IN THE SUPREME COURT OF MISSISSIPPI

NO. 2018-CA-01282-SCT

SYLVIA P. BARBER

v.

MARK C. BARBER

DATE OF JUDGMENT:	08/14/2018
TRIAL JUDGE:	HON. JAMES CHRISTOPHER WALKER
TRIAL COURT ATTORNEYS:	JOHN ROBERT WHITE, JR. PAMELA GUREN BACH KENNETH TREY O'CAIN
COURT FROM WHICH APPEALED:	MADISON COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	KENNETH TREY O'CAIN
ATTORNEYS FOR APPELLEE:	JOHN ROBERT WHITE PAMELA GUREN BACH
NATURE OF THE CASE:	CIVIL - CUSTODY
DISPOSITION:	REVERSED AND REMANDED - 01/30/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE KITCHENS, P.J., MAXWELL AND CHAMBERLIN, JJ.

KITCHENS, PRESIDING JUSTICE, FOR THE COURT:

¶1. Mark and Sylvia Barber were divorced in Madison County Chancery Court. The court awarded Mark Barber custody of the parties' minor children. The trial court had appointed a guardian *ad litem* during the divorce proceedings to investigate allegations raised by Sylvia Barber that Mark Barber had abused their children. The chancellor, however, granted Mark Barber's motion to limit testimony of the guardian *ad litem* and to exclude a guardian *ad litem* report from evidence after finding Sylvia Barber's allegations of child abuse to be unsubstantiated.

¶2. On appeal, Sylvia Barber argues that the trial court abused its discretion by not allowing the guardian *ad litem* to testify or by not admitting into evidence a guardian *ad litem* report. She contends that the exclusion impermissibly prevented the guardian *ad litem* from completing its court-appointed role and precluded admission of relevant and required findings regarding the alleged abuse and the best interest of the children. Mark Barber contends that the trial court did not err because a chancellor has the authority and the discretion to expand or limit the guardian *ad litem*'s role, and he argues additionally that the guardian *ad litem*'s findings contained inadmissible hearsay.

¶3. The court did not abuse its discretion by limiting the guardian *ad litem*'s participation. But because the appointment was mandatory, the chancellor was required at least to consider the guardian *ad litem*'s report and recommendations. He declined to do so. Accordingly, we reverse the judgment of the Madison County Chancery Court, and we remand the case for the chancellor to make findings of fact and conclusions of law that take into consideration the guardian *ad litem*'s report and recommendations.

FACTS AND PROCEDURAL HISTORY

¶4. Mark Barber and Sylvia Barber were married on March 8, 2008, in Apopka, Florida. They had four minor children: G.L.B., a male child born in 2008; M.C.B., a male child born in 2012; R.E.B., a male child born in 2015; and T.A.B., a male child born in 2016. Sylvia Barber also is the mother of a son from a prior relationship, B.A., born in 2003, who resided

with the Barbers during their marriage. The couple moved to Mississippi and lived in Ridgeland in Madison County, until their separation in 2018.

¶5. Mark Barber filed his complaint for divorce on February 15, 2018, in the Chancery Court of Madison County on grounds of adultery or, in the alternative, irreconcilable differences. He asked for sole legal and physical custody of the parties' minor children. The court ordered a hearing to determine temporary custody of the children pending a final judgment of divorce.

¶6. A special family master conducted a temporary relief hearing on March 20, 2018. Sylvia Barber appeared *pro se*. The family master recommended, and the chancellor ordered, that Mark Barber be granted immediate temporary physical custody of the Barber's four minor children.

¶7. On March 23, 2018, Sylvia Barber filed a motion for relief from the order and for a rehearing, claiming that Mark Barber had abused their minor children. She alleged that "placing the minor children in the sole care and custody of Mark is not in the children's best interests and would place them all in an unsafe and dangerous environment" because "Mark is guilty of conduct constituting abuse towards [sic] the minor[s]." She requested that she be awarded legal and physical custody of the children, and she also asked the chancellor to appoint a guardian *ad litem* "in order to investigate the abuse."

¶8. On April 6, 2018, the chancellor heard the motion and appointed a temporary guardian *ad litem*, Jessica Culpepper, to examine the allegations of child abuse. The court ordered

Culpepper to "conduct an investigation as she deems appropriate in her professional opinion; [to] interview the parties and interested witnesses; [and to] prepare a report at the conclusion of her investigation and any interim reports as needed regarding the mandatory appointment of a Guardian *Ad Litem*." Further, the chancellor charged the guardian *ad litem* with protecting "the best interest and welfare of these children . . . report[ing] to this Court if there is even a shred of thought that there might be any danger to the child."

¶9. The guardian *ad litem* prepared a preliminary report that she submitted April 12, 2018. She found that,

> [a]fter a preliminary investigation, the Guardian Ad Litem believes that the allegations before this Court, although unsubstantiated at this time, do rise to the level that the [guardian *ad litem*] should be appointed as a permanent [guardian *ad litem*]. The Guardian Ad Litem asks that she be appointed to this matter as a permanent Guardian Ad Litem with the authority to further investigate all areas of these allegations.

