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Jennifer Garvin

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REMEMBERING THE BEST INTEREST OF THE CHILD IN CHILD CUSTODY DISPUTES BETWEEN A NATURAL PARENT AND A THIRD PARTY

Grant v. Martin
757 So. 2d 264 (Miss. 2000)

Jennifer Garvin

I. INTRODUCTION

In determining who is best suited to have custody, care and control of a minor child, the polestar consideration is the best interest and welfare of the child.[1] Until now, in custody disputes between a natural parent and a third party, Mississippi courts have consistently applied the presumption that the best interest of the child is to be in the custody of the natural parent.[2] This presumption could be overcome only by clearly establishing that the parent is unsuitable to have custody of the child.[3] In April 2000, the Mississippi Supreme Court adopted a new standard, holding that a natural parent who voluntarily relinquishes custody of a minor child through a court of competent jurisdiction, forfeits the right to rely on the natural parent presumption and can reclaim custody only upon showing by clear and convincing evidence that the change in custody is in the best interest of the child.[4]

This Note will present an explanation of how and why the natural parent presumption originated. It will also explore various applications of the presumption in custody disputes between parents and third parties over the past three decades, as well as cases which seem to have deviated from the application of the presumption. Finally, this Note will analyze how the court arrived at the new standard, and discuss possible problems with the new standard, such as, whether its adoption was necessary, and what effect, if any, *Grant v. Martin*[5] will have on future custody cases involving a natural parent and a third party.

II. FACTS AND PROCEDURAL HISTORY

Robin and Scott Martin, parents of three minor children, separated in 1993.[6] That same year, the Hinds County Chancery Court granted letters of guardianship over the children's estates and custody of the children to Scott's parents, so that the children would have health insurance benefits.[7] In the 1995 divorce,

1. Albright v. Albright, 437 So. 2d 1003 (Miss. 1983).
2. *See, e.g.*, McKee v. Flynt, 630 So. 2d 44 (Miss. 1993); Carter v. Taylor, 611 So. 2d 874 (Miss. 1992); Rodgers v. Rodgers, 274 So. 2d 671 (Miss. 1973); Milam v. Milam, 376 So. 2d 1336 (Miss. 1979); Hendrix v. Hendrix, 83 So. 2d 805 (Miss. 1955); Walker v. Williams, 58 So. 2d 79 (Miss. 1952); Bullard v. Welch, 158 So. 791 (Miss. 1935); Nickle v. Burnett, 84 So. 138 (Miss. 1920); Watts v. Smylie, 76 So. 684 (Miss. 1917); Morgan v. Shelly, 72 So. 700 (Miss. 1916); Glidewell v. Morris, 42 So. 537 (Miss. 1906); Hibbette v. Baines, 29 So. 80 (Miss. 1900).
3. *Hibbette,* 29 So. at 81.
4. 757 So. 2d 264 (Miss. 2000).
5. *Id.*
6. 744 So. 2d 817, 818 (Miss. Ct. App. 1999).
7. *Id.* at 818.

Robin and Scott voluntarily relinquished custody of the children by awarding custody to the grandparents in the property settlement agreement.[8]

In 1996, Robin remarried.[9] In 1997, she petitioned the chancery court for modification of the custody order, dissolution of the guardianship, and return of her three children, then ages eight, six and five.[10] Only Robin and her new husband, Prentiss Grant, testified at the hearing.[11] Robin testified that she had provided virtually no financial assistance for the children during those four years with their grandparents, even though she had the means to do so.[12] Although she had the children every other weekend for visitation and spoke to them by telephone each week, according to her testimony, she took little, if any, interest in the children's academic, physical or mental well-being.[13] Robin presented no evidence at the hearing to indicate that it would be harmful for the children to continue living with their grandparents.[14] At the close of Robin and her husband's testimony, counsel for the grandparents moved to dismiss.[15] The court granted the motion and dismissed the case without further hearing.[16] The grandparents retained custody of the children.[17]

The Chancellor applied the legal standard that the parent seeking to modify the arrangement must prove a material change in the circumstances of the custodial party that materially affects the best interests of the child.[18] As the Mississippi Supreme Court held in *Thomas v. Purvis,*[19] this standard should not be applied when a natural parent is seeking to regain custody of the children from a third party.[20] Rather it is customarily applied to a request for modification of child custody between the two natural parents.[21]

