upon the death of her ex-husband, the mother filed a petition to modify and amend an earlier child custody decree which had denied her request for custody. This petition was denied by the chancellor on the ground that the mother was not a fit and proper parent because she had previously abandoned the child. The effect of the findings was to allow custody to remain with the paternal grandparents. On appeal this decree was reversed and the mother regained custody. The supreme court ruled that the earlier decree for modification had not found abandonment as

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[42]Walker v. Williams, 214 Miss. 34, 58 So. 2d 79 (1952).

[43]Mayfield v. Braund, 217 Miss. 514, 533, 64 So. 2d 713, 721 (1953).

[44]228 Miss. 271, 87 So. 2d 686 (1956).

[45]*Id.* at 283, 87 So. 2d at 691.

[46]*See* Thibodeaux v. Hilliard, 287 So. 2d 434 (Miss. 1973).

[47]Kees v. Fallen, 207 So. 2d 92 (Miss. 1968); Newman v. Sample, 205 So. 2d 650 (Miss. 1968); McWilliams v. Burns, 254 Miss. 326, 180 So. 2d 621 (1965); Hendrix v. Hendrix, 226 Miss. 110, 83 So. 2d 805 (1956); Mayfield v. Braund, 217 Miss. 514, 64 So. 2d 713 (1953); Bullard v. Welch, 171 Miss. 833, 158 So. 791 (1935); Nickle v. Burnett, 122 Miss. 56, 84 So. 138 (1920); Hibbette v. Baines, 78 Miss. 695, 29, So. 80 (1900).

[48]Pace v. Barrett, 205 So. 2d 647 (Miss. 1968).

the chancellor had indicated. Since no new testimony was offered in the hearing for modification to prove that she had abandoned the children, the paternal grandparents had no right to custody against the mother unless abandonment was charged and clearly shown.[49]

In *Simpson v. Rast*[50] a father sought the custody of his three children from their stepfather after the natural mother died. The natural parents had been divorced for approximately eight years. Although ordered to pay forty dollars per week for child support, he was shown to have paid less than five hundred dollars over the entire period. The mother had insisted that he not see the children, but he had in fact, visited them several times. The chancellor held that it would be better for the children to remain with their stepfather. On appeal this decision was reversed as being manifestly erroneous. The supreme court felt that the father had done nothing "reaching that degree of gravity" essential to establishing abandonment by the parent.[51]

On the basis of the above mentioned cases it must be concluded that the courts are going to be extremely hesitant to find parental abandonment, unless it is shown that the actions of the parent have been over such an extended period of time and of such a blatant character that the best interest of the child can in no way be served by being in the custody of its natural parent. But if the transgression has not been ongoing for an extended duration or if it is of such a nature that it may be forgiven with no harm occuring to the child, the law will uphold the strong presumption that the best interest of the child will be served by being in the custody of its natural parent.

BURDEN OF REBUTTING THE PRESUMPTION AND OPPORTUNITY TO SHOW REFORM

In the principal case the chancellor cited as the basis for his decision Steve Milam's past failure to provide support for his child.[52] Without question in a child custody contest, the law in Mississippi places the burden on the third party to prove clearly that the biological parent is mentally or morally unfit or has abandoned the child.[53] A parent does not have to prove that he has rehabilitated himself unless this initial burden has been met.[54] Because *Thompson v. Foster*[55] overruled the

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[49]*Id.*

[50]258 So. 2d 233 (Miss. 1972).

[51]*Id.* at 237.

[52]376 So. 2d at 1338. "Having for that period of time failed to provide support for the child, I would have some apprehension about his conduct should ever adverse situations develop in the future." *Id.*

[53]*See* Turner v. Turner, 331 So. 2d 903 (Miss. 1976); Rodgers v. Rodgers, 274 So. 2d 671 (Miss. 1973); Simpson v. Rast, 258 So. 2d 233 (Miss. 1972).

[54]205 So. 2d at 649.

[55]244 So. 2d 395 (Miss. 1971).

old statement of the law that there could be no opportunity to regain custody of a child if abandonment had been once proven, the parent is now given an opportunity to show he has reformed.[56] The court felt that offering no chance to show reform was too rigid and inflexible a rule and in truth had not actually been followed.[57]

The "no reform" rule was not adhered to in *Mayfield v. Braund*,[58] where the court quoted on the subject of abandonment from a legal encyclopedia.