¶10. After receipt of the guardian *ad litem*'s findings, the court appointed Jessica Culpepper as a permanent guardian *ad litem* on April 16, 2018. The chancellor authorized Culpepper to continue in her assigned role; to prepare interim and final reports "as needed regarding placement of the children, including any and all factors supportive and unsupportive of the recommendation; and [to] act in all respects to assist the Court in protecting the best interests of the minor children."

¶11. Following the chancellor's order, the guardian *ad litem* extended her investigation and authored a report that included her findings and recommendations. The guardian *ad litem*

provided the report to the parties. The report was not entered into evidence at trial, and its contents are not part of the record on appeal.

¶12. On June 19, 2018, Mark Barber filed a "Motion to Strike Final Report of Guardian ad Litem and to Limit Testimony of Guardian ad Litem." He asked that the guardian *ad litem*'s report be struck in whole or in part because its contents, *inter alia*, contained an ***Albright***[1] factors analysis and recommended a permanent custody determination without express authorization from the court, presented the custody preference of a child younger than twelve, and incorporated "opinions and recommendations expressed . . . based on or influenced by hearsay and limited personal observations and experience." He also requested that the court not permit the guardian *ad litem* "to support her recommendations with hearsay or to testify to any matter about which she does not have personal knowledge" and asked that "the [guardian *ad litem*] . . . not be permitted to offer 'expert' opinions in her report or through testimony."

¶13. Sylvia Barber filed her response to the motion to strike, contending that the guardian *ad litem* was authorized and required to complete its investigation and report with respect to the best interests of the children and that exclusion would eliminate the guardian *ad litem*'s role, "which goes directly against the Court's intent and purpose . . . behind the basis for her appointment to begin with." She further argued that utilizing the ***Albright*** factors within the

[1] ***Albright v. Albright***, 437 So. 2d 1003 (Miss. 1983).

report was necessary and required by law in "assisting the court with the ultimate determination of the placement of the children."

¶14. The trial court heard the complaint for divorce and all motions over a period of three days.[2] Numerous witnesses testified concerning the parties' roles as parents and their fitness to have custody. And testimony was adduced regarding the allegations of abuse.

¶15. Mark Barber argued the motion to strike on August 3, 2018, before the guardian *ad litem* was called to testify. He contended that the guardian *ad litem* report should not be entered into evidence because the guardian *ad litem* was not authorized to make an ***Albright*** analysis for the court. He also submitted that the report "is nothing but a hearsay conduit," contravening the Mississippi Rules of Evidence.[3]

¶16. In response, Sylvia Barber answered that a guardian *ad litem*—as a duly appointed officer of the court—is obligated to testify and that the chancellor "specifically charged the guardian *ad litem* with the responsibility to investigate[,] . . . to interview the parties and witnesses, and to prepare a report at the conclusion of her investigation." Additionally, Sylvia Barber cited decisions of other courts that have approved the introduction of a written

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[2] Hearings began June 28, 2018. The court also heard the matter on June 29, 2018, and concluded the hearing on August 3, 2018. The parties filed a consent to divorce on the grounds of irreconcilable differences, agreeing to the court's deciding issues on which the parties could not agree, *inter alia*, physical custody and visitation.

[3] Mark Barber argued that the report is "so flawed and so permeated by that flawed information[that] it shouldn't even be allowed at all." He offered that, "[i]nstead of using the report as evidence, it would be appropriate for the guardian *ad litem* to testify live and to base her opinion on only what comes from the witness stand."

guardian *ad litem* report or that allowed a guardian *ad litem* to testify subject to cross-examination.

¶17. The chancellor stated at the hearing that he had not read the guardian *ad litem* report. He questioned the "foundation [of] the initial abuse allegations" and whether the guardian *ad litem* should testify "if [the] Court has heard three days' worth of testimony [without] hear[ing] anything that would rise to the level of appointing a guardian *ad litem*."

¶18. Before ruling on the motion, the chancellor requested a brief statement from the guardian *ad litem*: the chancellor inquired whether the guardian *ad litem*, "based upon the evidence . . . heard in the two and a half days of trial[, had] found any credible evidence of abuse or neglect of these children[.]" The guardian *ad litem* testified that, "[b]ased on what I have heard at trial[,] . . . I believe there is some credible evidence that there has been some abuse. It does not rise to an alarming level, but there has been some abuse." This question was limited to what the guardian *ad litem* had heard during the trial. She was not being asked whether she had found evidence of abuse or neglect in her investigation.

¶19. The chancellor then found, having received testimony from the parties and witnesses, that Sylvia Barber's allegations lacked support; accordingly, the chancellor determined that the guardian *ad litem*'s testimony was not required and that the guardian *ad litem* report should be excluded:

> [t]his Court, after two and a half days, [] – although Ms. Culpepper has indicated, somewhat hesitatingly, that there was some issues that she might view as quote abuse, [] that is a very nebulous term in these matters.