Robin appealed and the Mississippi Court of Appeals, recognizing the chancellor's error, reversed the chancellor's decision.[22] The court of appeals held that in custody disputes between a natural parent and a third party, the court should apply the presumption that the best interests of the child will be served by he or she being in the custody of his or her parents.[23] This presumption can only be overcome by proving that the parent has previously abandoned the child or is otherwise unfit to have custody.[24] The court of appeals, finding nothing in the record evidencing unfitness or abandonment by Robin, held that the grandparents had no right to custody of the grandchildren as against a natural parent.[25]

8. *Id.*
9. *Id.*
10. *Id.* at 819.
11. *Id.*
12. *Id.*
13. *Id.* Robin never met the children's teachers or saw their report cards. She did not know which dentist or doctor treated the children. She never consulted with their mental health counselors about the change in custody or any other matter.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 820.
19. 384 So. 2d 610 (Miss. 1980).
20. *Id.* at 612.
21. *Id.*
22. *Grant,* 744 So. 2d at 820.
23. *Id.*
24. *Id.*
25. *Id.*

The Mississippi Supreme Court granted certiorari and adopted a new standard holding that

> a natural parent who voluntarily relinquishes custody of a minor child, through a court of competent jurisdiction, has forfeited the right to rely on the existing natural parent presumption. A natural parent may reclaim custody of the child only upon showing by clear and convincing evidence that the change in custody is in the best interest of the child.[26]

The court reversed the decision of the court of appeals and remanded the case to the chancellor for a full hearing under the new standard.[27]

III. BACKGROUND AND HISTORY OF THE LAW

A. Establishment of the Natural Parent Presumption

Until now, in custody cases between a natural parent and a third party Mississippi courts applied the presumption that the best interest of the child is served by being in the custody of the natural parent.[28] A third party can overcome this presumption only by a clear showing that the natural parent has: (1) abandoned the child; or (2) the conduct of the parent is so immoral as to be detrimental to the child; or (3) the parent is mentally or otherwise unfit to have custody of the child.[29] This rebuttable presumption was established at the turn of the century by the Supreme Court of Mississippi in *Hibbette v. Baines*[30] and is codified in section 93-5-24 of the Mississippi Code.[31]

Hibbitte was a habeas corpus proceeding brought in 1900 in which a father sought custody of his son and daughter from their maternal aunts.[32] The children lived with their maternal grandmother until her death and then with their maternal aunts for ten years following the mother's death.[33] The father supported the children financially and otherwise throughout the ten years and intended to reclaim custody of them after their grandmother's death.[34] Despite the children's desire to remain with their aunts, the court applied the newly adopted natural parent presumption and held that the aunts failed to prove the father unsuitable to have custody of his children.[35]

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26. *Grant*, 757 So. 2d at 266.
27. *Id.*
28. *See, e.g.*, McKee v. Flynt, 630 So. 2d 44 (Miss. 1993); Carter v. Taylor, 611 So. 2d 874 (Miss. 1992); Milam v. Milam, 376 So. 2d 1336 (Miss. 1979); Rodgers v. Rodgers, 274 So. 2d 671 (Miss. 1973); Hendrix v. Hendrix, 83 So. 2d 805 (Miss. 1955); Walker v. Williams, 58 So. 2d 79 (Miss. 1952); Bullard v. Welch, 158 So. 791 (Miss. 1935); Nickle v. Burnett, 84 So. 138 (Miss. 1920); Watts v. Smylie, 76 So. 684 (Miss. 1917); Morgan v. Shelly, 72 So. 700 (Miss. 1916); Glidewell v. Morris, 42 So. 537 (Miss. 1906); Hibbette v. Baines, 29 So. 80 (Miss. 1900).
29. *Id.*
30. *Hibbette*, 29 So. at 80.
31. MISS. CODE ANN. § 93-5-24(1)(e) (Supp. 2000): "Upon finding by the court that both of the parents of the child have abandoned or deserted such child or that both such parents are mentally, morally or otherwise unfit to rear and train the child the court may award physical and legal custody to (i) The person in whose home the child has been living in a wholesome and stable environment; or (ii) Physical and legal custody to any other person adequate and proper care and guidance for the child."
32. *Hibbette*, 29 So. at 80.
33. *Id.*
34. *Id.* at 86-87.
35. *Id.* at 86.