> It does not follow that the purpose may not be repented of, and, in proper cases, all parental rights again acquired, . . . but when abandonment is shown to have existed, it becomes a judicial question whether it really has been terminated, or can be, consistently with the welfare of the child.[59]

Therefore, even if Steve Milam had, at one time abandoned his child, his renewed interest upon the death of her mother could be judicially determined as ending such abandonment, thus reinstating his parental rights.

Although the supreme court has said that it is not its function to invade the province of the chancellor in determining what is in the best interest of the child,[60] it has not hesitated to reverse a chancellor's decision if it represents an incorrect application of law, [61] a manifestly erroneous finding of fact, or an erroneous application of law to the facts.[62] On one occasion the supreme court reversed a ruling of abandonment where the written opinion of the chancellor made no *affirmative* finding of abandonment or unfitness, yet the final decree adjudicated both that the father was morally unfit and that he had aban-

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[56]*Id.* at 396. The court in *Thompson*, overruled the old principle of law stated in *McAdams v. McFerron*, that "he or she is guilty of such an abandonment of it [the child] as to bar his or her right to thereafter reclaim its custody from any person who may have ministered to and protected it during such period of desertion." 180 Miss. 644, 654, 178 So. 333, 336 (1938) (quoting A. AMIS, THE LAW OF DIVORCE AND SEPARATION IN MISSISSIPPI, § 216 (1935)).

[57]180 Miss. at 654, 178 So. at 336.

[58]217 Miss. 514, 64 So. 2d 713 (1953).

[59]217 Miss. at 533, 64 So. 2d at 721 (quoting 1 AM. JUR. *Adoption of Children* § 42 (1931)).

[60]Litton v. Litton, 227 Miss. 569, 578, 86 So. 2d 485, 488 (1956).

[61]*See* Turner v. Turner, 331 So. 2d 903 (Miss. 1976); Hale v. Hood, 313 So. 2d 18 (Miss. 1975); Simpson v. Rast, 258 So. 2d 233 (Miss. 1972); Pace v. Barrett, 205 So. 2d 647 (Miss. 1968); Hendrix v. Hendrix, 226 Miss. 110, 83 So. 2d 805 (1955); Mayfield v. Braund, 217 Miss. 514, 64 So. 2d 713 (1953); Forbes v. Warren, 184 Miss. 526, 186 So. 325 (1939).

[62]*See* Rodgers v. Rodgers, 274 So. 2d 671 (Miss. 1973); Newman v. Sample, 205 So. 2d 650 (Miss. 1968); McWilliams v. Burns, 254 Miss. 326, 180 So. 2d 621 (1965); Stegall v. Stegall, 151 Miss. 875, 119 So. 802 (1929).

doned his children.[63] In *Simpson v. Rast*,[64] the supreme court held that the decree of the chancery court was "manifestly erroneous," since not based on a finding that the petitioner was "unfit" to have custody of his children or that he had "abandoned" them, but rather it was based on the chancellor's opinion that it would be better for the children to live with the defendant.[65] Language such as this used by the supreme court should be sufficient to place all persons on notice that the court will not rule against a parent in a child custody case, unless it is specifically adjudicated that the parent has abandoned his child or is mentally or morally unfit to have custody.

The dissenting justices in the instant case placed fault on Steve Milam because he did not seek judicial relief for the alleged prohibition of his reasonable visitation rights with his daughter and for his unsatisfactory explanation for his failure to provide support. They felt the "flimsy pretense" of insuring domestic tranquility between the ex-wife and her new husband was insignificant.[66] This requirement that Milam justify his past actions would not coincide with the previously noted burden placed on the third party of clearly showing the fault of the parent.[67] It would also be in direct conflict with the holding that rehabilitation must be shown only after a showing of abandonment or mental or moral unfitness.[68]

ANALYSIS AND CONCLUSION

The dissent might have been correct in implying that Milam's renewed interest in his daughter may have been based upon the potential recovery of damages from her accident.[69] However, when later referring to this probable motive the dissent conceded the significance of the fact that all three parties sought to become guardian of Shonda's person and estate.[70] This would place all three petitioners on an equal level in this matter. Therefore this possibility could not work any more unfavorably against Milam than against the stepfather or uncle. Fault may also be found in this argument because it is the natural parent's duty during a child's infancy to administer his affairs, legal as well as personal. For Milam not to seek an award of damages for Shonda would be a greater transgression than seeking the recovery which could then be utilized on behalf of the child.