. . . .

> That being said, this Court only would allow such hearsay into this Court, as I think the appellate courts have had a lot of heartburn as well, in only cases, very restricted cases, in which this Court has credible evidence of abuse and neglect. And that such an investigation by the guardian *ad litem* is central to this Court's protection of said minor child and/or children.
>
> And as much as this Court respects the work of Mrs. Culpepper in this case and any other, this Court is the ultimate arbiter of whether or not there is credible evidence of abuse or neglect that would trigger this Court appointing [a] guardian *ad litem*.
>
> And there is absolutely no doubt in this Court's mind that after hearing the testimony, if this Court were to be asked to appoint a guardian *ad litem* based upon the credible evidence, this Court would not appoint a guardian *ad litem* in this matter.
>
> This matter is chock full of bad parenting, bad judgment, general knucklehead behavior and immaturity, which makes it consistent with about 90 percent of the cases that come to this Court.
>
> As such, *as the ultimate foundation upon which the guardian ad litem was appointed, and that is potential abuse, neglect of the minor child*, in this Court's view, not being credible or substantiated in any way, the Court would indeed grant the motion to exclude the guardian *ad litem* report, as well as this Court would exclude the testimony of the guardian *ad litem* herein.

(Emphasis added.)

¶20. The trial court, following exclusion of the guardian *ad litem*'s report and testimony, entered a final judgment of divorce on August 14, 2018, awarding Mark Barber physical custody of the parties' minor children. Sylvia Barber appealed.

¶21. Sylvia Barber claims on appeal that the chancellor impermissibly disregarded the guardian *ad litem*'s recommendations and report and that the chancellor was required to

allow the guardian *ad litem* to participate at the hearing. In response, Mark Barber contends that a chancellor has the authority and the discretion to determine a guardian *ad litem*'s role. All of the parties' arguments concern the ultimate issue of whether the chancellor erred by limiting the participation and findings of a duly appointed guardian *ad litem*.

STANDARD OF REVIEW

¶22. "The standard of review in child custody cases is limited. Reversal occurs only if a chancellor is manifestly wrong or applied an erroneous legal standard." ***Floyd v. Floyd***, 949 So. 2d 26, 28 (Miss. 2007) (citing ***Powell v. Ayars***, 792 So. 2d 240, 243 (Miss. 2001)). The Court will "affirm findings of fact by chancellors in [child custody] cases when they are supported by substantial evidence unless the chancellor abused [its] discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." ***Borden v. Borden***, 167 So. 3d 238, 241 (Miss. 2014) (first alteration in the original) (internal quotation marks omitted) (quoting ***Robison v. Lanford***, 841 So. 2d 1119, 1122 (Miss. 2003)).

DISCUSSION

Whether the trial court erred by failing to allow the guardian *ad litem* to testify or to receive the guardian *ad litem*'s recommendation

A. Chancellor's Authority to Limit Guardian ad Litem *Participation*

¶23. Sylvia Barber argues that our courts require a court-appointed guardian *ad litem* either to testify at trial subject to cross-examination or to submit a written report and, if requested,

to make recommendations. Because Culpepper was not allowed to testify or submit her report, she contends that the chancellor's decision was clear error.[4]

¶24. This Court has recognized that "[t]he role to be played by a guardian *ad litem* is complex and not subject to a simple, universal definition." ***S.G. v. D.C.***, 13 So. 3d 269, 280 (Miss. 2009). The Court clarified function of the guardian *ad litem* in ***S.G.***:

> In Mississippi jurisprudence, the role of a guardian ad litem historically has not been limited to a particular set of responsibilities. In some cases, a guardian ad litem is appointed as counsel for minor children or incompetents, in which case an attorney-client relationship exists and all the rights and responsibilities of such relationship arise. In others, a guardian ad litem may serve as an arm of the court—to investigate, find facts, and make an independent report to the court. The guardian ad litem may serve in a very limited purpose if the court finds such service necessary in the interest of justice. Furthermore, the guardian ad litem's role at trial may vary depending on the needs of the particular case. The guardian ad litem may, in some cases, participate in the trial by examining witnesses. In some cases, the guardian ad litem may be called to testify, and in others, the role may be more limited.

Id. at 280-81.

¶25. Thus, chancellors may assign duties to a guardian *ad litem* upon appointment. This Court "encourage[s] chancellors to set forth clearly the reasons an appointment has been made and the role the guardian ad litem is expected to play in the proceedings." ***Id.*** at 281. This charge to

> [s]et[] out such expectations should not permanently bind the court should needs change as the litigation progresses. Judges may revise these

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[4]According to Sylvia Barber, "[a]lthough the [guardian *ad litem*] fulfilled all obligations, she was not allowed to testify, her report was completely stricken; and the Court strangely refused to receive any of her recommendations."