Rendering judgment in favor of the father, the Mississippi Supreme Court quoted the Missouri Supreme Court in *Weir v. Marley*[36] to adopt the law announced in that decision asserting that children

> must and ought to be subject to the custody and control of those who are immediately responsible for their being, for the reason that by nature there has been implanted in the human heart those seeds of parental and filial affection that will assure to the infant care and protection in the years of its helplessness . . . that the primary object is the interest of the child, the presumption of the law is that its interest is to be in the custody of its parent.[37]

The court gave great weight to the natural presumption that a parent will love and care for his child more wisely than any other.[38] In order to overcome such a supposition, one must clearly show that the parent is unsuitable to have custody of the child.[39]

For the past one hundred years, the courts have consistently applied the rule of *Hibbette* in custody cases between natural parents and third parties.[40] The facts of these cases varied, but the rule has very rarely deviated and has become more firmly established with each decision.

B. Modern Applications of the Natural Parent Presumption

Since the adoption of the natural parent presumption by the court in *Hibbitte*, it has been applied in many cases involving a wide array of facts. The following cases demonstrate the consistency with which Mississippi courts have employed the presumption.

In 1973, a mother appealed a divorce decree modification granting custody of a child to his paternal grandparents in *Rodgers v. Rodgers*.[41] The mother was initially awarded custody by the divorce decree.[42] When she decided to move to Florida, her former husband's attorney advised her that she could not take the child out of the jurisdiction, and that she should leave him with his paternal grandparents until she could obtain a court order allowing her to take the child to Florida.[43] She left the child with his paternal grandparents, who, with the child's father, subsequently filed a petition to modify the divorce decree asking that paramount custody be placed with the grandparents.[44]

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36. Weir v. Marley, 12 S.W. 798 (Mo. 1890).
37. *Hibbitte*, 29 So. at 81 (quoting *Weir*, 12 S.W. at 800).
38. *Id.*
39. *Id.*
40. *See, e.g.*, McKee v. Flynt, 630 So. 2d 44 (Miss. 1993); Carter v. Taylor, 611 So. 2d 874 (Miss. 1992); Rodgers v. Rodgers, 274 So. 2d 671 (Miss. 1973); Milam v. Milam, 376 So. 2d 1336 (Miss. 1979); Hendrix v. Hendrix, 83 So. 2d 805 (Miss. 1955); Walker v. Williams, 58 So. 2d 79 (Miss. 1952); Bullard v. Welch, 158 So. 791 (Miss. 1935); Nickle v. Burnett, 84 So. 138 (Miss. 1920); Watts v. Smylie, 76 So. 684 (Miss. 1917); Morgan v. Shelly, 72 So. 700 (Miss. 1916); Glidewell v. Morris, 42 So. 537 (Miss. 1906).
41. 274 So. 2d 671 (Miss. 1973).
42. *Id.* at 672.
43. *Id.*
44. *Id.*

In the petition for modification, the grandparents alleged that the mother engaged in various immoral activities such as adultery, fornication and drinking alcohol in the presence of the child, but were unable to prove these allegations.[45] The chancellor, granted custody to the grandparents basing his decision on the fact that there was a material change of circumstances and the best interest of the child would be served by placing the child in the custody of his grandparents.[46] He did not find that the mother was morally unfit to have custody of her child.[47] The Mississippi Supreme Court conceded that the mother was not a model parent; nevertheless, in applying the natural parent presumption the grandparents were charged with the burden of clearly establishing that she was unfit to have custody of her child.[48] Because they were unable to establish that the mother was unfit, the court reversed the decision of the chancellor and reinstated the original decree.[49]

Courts have also applied the natural parent presumption when one parent dies and the surviving parent is seeking custody against a third party.[50] The surviving parent has a superior right to custody of the child against a third party absent a showing that the surviving parent has abandoned the child or is otherwise unfit.[51] In 1979, the Mississippi Supreme Court applied the presumption to such a case, *Milam v. Milam*.[52] In this case, the natural father, upon the death of the natural mother, filed a petition to modify a divorce decree awarding custody of the child to the mother.[53] He also prayed for the issuance of a writ of habeas corpus to have the child returned to him.[54] The child lived with her mother and stepfather from the time she was four months old until her mother's death two years later.[55] In the automobile accident that killed her mother, the child suffered a broken leg.[56] For the two months that her leg was in a cast, she lived with and was cared for by her maternal uncle and his wife.[57]

The uncle and the stepfather each filed an answer and a cross-petition.[58] In his answer, the stepfather asserted that the father had abandoned the child and was morally unfit to have custody of her.[59] The court did not find that the father had abandoned her or was otherwise unfit to have custody of her, but, because of his failure to support the child, the court awarded custody to the stepfather.[60] The