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[63]217 Miss. at 522, 64 So. 2d at 716.

[64]258 So. 2d 233 (Miss. 1972).

[65]*Id.* at 236.

[66]376 So. 2d at 1341 (Cofer, J., dissenting).

[67]*See, e.g.*, Turner v. Turner, 331 So. 2d 903 (Miss. 1976); Rodgers v. Rodgers, 274 So. 2d 671 (Miss. 1973); Simpson v. Rast, 258 So. 2d 233 (Miss. 1972).

[68]Pace v. Barrett, 205 So. 2d 647 (Miss. 1968).

[69]376 So. 2d 1341 (Cofer, J., dissenting).

[70]*Id.* at 1342-43.

The dissent would have placed the custody of the child with her stepfather, and required the natural father to pay support, but would have allowed liberal visitation rights hoping that a later material change in circumstances would warrant placing Shonda in the custody of her natural father.[71] Justice Cofer, writing for the minority stated in this regard, that he realized that in cases such as this "reasonable visitation" often must be clarified.[72] A more unmanageable situation could not be contemplated and could in no way be found to be in the best interest of the child. Shonda's mother had been tragically taken from her, now it was urged that she continue living with one "father," visit with another, and later possibly leave the one with whom she was living and go to the home of the other.

In these types of cases the court speaks primarily of the parental preference rule. Therefore the court must first assume that the child's interest will be served by being with the natural parent. If this assumption is shown clearly to be in error, then and only then, should another arrangement be made, but never one that would submit a child to the inconsistency and uncertainty that would result if the views of the dissenting opinion were implemented.

The dissent neither makes mention of nor follows the statutory law of this state.[73] Section 93-13-1 of the Mississippi Code uses strict and explicit language in proclaiming that if one parent should die, the guardianship will devolve on the surviving parent. Only if this parent is proven unsuitable shall another party be appointed as guardian to the child.[74] The chancellor found Steve Milam suitable and did not mention abandonment in his opinion.[75] Yet the dissent would interpret the chancellor's ruling in such a way as to find abandonment,[76] and thus deprive the natural father of the joy of raising his child. A holding such as this would be clearly inconsistent with the opinion in *Simpson v. Rast*[77] that the chancellor must find abandonment or unfitness.

The ruling in this case need not be limited to cases seeking to modify a divorce decree. In any contested adoption, habeas corpus, or section 93-11-65[78] proceeding between a natural parent and any third

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[71] *Id.* at 1343.

[72] *Id.* at 1341.

[73] *Compare* 376 So. 2d 1340-43 (Cofer, J., dissenting); *with* MISS. CODE ANN. § 93-13-1 (1972).

[74] *Id.*

[75] 376 So. 2d at 1338.

[76] *Id.* at 1342 (Cofer, J., dissenting).

[77] 258 So. 2d 233.

[78] "Proceedings may be brought by or against a resident or nonresident of the State of Mississippi, whether or not having the actual custody of minor children, for the purpose of judicially determining the legal custody of a child." MISS. CODE ANN. § 93-11-65 (1972).

party where the issue is the custody of a child, the same assumption as to parental preference and the same criteria to determine abandonment must be followed.

It is natural that any dispute involving children whether a domestic quarrel or court proceeding, will necessarily be approached with the greatest seriousness and weigh heavily upon the courts as well as the parties involved. Emotions necessarily will become involved in a case such as this, where a little girl less than five years old may be taken from the only father that she has known and given to a man who apparently, in a nonlegal sense, has renounced any right to fatherhood. These emotions are natural and to be expected.

The court eloquently directed all future jurists on the approach that must be maintained when this situation arises. Noting the difficulty of rendering decisions that are totally free from any hardship or injustice for some of the persons involved in an unusual fact situation, the court continued: "We are often confronted with the disturbing truth that it is not within our power to administer equal and exact justice in every case; that we can administer justice only according to the law."[79] The court in *Milam*, assumed the responsibilities as directed by the earlier courts, took the intent of the applicable statute and the developed law, and applied them correctly.

James H. Gabriel

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[79]217 Miss. at 535, 64 So. 2d at 722.