> expectation[s] by order as the need arises, so long as the guardian *ad litem* is not required to breach client confidences or other ethical duties by the change in responsibilities. Chancellors should be free to assign duties to a guardian ad litem as the needs of a particular case dictate, [but] the role of the guardian ad litem should at all times be clear.

Id.

¶26. This Court has held that "the guardian ad litem should never serve as a substitute for the court. The court is not bound by the guardian ad litem's recommendation . . . ." ***Id.*** at 282 (footnote omitted). To be sure, guardians *ad litem* serve important roles as "appointed . . . investigator[s] for, or advisor[s] to, the court," and, as authorized, "the guardian ad litem, should recommend a course of action to the court . . . ." ***Id.*** at 282. This Court has emphasized that "the trial court, and not the guardian ad litem, is the ultimate finder of fact." ***Id.*** at 283. Further, this Court will not impose a strict rule in circumstances in which chancellors are authorized to exercise their discretion "as the needs of a particular case dictate . . . ." ***Id.*** at 281; *see also* ***S.N.C. v. J.R.D.***, 755 So. 2d 1077, 1082 (Miss. 2000) ("Although this Court has required a guardian ad litem to perform tasks competently, there is no requirement that the chancellor defer to the findings of the guardian ad litem, as is proposed by the petitioners. Such a rule would intrude on the authority of the chancellor to make findings of fact and to apply the law to those facts.").

¶27. When charges of child abuse or neglect arise, Mississippi Code Section 93-5-23 mandates the appointment of a guardian *ad litem*. The statute provides that a court "*shall* appoint a guardian ad litem if charges of child abuse or neglect are raised in a child custody

action. Miss. Code Ann. § 93-5-23 (Rev. 2018) (emphasis added).[5] Under this statute, a judge is required to "investigate, hear and make a determination" regarding allegations of abuse. *Id.* And the court "is provided discretion to determine if issues of abuse or neglect have sufficient factual basis to support the appointment of a guardian ad litem." ***Carter v. Carter***, 204 So. 3d 747, 759 (Miss. 2016) (citing Miss. Code Ann. § 93-5-23 (Rev. 2013)). Upon appointment, a guardian *ad litem* is obligated "to protect the interest[s] of the child[ren] for whom he has been appointed" and is authorized to "investigate, make recommendations to the court or enter reports as necessary to hold paramount the child's best interest." Miss. Code Ann. § 43-21-121(3) (Supp. 2019). When appointed in accordance with Section 93-5-23, the guardian *ad litem* must be an attorney. Miss. Code Ann. § 93-5-23.

¶28. Sylvia Barber argues on appeal that the chancellor was bound by this Court's decision in ***McDonald v. McDonald*** and that, in a mandatory appointment, the [guardian *ad litem*] must *either* submit a written report or testify *and* must make recommendations to the court if requested. ***McDonald v. McDonald***, 39 So. 3d 868, 883 (Miss. 2010). Indeed, this Court has relied on ***McDonald*** to hold that "[w]hen a chancellor chooses to hear the abuse

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[5] The court may investigate, hear and make a determination in a custody action when a charge of abuse and/or neglect arises in the course of a custody action as provided in Section 43-21-151, and in such cases the court shall appoint a guardian ad litem for the child as provided under Section 43-21-121, who shall be an attorney.

Miss. Code Ann. § 93-5-23.

allegation during a custody hearing, appointment of a [guardian *ad litem*] is mandatory. As part of his or her duties, the [guardian *ad litem*] must either submit a written report or testify, and must make recommendations to the court if requested." ***Smith v. Smith***, 206 So. 3d 502, 510 (Miss. 2016) (footnote omitted) (citing ***McDonald***, 39 So. 3d at 883). Because, as discussed below, we find that the appointment of the guardian *ad litem* in this case was mandatory, the guardian was required to submit a written report or testify, and, if requested, to make recommendations to the court.

¶29. Before further discussion, we emphasize the serious and vital nature of guardians *ad litem* in safeguarding the welfare of children whose lives are impacted irrevocably by the decisions of our judicial system. The literal translation of the term *guardian* ad litem is *guardian for the suit*. *Ad litem*, Black's Law Dictionary (7th ed. 1999). Section 93-5-23 and this Court's decisions applying it make clear that the legislature and the judiciary have recognized the specific need for an officer of the court with the dedicated role of protecting the interests of children who are the subject of child abuse or neglect allegations. The appointment of a guardian *ad litem* is not a mere perfunctory hoop through which the court must go to resolve a child custody case. Rather, the role of the guardian *ad litem* is a meaningful one; it has been enshrined in the law and public policy of this state for the very reason that the guardian *ad litem* is the only participant in a child custody proceeding whose sole interest is identifying and protecting the rights of the children and reporting its findings

to the court. Therefore, a chancellor's failure to consider a mandatorily appointed guardian *ad litem*'s findings is an error of the utmost seriousness.