45. *Id.*
46. *Id.* at 673.
47. *Id.*
48. *Id.* at 674.
49. *Id.*
50. Milam v. Milam, 376 So. 2d 1336 (Miss. 1979); *see, e.g.,* Rutland v. Pridgen, 493 So. 2d 952 (Miss. 1986); Stegall v. Stegall, 119 So. 802 (Miss. 1929).
51. *Id.*
52. 376 So. 2d at 1339.
53. *Id.* at 1336.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

Mississippi Supreme Court reversed the decision of the chancellor relying on section 93-13-1 of the Mississippi Code,[61] as well as *Hibbette* and subsequent cases holding that a natural parent's right to custody is superior as against others absent a showing of abandonment or unfitness.[62]

In his dissent, Justice Cofer asserted that *Hibbette* was misapplied.[63] He noted that the feelings of affection between the father and children in *Hibbette* were absent in this case.[64] He concluded that the father's conduct amounted to abandonment and that the custody award should have been modified only to afford liberal visitation rights to the father.[65]

In 1980, the Mississippi Supreme Court applied the natural parent presumption in a custody dispute between a natural parent and a third party even when the natural parent had previously been ruled unfit to have custody of the child.[66] In *Thomas v. Purvis,* the original divorce decree recited that the court had previously ordered the children to be placed in the temporary custody of the Leake County Welfare Department and that both parents were unfit to have custody.[67] The chancery court granted custody to the paternal grandparents, with the right of the maternal grandparents to have custody during the summer months, and with certain visitation rights to the parents of the children.[68]

After the divorce, the mother remarried and petitioned the court to modify the final decree.[69] The chancellor determined that the mother failed to prove a change in circumstances had occurred which materially affected the children's welfare adversely, and he dismissed the petition for modification.[70] The Mississippi Supreme Court held that this standard only applies to modification requests between parents of the child, and that the correct application of the law as between parents and third parties was the natural parent presumption.[71] The court reversed the judgement of the lower court and remanded the cause to determine the fitness of the mother to have custody of her children.[72]

In one case, a father received the benefit of the natural parent presumption even after a youth court referee found the child to be a neglected child and previously awarded temporary custody to the maternal grandfather until the final

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61. MISS. CODE ANN. 93-13-1 (1972): "The father and mother are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare and education, and the care and management of their estates. The 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 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 appear that such person is unsuitable, and appoint a suitable person."

62. *Milam,* 376 So. 2d at 1339 (citing Turner v. Turner, 331 So. 2d 903 (Miss. 1976); Pace v. Barrett, 205 So. 2d 647 (Miss. 1968); Stegall v. Stegall, 119 So. 802 (Miss. 1929); *Hibbette,* 29 So. at 80)).

63. *Milam,* 376 So. 2d at 1342.

64. *Id.*

65. *Id.* at 1342-43.

66. *Thomas,* 384 So. 2d at 610.

67. *Id.* at 611.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 613.

hearing of the divorce. *Keely v. Keely* was a 1986 divorce and child custody suit between the natural father and natural mother.[73] At the final hearing of the divorce, the chancellor refused to hear testimony as to the custody of the child and allowed the child to remain in the custody of the grandfather.[74] Applying the natural parent presumption, the Mississippi Supreme Court reversed the chancellor's order.[75] The court held that in substituting the judgment of the youth court referee, the court deprived the natural father of his right to be heard on the custody of his child and awarded custody to the father.[76]

In 1994, the Mississippi Supreme Court ruled that the natural parent presumption should prevail over the presumption that siblings should not be separated.[77] In *Sellers v. Sellers,* a divorce action, the chancery court awarded custody of the two children, only one of which was born of the marriage, to their maternal aunt.[78] The chancellor stated that neither parent was fit at that time to have custody of the one child born of the marriage.[79] The mother had one child by a previous marriage.[80] When she left her second husband she took both children with her.[81] After an alleged incident of abuse by the mother's new boyfriend, the Mississippi Department of Human Services removed the children from the mother's custody and placed them in the custody of their aunt.[82] According to the aunt's testimony, during these three years, the mother only visited the children ten to fifteen times and never had them overnight.[83] The father on the other hand, had missed only three weekends and kept both children overnight on several occasions.[84]

On appeal the Mississippi Supreme Court reversed the judgment of the chancellor, because he "made no factual determination as to the fitness of either parent, nor did he state whether his custody decision was based on the desire to keep the children together,"[85] as averred by the father.[86] The chancellor's opinion did indicate that keeping the children together was a factor in weighing his decision.[87] The court took the opportunity to declare that the presumption in favor of awarding custody to the natural parent is not overcome by an imperative regarding the separating of siblings.[88]

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73. 495 So. 2d 452 (Miss. 1986).
74. *Id.* at 453.
75. *Id.*
76. *Id.*
77. 638 So. 2d 481 (Miss. 1994).
78. *Id.*
79. *Id.* at 482.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 483.
87. *Id.* at 483-84.
88. *Id.* at 484.

C. Apparent Departures from the Natural Parent Presumption

As mentioned above, very few instances exist in which the court did not apply the natural parent presumption. Most of these cases can easily be distinguished from the usual custody dispute between a natural parent and a third party. Perhaps the most difficult to reconcile with the rule is *Forbes v. Warren*.[90]

In *Forbes,* the mother of the child died shortly after giving birth in 1924.[91] The father and grandparents agreed that the child should live with the grandparents. Fifteen years later, upon returning to Mississippi, the father brought this habeas corpus action seeking custody and control of his daughter. Evidence showed that all parties involved were fit to have custody and control of the child.[92] Initially, the grandparents were willing to grant the father custody with the child's consent, but the child was "passionately opposed" to going with her father.[93] The chancellor awarded custody to the father and the grandparents appealed.[94] The Mississippi Supreme Court held that evidence that the happiness, welfare and best interest of the child were with her grandparents should be controlling in this particular case and reversed the decision of the chancellor.[95] While the court did acknowledge the existence of a natural parent presumption, instead of applying it, it declared that the welfare of the child will prevail over any "mere preponderance of legal right in one or the other party."[96] It also held that the wishes of a child of sufficient capacity to decide for herself should be given special consideration when her parents have voluntarily allowed them to live with someone else for an extended period of time.[97] The court supported its decision mostly with case law decided prior to *Hibbette v. Baines*.[98]

The court attempted to reconcile its decision in *Forbes* with that of *Hibbette*.[99] It contended that in *Hibbette,* the court considered the feelings between the father and the children, which were of deep, tender affection.[100] Determining that no such feelings existed between father and child in *Forbes,* the court held a reversal was proper.[101] Following this line of reasoning the natural parent presumption seemingly lends little weight to the natural parent's case in some instances.

The court relied in part on *Forbes* in *Governale v. Haley*.[102] This was a habeas corpus proceeding brought by a mother against an aunt with whom the child was living.[103] In 1944, a few months after the child was born, the mother and child

90. 186 So. at 325 (Miss. 1939).
91. *Id.*
92. *Id.* at 326.
93. *Id.*
94. *Id.* at 325.
95. *Id.* at 326.
96. *Id.*
97. *Id.*
98. *Id.* (citing McShan v. McShan, 56 Miss. 413 (1879); Maples v. Maples, 49 Miss. 393 (1873); Cocke v. Hannum, 39 Miss. 423 (1860)).
99. *Id.* at 326.
100. *Id.* at 326-27.
101. *Id.* at 327.
102. 87 So. 2d 686, 691 (Miss. 1956).
103. *Id.* at 686.

moved in with the aunt and her husband in New Orleans.[104] The aunt cared for the child while the mother was at work.[105] The mother moved out four or five months later leaving the child with the aunt.[106] About two years later, the aunt and her husband moved to Grenada, Mississippi, and, with the mother's consent, took the child with them.[107] During the following two years, the mother did not visit the child and only sent $10 for the child.[108] The mother then wrote the aunt a letter in which she stated that she was never going to take the baby back and that she could not take care of the baby.[109] In 1948, the mother remarried and went to visit the aunt and baby.[110] She promised to send $5 a week for the child's support but failed to fulfill that promise.[111] The child remained with the aunt and started school in Grenada in 1950.[112]

In 1951 the mother filed a petition for writ of habeas corpus to obtain custody of the child.[113] While no formal hearing was ever held, the court did enter an order reciting an agreement by the parties that the child should remain in the custody of the aunt subject to visitation with the mother for the summer.[114] The court later entered an order dismissing the petition at the request of the mother.[115] In 1953, the child went to New Orleans for what was supposed to be a two-week visit with her mother.[116] According to the child's testimony, she was forced to remain in New Orleans.[117] A year later, when the mother brought the child to Philadelphia, Mississippi, to visit relatives, the aunt took the child back to Grenada with her.[118] The mother thereafter filed the petition at issue in this case.[119]