B. Chancellor's Discretion to Limit the Guardian ad Litem*'s Report and Recommendations*

¶30. Sylvia Barber argues that the chancellor abused his discretion by failing to review the guardian *ad litem*'s report and recommendations; specifically, she contends that the chancellor erred by declining to consider the guardian *ad litem*'s report and recommendations in making findings of fact and conclusions of law.

¶31. We find that the chancellor's failure to address the guardian *ad litem*'s report constitutes reversible error.

¶32. This Court in ***Borden*** held that, when the appointment is mandatory, "[a] chancellor must include a summary of the guardian *ad litem*'s recommendations in his or her findings of fact and conclusions of law." ***Borden***, 167 So. 3d at 243 (citing ***S.N.C.***, 755 So. 2d at 1082). We said that, "[w]hile the chancellor in the current case acknowledged the guardian ad litem's recommendation, he did not provide a summary of the report or a summary of his reasons for rejecting the guardian ad litem's recommendation. Therefore, we find the chancellor erred in failing to do so." ***Id.***; *see also* ***J.P. v. S.V.B.***, 987 So. 2d 975, 982 (Miss. 2008) ("While a chancellor is in no way bound by a guardian's recommendations, a summary of these recommendations in addition to his reasons for not adopting the recommendations is required in the chancellor's findings of fact and conclusions of law." (internal quotation marks omitted) (quoting ***Floyd v. Floyd***, 949 So. 2d 26, 29 (Miss. 2007))); *cf.* ***Barbaro v.***

Smith, 282 So. 3d 578, 600 (Miss. Ct. App. 2019) ("Reasons are required only when 'a chancellor's ruling is contrary to the recommendation of a statutorily required [guardian *ad litem*.'] Here, the chancellor's ruling was consistent with the [guardian *ad litem*'s] recommendation. Accordingly, the chancellor sufficiently addressed the [guardian *ad litem*'s] report." (quoting ***S.N.C.***, 755 So. 2d at 1082)).

¶33. This Court also finds instructive the Court of Appeals decision in ***Farthing v. McGee***, 158 So. 3d 1223 (Miss. Ct. App. 2015). The trial court in that case appointed a guardian *ad litem* in a termination of parental rights case. ***Id.*** at 1227. The guardian *ad litem* had submitted findings and recommendations that were available to the chancellor for evaluation, but the record did not reflect that the chancellor had reviewed either; further, the court did not ask that the guardian *ad litem* provide any report or recommendation until after the termination hearing. ***Id.*** at 1227. The Court of Appeals "acknowledge[d] there is certainly no requirement that a chancellor defer to a [guardian *ad litem*]'s findings." ***Id.*** (citing ***S.N.C.***, 755 So. 2d at 1082). But also it recognized the existence of

> certain court-created mandates about what a chancellor *must* do in cases where a [guardian *ad litem*] is required to submit findings and recommendations. In such cases, the chancellor "*shall* include at least a summary review of the qualifications and recommendations of the guardian *ad litem* in the court's findings of fact and conclusions of law."

Id. (quoting ***S.N.C.***, 755 So. 2d at 1082). Accordingly, this "failure to address, much less mention, the recommendations requires reversal." ***Id.***

¶34. Here, the chancellor appointed the guardian *ad litem* on a temporary basis to conduct a preliminary investigation into the child abuse allegation and "to assist the [c]ourt in determining whether the appointment of a Guardian *Ad Litem* is mandatory pursuant to Miss. Code Ann. § 93-5-23." At the conclusion of the preliminary investigation, the guardian *ad litem* submitted a report that found that the allegations, "although unsubstantiated at the time," were sufficient to warrant her permanent appointment as guardian *ad litem*. The chancellor signified his agreement by making the guardian *ad litem*'s appointment permanent.[6] The guardian *ad litem* was ordered to investigate and prepare a report. Neither party registered an objection.[7]

¶35. After hearing the evidence adduced at trial, the chancellor revisited that decision and, although noting that the guardian *ad litem* had been appointed to investigate potential child

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[6] While the dissent interprets what occurred as something less than a mandatory appointment, the facts, the procedural history, and the chancellor's comments at the hearing indicate that the chancellor, in his discretion, had appointed the guardian *ad litem* to investigate a charge of abuse, implicating Section 93-5-23. Thus, it is evident that, at the time of the appointment, the chancellor considered the requirements for a mandatory appointment to be met. The question this case presents is whether the chancellor can reconsider a mandatory appointment at the hearing, having never reviewed the guardian *ad litem*'s findings, and the answer is no.