The trial court, finding that to permanently displace the child from the custody of the aunt would be psychologically damaging to the child, dismissed the mother's petition.[120] The Mississippi Supreme Court affirmed the decision of the trial court. As in *Forbes,* the court addressed the issue of the *Hibbette* decision by asserting that

> [i]n a particular case, however, when the parent, by agreement or otherwise, has relinquished custody of the child to third persons and has permitted the child to remain in their custody for a long period of time during which the parent has contributed little or nothing to the support of the child and has evinced no special interest in the child, the court may refuse to allow the parent to reclaim the

104. *Id.* at 687.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 688.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*

> child from those to whom it has been surrendered; and this is especially true in a case where the forces of environment may be so strong that the condition of affairs cannot be disturbed by a forced separation without risking the happiness and best welfare of the child.[121]

While not using these exact words, the court, essentially, did apply the natural parent presumption finding that the mother did in fact abandon the child.[122] Having so found, the presumption was successfully rebutted by the aunt.[123]

In 1964, the Mississippi Supreme Court held that whether or not the father was morally fit and whether or not the father had abandoned the children are not the only criteria used in determining who is best qualified to have custody and care of the children.[124] Other circumstances examined to determine the best interests of the child should also be considered in these cases.[125] *Drew v. Drew* began as a suit by the nonresident father against the mother for custody of their two minor children.[126] The chancery court found the mother to be morally unfit to retain custody of the children but refused to award permanent custody to the father and placed the children in an orphanage.[127] The chancellor did not find that the father was unsuitable to have care and custody of the children, nor did he find that the father had abandoned the children.[128] The father appealed the refusal of the chancellor to award custody unto him.[129]

Considering other circumstances, the Mississippi Supreme Court affirmed the decision of the chancellor based on the fact that the father failed to corroborate his testimony that his sister and her husband in Michigan were willing to welcome him and his children into their home.[130] He also failed to show that their home, financial condition, and other criteria would be desirable and beneficial for the children.[131] The court also pointed out that the best interest of the child was for the chancery courts of this jurisdiction to retain custody.[132]

According to Mississippi court decisions in later cases,[133] the decision in *Drew* did not change the rule regarding the right of a parent to custody over that of a third person.[134] It was limited to the facts of that case.[135] The court in *Mitchell v. Powell*[136] stated that "the additional guides set out in *Drew* come into play when the parent is not entitled to the custody of his or her child."[137]

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121. *Id.*
122. *Id.* at 690.
123. *Id.*
124. Drew v. Drew, 162 So. 2d 652 (1964).
125. *Id.* at 655.
126. *Id.* at 652.
127. *Id.* at 652-53.
128. *Id.* at 653.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. Daniels v. Lewellen, 254 So. 2d 907 (Miss. 1971); Newman v. Sample, 205 So. 2d 650 (Miss. 1968); Mitchell v. Powell, 179 So. 2d 811 (Miss. 1965); and *Rodgers*, 274 So. 2d at 674.
134. *Id.*
135. *Rodgers*, 274 So. 2d at 674.
136. 179 So. 2d 811 (Miss. 1965).
137. *Id.*

IV. INSTANT CASE

In Grant, the paternal grandparents appealed from the judgment of the Mississippi Court of Appeals.[138] The appeals court reversed the decision of the Hinds County Chancery Court, dismissing the mother's petition for a change in custody order, and rendered a decision in favor of the mother.[139] The court of appeals reasoned that the grandparents had no right to custody of the children as against their natural parent and that the mother's bid for custody must prevail absent a showing of abandonment or unfitness.[140] In other words, the court of appeals applied the customary natural parent presumption. The Mississippi Supreme Court granted certiorari to consider the proper standard to be applied in a request for modification where the natural parent, or parents, have previously relinquished custody.[141] Justice Cobb wrote the majority opinion for the court adopting a new standard in such cases, with Justice McRae concurring in part and dissenting in part.[142]