[7] The dissent relies in large part on ***Carter v. Carter***, 204 So. 3d 747 (Miss. 2016), a plurality decision. In ***Carter***, the issue was whether a charge of neglect had arisen in a child custody case such that the chancellor had erred by failing to appoint a mandatory guardian *ad litem*. ***Id.*** at 759. The plurality and dissent disagreed on whether such a charge had arisen. This case is very different; here, the chancellor had made a mandatory guardian *ad litem* appointment but then reconsidered it at the hearing, having never reviewed the guardian *ad litem*'s findings and conclusions at all. The majority also relies on ***Porter v. Porter***, 23 So. 3d 438, 449 (Miss. 2009), which did not involve any mention of child abuse or neglect; so the chancellor's appointment of a guardian *ad litem* obviously was discretionary.

abuse or neglect, refused to address the guardian *ad litem*'s report and recommendations. This was error. Section 93-5-23 and our case law do not contemplate that a chancellor, after hearing testimony, may disregard an earlier mandatory guardian *ad litem* appointment upon the chancellor's independent finding that the abuse allegations were unfounded. Under Section 93-5-23, the guardian *ad litem*'s investigation and report are intended to assist the chancellor in determining whether the abuse allegation is substantiated. The statute contemplates that, once a mandatory guardian *ad litem* appointment has been made, the chancellor will consider the guardian's report. It is for this reason that this Court has held that, when the appointment is mandatory, the chancellor must consider the guardian *ad litem*'s findings and recommendations although the chancellor remains free to reject them. ***Borden***, 167 So. 3d at 243. And while we have held that a chancellor cannot rely on rank hearsay provided by a guardian *ad litem* as substantive evidence, ***Ballard v. Ballard***, 255 So. 3d 126, 134 (Miss. 2017), in this case the chancellor never read the report at all and thus had no basis for a ruling on the hearsay objection. Without the report, the chancellor could not evaluate whether the report contained rank hearsay or whether any hearsay it might contain fell within a hearsay exception. *See* M.R.E. 803.

¶36. The guardian *ad litem*, the only officer of the court charged with the sole responsibility of guarding the legal interests of the children, was not called upon to provide her findings or recommendations to the trial court. The chancellor did not formally reject the guardian *ad litem*'s report or recommendations outright, nor did the chancellor address the

guardian *ad litem*'s findings after deciding that the guardian *ad litem* was not required to testify. The chancellor questioned the guardian *ad litem* briefly concerning whether she had heard evidence of neglect or abuse, but the court's inquiry was focused on the guardian's impressions from the trial: "based upon the evidence . . . *heard in the two and a half days of trial.*" (Emphasis added.) When the court asked the guardian *ad litem* whether there was evidence of abuse, "[i]n your opinion, as the guardian *ad litem*[,]" she responded, "[y]es, your Honor." Notwithstanding that unequivocal announcement, the chancellor granted Mark Barber's motion, and the children's guardian *ad litem* was excused from the trial. No post-trial document, including the final judgment of divorce, cites the guardian *ad litem* report or mentions any of the guardian's findings.

¶37. Thus, the chancellor "did not provide a summary of the report or a summary of his reasons for rejecting the guardian *ad litem*'s recommendation." ***Borden***, 167 So. 3d at 243. And while the report was circulated to the parties, the chancellor failed to address its findings, contrary to this Court's clear precedent. *See* ***id.*** The chancellor had entered an order directing the guardian *ad litem* to make findings and prepare a guardian *ad litem* report, and this Court's precedent requires a chancellor to review and address the guardian's findings and recommendations. "As previously stated, the trial court, and not the guardian *ad litem*, is the ultimate finder of fact," but the chancellor himself limited that capacity by not

addressing the recommendations or report and dismissing whatever findings the guardian *ad litem* made.[8] ***S.G.***, 13 So. 3d at 283.

¶38. Because this Court has held that a failure to address the guardian *ad litem*'s findings and recommendations respecting this issue constitutes reversible error, we reverse and remand this case for the trial court to assess the guardian *ad litem*'s report and recommendations in its findings of fact and conclusions of law consistent with ***Borden*** and ***Farthing***.

¶39. Because this issue constitutes grounds for reversal, we decline to review the other arguments raised on appeal or to assess the trial testimony and the chancellor's findings that the allegations of abuse are unsubstantiated. Upon remand, the guardian *ad litem*'s report and recommendations shall be duly considered by the chancellor, after which the chancellor shall adjudicate all pending issues related to the children of the parties.

CONCLUSION

¶40. The chancellor had authority to direct the participation of a mandatorily appointed guardian *ad litem* respecting child custody proceedings, but because the chancellor also was bound to consider the guardian *ad litem*'s report and recommendations and did not do so, reversible error occurred. Therefore, we reverse the judgment and remand this case to the Madison County Chancery Court for further proceedings consistent with this opinion.

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[8]The chancellor remarked that "we have an unknown recommendation from a guardian *ad litem* at this point."

¶41. **REVERSED AND REMANDED.**

KING, P.J., COLEMAN, MAXWELL, BEAM AND CHAMBERLIN, JJ., CONCUR. ISHEE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY RANDOLPH, C.J., AND GRIFFIS, J.