A. Justice Cobb's Majority Opinion

The Mississippi Supreme Court considered for the first time whether the natural parents' consent to joinder in court proceedings granting custody to such third parties should alter the natural parent presumption previously applied in custody cases between a parent and a third party.[143] Understanding the importance of stability in the lives of children, the court "carefully weighed the impact of establishing an exception, or a new standard, for such instances."[144] The court recognized the need to discourage irresponsible parents from relinquishing custody of their child for the sake of convenience, and then coming back into the child's life and claiming the natural parent's presumption as applied in the past.[145] The court, however, did not want to discourage the voluntary relinquishment of custody in dire circumstances to a third party, when the natural parent is unable to provide for the child's needs.[146] With these concerns in mind and giving little else in the way of explanation, the court held that a natural parent in such cases can no longer rely on the natural parent presumption as in ordinary custody cases between a parent and a third party.[147] In order to reclaim custody of the child, the parent must show by clear and convincing evidence that the change in custody is in the best interest of the child.[148] The supreme court reversed the decision of the court of appeals and remanded the case for trial under the new standard.

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138. *Grant*, 744 So. 2d at 817.
139. *Id.*
140. *Id.* at 820.
141. *Grant*, 757 So. 2d at 264 (granting certiorari also for having found that it was error for the court of appeals to reverse and render when there was never a full hearing on the merits of the case).
142. *Id.*
143. *Id.* at 266.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*

B. Justice McRae's Dissenting Opinion

Justice McRae wrote a separate opinion concurring in part and dissenting in part.[149] While he agreed that the decision of the court of appeals should be reversed, he disagreed with the majority's decision to send the case back for rehearing to determine the best interests of the child.[150] He asserted that once the parties have gone through the initial custody battle, the natural parent presumption was no longer available and the best interests of the child became the polestar consideration.[151] Under this reasoning, the chancellor used the correct standard in dismissing the case, and the matter should not be reheard.[152] The chancellor found no material changes, Grant had essentially abandoned her children, and that the best interests of the children was to remain in the custody of their grandparents.[153] McRae asserted that Grant failed to prove that the children's best interest was for her to have custody of them at the first hearing on this matter, and she should not be given a second chance to do so.[154]

V. ANALYSIS

Most states in this country have a natural parent presumption or a superior or natural rights doctrine, offering a presumption or preference favoring the natural parent over an unrelated third party.[155] Certainly all of these jurisdictions consider disputes similar to that in *Grant.* Mississippi is not the only state to apply a new standard to such cases. In attempting to keep the best interest of the child as the focus in resolving such disputes, different courts have used different mechanisms. The Tennessee Court of Appeals confronted a similar situation by "carving out an exception" to the natural parent preference in "unusual exigent and compelling circumstances."[156] Other states support a single "best interests" criterion for all child custody cases, using the natural parent's unfitness as a consideration rather than a prerequisite for third party custody.[157] Commentators have suggested everything from totally abolishing the natural parent presumption[158] to broadening the definition of "parent."[159]

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149. *Id.* at 267.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 268.
155. Lawrence Schlam, *Third-Party Standing In Child Custody Disputes: Will Kentucky's New "De Facto Guardian" Provision Help?,* 27 N. KY. L. REV. 368, 368-369 (2000) (citing State ex rel Paul v. Peniston, 105 So. 2d 228, 232 (La. 1958); In re Hernandez, 376 A.2d 648, 654 (Pa. Super. Ct. 1997); CAL. FAM. CODE § 3040 (a) (West 1994); J.E.C., Jr. v. J.E.C., Sr., 575 So. 2d 592 (Ala. Civ. App. 1991); Uhing v. Uhing, 499 N.W. 2d 366 (Neb. 1992); Abaire v. Himmelberger, 558 N.Y.S.2d 678 (N.Y. App. Div. 1990); In re Sedelmeier, 491 N.W.2d 86 (S.D. 1992); Brown v. Dixon, 776 S.W.2d 599 (Tex. Ct. App. 1989)).
156. Janet Leach Richards, *Custody Conflicts Between Parents And Third Parties: Protecting The Child's Interests,* 29-Aug. TENN. B.J. 16, 16-17 (1993) (citing Henderson v. Mabry, 838 S.W.2d 537 (Tenn. App. M.S. 1992)).
157. Lawrence Schlam, *Third Party Custody Disputes In Minnesota: Overcoming The "Natural Rights" Of Parents Or Pursuing The "Best Interests" Of Children?,* 26 WM. MITCHELL L. REV. 733, 759-760 (2000) (citing Wallin v. Wallin, 187 N.W.2d 627 (Minn. 1971)).
158. Eric P. Salthe, *Would Abolishing The Natural Parent Preference In Custody Disputes Be In Everyone's Best Interest?,* 29 J. FAM. L. 539 (1990/1991).
159. Schlam, *supra* note 155, at 374.