ISHEE, JUSTICE, DISSENTING:

¶42. The statute requires the appointment of a guardian ad litem "when a charge of abuse and/or neglect arises in the course of a custody action as provided in Section 43-21-151 . . . ." Miss. Code § 93-5-23 (Rev. 2018). As the majority acknowledges, more than a mere allegation is required to invoke the statute; the chancellor "is provided discretion to determine if issues of abuse or neglect have sufficient factual basis to support the appointment of a guardian ad litem." Maj. Op. ¶ 27 (internal quotation marks omitted) (quoting ***Carter v. Carter***, 204 So. 3d 747, 759 (Miss. 2016)). "The statute should not be read 'as requiring . . . the appointment of a guardian ad litem based merely on an unsubstantiated assertion found in the pleadings of one of the parties.'" ***Carter***, 204 So. 3d at 759 (quoting ***Johnson v. Johnson***, 872 So. 2d 92, 94 (Miss. Ct. App. 2004)).

¶43. The majority sidesteps the question of whether there was a sufficient factual basis to trigger the statute. It appears instead to be satisfied with its supposition that "at the time of the appointment, the chancellor considered the requirements for a mandatory appointment to be met." *See* Maj. Op. ¶ 34 n.6. From my own review of the record, I disagree; it appears that the chancellor appointed the guardian ad litem out of an abundance of caution, not because he had found that doing so was statutorily required. But regardless of the

chancellor's subjective intent, the appointment was not statutorily required because the allegation the children were abused was never substantiated. *See* ***Carter***, 204 So. 3d at 759.

¶44. Sylvia leveled a cursory allegation of abuse after the chancellor awarded temporary custody to Mark—Sylvia alleged just that "Mark is guilty of conduct constituting abuse towards the minor children, inclusive of physical, verbal and emotional abuse." The chancellor appointed a guardian ad litem to look into Sylvia's allegation. The guardian ad litem was instructed to report back to the court whether appointment of a guardian ad litem was mandatory, but she was also to "report to this [c]ourt if there is even a shred of thought that there might be any danger to the child[ren]." The guardian ad litem reported back with no details about the allegations, just her conclusion that the allegations were "unsubstantiated at this time"—unsubstantiated is, again, a word this Court and the Court of Appeals have used to describe allegations that do not require the appointment of guardian ad litem. *See* ***Carter***, 204 So. 3d at 759. Nonetheless, the guardian ad litem went on to recommend that the allegations "[rose] to the level that the [guardian ad litem] should be appointed as a permanent [guardian ad litem]." The chancellor then entered an order finding that the appointment of a guardian ad litem was "necessary and warranted." The order instructed the guardian ad litem to "conduct an investigation" and to "make a recommendation," but it did not say the appointment was mandatory under the statute. In fact, the chancellor's order indefinitely appointing the guardian ad litem said nothing at all about the allegations of abuse.

¶45. Later, after the chancellor heard the details, he changed his mind about the need to hear the guardian ad litem's report or recommendation. The chancellor found unequivocally that the appointment had been discretionary and that the allegation Mark had abused the children was not credible. He held,

> [T]his Court is the ultimate arbiter of whether or not there is credible evidence of abuse or neglect that would trigger this Court appointing [a] guardian ad litem.
>
> And there is absolutely no doubt in this Court's mind that after hearing the testimony, if this Court were to be asked to appoint a guardian ad litem based upon the credible evidence, this Court would not appoint a guardian ad litem in this matter.
>
> This matter is chock full of bad parenting, bad judgment, general knucklehead behavior and immaturity, which makes it consistent with about 90 percent of the cases that come to this Court.
>
> As such, as the ultimate foundation upon which the guardian ad litem was appointed, and that is potential abuse, neglect of the minor child, in this Court's view, not being credible or substantiated in any way, the Court would indeed grant the motion to exclude the guardian ad litem report, as well as this Court would exclude the testimony of the guardian ad litem herein.

The chancellor reached this conclusion after hearing three days of testimony and conducting in camera interviews with the two oldest children.

¶46. In changing the guardian ad litem's assignment to suit the needs of the case as it unfolded, the chancellor acted according to this Court's prior direction—the chancellor's order appointing a guardian ad litem "should not permanently bind the court should needs change as the litigation progresses." ***S.G. v. D.C.***, 13 So. 3d 269, 281 (Miss. 2009). A chancellor has the authority to expand or limit the role of a guardian ad litem "as the needs

of a particular case dictate . . . ." ***S.G.***, 13 So. 3d 281. "The guardian ad litem may serve in a very limited purpose if the court finds such service necessary in the interest of justice" and her "role at trial may vary depending on the needs of the particular case." ***Id.*** at 280-81. The majority notes these holdings but fails to give them effect. *See* Maj. Op. at ¶¶ 24-25.

¶47. I submit that reversible error cannot be found without a showing that the allegation of abuse was sufficiently substantiated and credible to make the appointment of a guardian ad litem mandatory under the statute. *See* ***Porter***, 23 So. 3d at 449; ***Carter***, 204 So. 3d at 759. No such showing has been made.

¶48. The Court of Appeals addressed a very similar scenario in the recent ***Kaiser v. Kaiser***, 281 So. 3d 1136 (Miss. Ct. App. 2019). There, a chancellor appointed a guardian ad litem to investigate allegations the children had been endangered when the mother exposed them to her abusive boyfriend. ***Id.*** at 1140. The guardian ad litem was subsequently released without giving a final report or recommendation to the chancellor, after it became clear that the children had not been abused or neglected. ***Id.*** at 1141-42. The Court of Appeals found no error because the appointment had been discretionary:

> Because allegations of abuse mandating the appointment of a GAL were not present in this case, the chancellor's appointment of the GAL was discretionary and not statutorily mandated pursuant to section 93-5-23. When an appointment of a GAL is discretionary, the chancellor is not required to include his or her reasons for rejecting the GAL's recommendation.

Id. at 1142 (citing ***Porter***, 23 So. 3d at 449).

¶49. Here, before trial, the allegation that the children were abused was bare and "unsubstantiated," as the guardian ad litem found. It is not mandatory to appoint a guardian ad litem "based merely on an *unsubstantiated* assertion found in the pleadings of one of the parties." ***Carter***, 204 So. 3d at 759 (emphasis added) (internal quotation mark omitted) (quoting ***Johnson v. Johnson***, 872 So. 2d 92, 94 (Miss. Ct. App. 2004). At trial, the most severe allegations leveled against Mark were that he had struck one of the boys on the top of the head with the handle of a kitchen knife (to get his attention) and had pushed his stepson (the oldest, about fourteen years of age) into a nest of yellow jackets. The appointment of a guardian ad litem is only mandatory when "the allegations of abuse and/or neglect rise to the level of a 'charge of abuse and/or neglect'" under the Youth Court Law. ***Carter***, 204 So. 3d at 759 (quoting Miss. Code Ann. § 93-5-23 (Rev. 2013)). The chancellor had substantial evidence to support his ultimate finding that the credible allegations amounted to little more than "bad parenting, bad judgment, [and] general knucklehead behavior and immaturity."

¶50. Applying ***Carter*** and ***Porter*** and ***Kaiser***, I would find that the appointment of the guardian ad litem here was discretionary, not mandatory under the statute, and that no error resulted from the chancellor's decision not to hear the guardian ad litem's recommendation. *See* ***Porter***, 23 So. 3d at 449; ***Kaiser***, 281 So. 3d at 1142.

¶51. Finally, I would point out that this issue should be procedurally barred for two reasons. First, even though Sylvia admitted at trial that the allegation of abuse had to be

sufficiently credible for the appointment of a guardian ad litem to have been mandatory, on appeal she entirely neglected to brief the question of whether her allegation of abuse was substantiated. *See* ***Carter***, 204 So. 3d at 759. Like the majority, Sylvia just assumes the question was finally decided by the appointment of a guardian ad litem following allegations of abuse. I do not agree and would hold that reversible error cannot be found without a showing that the appointment really was required by the statute. *See* ***Porter***, 23 So. 3d at 449. Since Sylvia failed to brief that question entirely, she has waived the issue on appeal. *See* ***Rosenfelt v. Miss. Dev. Auth.***, 262 So. 3d 511, 519 (Miss. 2018) ("The appellant must affirmatively demonstrate error in the court below, and failure to do so waives an issue on appeal." (internal quotation marks omitted) (quoting ***Jefferson v. State***, 138 So. 3d 263, 265 (Miss. Ct. App. 2014))).

¶52. Sylvia also failed to proffer the guardian ad litem's report or testimony. A party complaining of the exclusion of evidence is required to proffer that evidence. ***Gordon v. Wall (In re Estate of Waller)***, 273 So. 3d 717, 720 (Miss. 2019). This is so the trial court will have an opportunity to correct its mistake (if there was one) and so a reviewing court can judge whether the error was sufficiently important to require reversal. *See* ***id.*** Reversible error could only result here if the chancellor's decision was contrary to the guardian ad litem's recommendation. *See* ***Porter***, 23 So. 3d at 449. Silvia elected not to make the guardian ad litem's report and recommendation part of the record, so this Court can only speculate about whether its exclusion from evidence was reversible error.

¶53. The statute does not require the appointment of a guardian ad litem in response to a bare, unsubstantiated allegation of abuse. ***Carter***, 204 So. 3d at 759. The appointment of a guardian ad litem here was therefore discretionary, so there was no error in the chancellor's decision not to receive a report or recommendation from the guardian ad litem. ***Porter***, 23 So. 3d at 449; ***Carter***, 204 So. 3d at 759; ***Kaiser***, 281 So. 3d at 1142. The issue is also procedurally barred because Sylvia failed to fully brief it and failed to proffer the guardian ad litem's recommendation. I would affirm the chancery court's judgment.

RANDOLPH, C.J., AND GRIFFIS, J., JOIN THIS OPINION.