A. Should the Mississippi Supreme Court Have Adopted a New Standard in Cases Such as Grant?

In the instant case, the court could feasibly have reached the same conclusion had it applied the natural parent presumption. The court could have found that Grant abandoned her children when she voluntarily relinquished custody of them to their grandparents in the divorce decree. The grandparents, consequently, would have successfully rebutted the presumption and would have been entitled to retain custody of the children.

As recognized by the supreme court, sometimes it is necessary, as in *Grant,* to relinquish custody through the courts in order to provide for the basic needs, such as health insurance, of the children. In many such cases, a parent faced with giving up his or her natural parent presumption, may be discouraged from taking such measures to provide for the child. Is this in the best interest of the child? In situations, however, when the natural parent provides nothing for the child, has had little or no contact with the child, or takes no interest in the child's life during the child's lengthy stay with a third party, the parent should not be allowed to disrupt the child's life and healthy parental bond he or she may have established with the custodial third party.

The supreme court was attempting to rectify this dilemma when it adopted the new standard. Ironically, a solution already existed –the *rebuttable* natural parent presumption. In 1979, Justice Cofer proffered the means to a solution in his previously discussed dissent in *Milam.*[160] If *Hibbette* were to be applied properly, the new standard would be unnecessary. In other words, a parent who, after voluntarily relinquishing custody of his or her child to a third party through a court of competent jurisdiction, then neglects to take any interest in the child's life for an extended period of time, should be found to have abandoned the child. A finding of abandonment will successfully rebut the natural parent presumption. This reasoning is similar to the reasoning of the court in *Forbes*[161] and *Governale*[162] discussed above.

B. How will Grant Affect Future Cases?

Prior to the *Grant* decision, the court based its judgment in child custody cases on the notion that a natural parent will love and care for a child better than anyone else will. This sentiment is manifest in the case law and the statutes of this jurisdiction. It is the law of nature and is difficult to overcome. As discussed above, the court offers very little explanation for adopting the new standard in *Grant.* While it does indicate policy reasons for its decision, no case law is mentioned or relied upon from this jurisdiction, nor that of any other jurisdiction.

The court does not provide much guidance for application of this standard in future cases. One could reasonably conclude that the standard will be applied in cases involving the same circumstances as in *Grant,* but what if the circum-

160. 376 So. 2d at 1340.
161. 186 So. at 325.
162. 87 So. 2d at 691.

stances vary slightly? How broadly or how narrowly will the standard be interpreted? In cases such as *Milam*, will a father, who voluntarily relinquishes custody of his child to the natural mother in an original divorce decree, be allowed to rely on the natural parent presumption as against a third party in the event that the mother subsequently abandons the child or if the mother dies? The language the court used indicates that the father would have to show by clear and convincing evidence that for him to have custody is in the best interest of the child. Should a father, who has dutifully visited and supported his child while in the custody of his mother, be saddled with this burden? Such an application may prove to be problematic, as it would be contrary to section 93-13-1 of the Mississippi Code.[163]

In *Thomas,* the court allowed a parent, who was previously determined to be unfit, to rely on the natural parent presumption when that parent petitioned to modify the custody arrangement.[164] Similarly, in *Keely,* the court applied the natural parent presumption even when the youth court referee determined that the parents had neglected the child.[165] To apply the presumption in such cases but not the case of a non-custodial parent asking for custody upon the death of the custodial parent seems unjust.

The court may in the future adopt a standard similar to that of *Grant* in cases where the parent was forced to relinquish custody involuntarily or was otherwise found unfit. Perhaps the courts will more narrowly apply the new standard. As in *Drew,* the ruling of *Grant* may only be applied to the facts of that case. To predict the consequences this decision will have on future cases would be difficult with what little direction the court has provided.

VI. CONCLUSION

In adopting the new standard, the court had the best of intentions—to insure stability in the lives of children. For practical purposes, the new standard adopted by the Mississippi Supreme Court in *Grant* is not a far stretch in the area of custody disputes between a natural parent and a third party. The court, however, made a bold move in dismissing the firmly established concept that the best interest of the child is to be in the custody of a parent. Having done so, the court should have provided more guidance in the application of the new standard, so as to avoid misapplication in matters of such immense importance.

163. MISS. CODE ANN. §93-13-1, *see supra* note 61.
164. *Thomas,* 384 So. 2d at 610.
165. *Keely,* 495 So. 2d at 452.