

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-SA-01568-SCT

***MISSISSIPPI DEPARTMENT OF CHILD
PROTECTION SERVICES***

v.

JACK BYNUM

DATE OF JUDGMENT:	09/04/2019
TRIAL JUDGE:	HON. GERALD MARION MARTIN
TRIAL COURT ATTORNEYS:	APRIL TAYLOR BRYANT STEVEN PATRICK WANSLEY AUDRY REGNAL BLACKLEDGE
COURT FROM WHICH APPEALED:	COVINGTON COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	OFFICE OF THE ATTORNEY GENERAL BY: STEVEN PATRICK WANSLEY
ATTORNEY FOR APPELLEE:	AUDRY REGNAL BLACKLEDGE
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
DISPOSITION:	AFFIRMED - 11/19/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE RANDOLPH, C.J., MAXWELL AND BEAM, JJ.

MAXWELL, JUSTICE, FOR THE COURT:

¶1. By statute, a parent facing the involuntary termination of his or her parental rights who is both indigent and legally entitled to counsel shall be appointed counsel. Miss. Code Ann. § 93-15-113(2)(b) (Rev. 2018). That is what happened in this case. The Mississippi Department of Child Protection Services (MDCPS) sought to terminate involuntarily the

parental rights of Jack Bynum, putative father of a child in MDCPS's custody.¹ The chancery court determined Bynum was both indigent and entitled to counsel. So the chancellor appointed Bynum counsel and ordered MDCPS to pay his attorney's fees of \$3,750.

¶2. MDCPS appealed. The agency argues Covington County should pay for Bynum's representation, just as it would if Bynum were an indigent criminal defendant. But this is not a criminal case. And the statutory scheme that directs the initiating county in criminal prosecutions to pay for indigent representation is expressly limited. It only applies to those "charged with a felony, misdemeanor punishable by confinement for ninety (90) days or more, or commission of an act of delinquency." Miss. Code Ann. § 99-15-15 (Rev. 2015); *see also* Miss. Code Ann. § 99-15-17 (Rev. 2015). Here, this Court is dealing with a termination case. And when it adopted Section 93-15-113(2), the Legislature neither expanded the scope of Sections 99-15-15 or 99-15-17 nor otherwise directed that the county in which a termination proceeding is initiated pay for an indigent parent's attorney's fees. Instead, in involuntary-termination proceedings, the Legislature expressly left fees-assessment issues to the court's discretion. Miss. Code Ann. § 93-15-113(2)(b).

¶3. Thus, absent a legislative directive to assess an indigent parent's attorney's fees to Covington County, the chancery court did not abuse its legislatively conferred discretion by ordering MDCPS to pay Bynum's attorney's fees. The chancellor assessed the agency the fees based on its role as plaintiff in the involuntary-termination proceeding, which is

¹ MDCPS acted through its subagency, the Covington County Department of Child Protection Services.

consistent with this Court’s precedent. *Miss. Dep’t of Human Servs. v. W.A. (In re Adoption of K.M.J.)*, 758 So. 2d 402, 405 (Miss. 2000). Therefore, we affirm.

Background Facts & Procedural History

¶4. In 2016, the Mississippi Legislature enacted the Mississippi Termination of Parental Rights Law. Miss. Code Ann. §§ 93-15-101 to -133 (Rev. 2018). Section 93-15-113 governs involuntary terminations. It directs the court, at the beginning of an involuntary termination-of-parental-rights proceeding, first to advise a parent facing termination of his right to counsel. Miss. Code Ann. § 93-15-113(2)(a) (Rev. 2018). Second, the court must “determine whether the parent before the court is represented by counsel.” Miss. Code Ann. § 93-15-113(2)(b). “If an indigent parent does not have counsel, the court shall determine whether the parent is entitled to appointed counsel under the Constitution of the United States, the Mississippi Constitution of 1890, or statutory law and, if so, appoint counsel for the parent”² *Id.* The statute mandates the court consider whether a parent has counsel and requires appointment of counsel if the court determines the indigent parent is legally entitled to counsel. But the statute leaves “[t]he setting of fees for court-appointed counsel and the assessment of those fees . . . [to] *the discretion of the court.*” *Id.* (emphasis added).

¶5. Here, the chancellor complied with Section 93-15-113(2)(b). When the involuntary-termination proceeding began, the court determined Bynam was an indigent parent, lacked counsel, and was legally entitled to appointed counsel. Exercising its discretion to set and

² Even before the enactment of Section 93-15-113(2)(b), this Court recognized the trial court’s “authority to appoint counsel for indigent parents in appropriate cases.” *Blakeney v. McRee*, 188 So. 3d 1154, 1162 (Miss. 2016) (citing *K.D.G.L.B.P. v. Hinds Cnty. Dep’t of Human Servs.*, 771 So. 2d 907, 909 (Miss. 2000)).

assess fees, the court followed its “standard practice.” The court “assessed such fees and expenses to the Plaintiff”—here MDCPS—because “Covington County and the State of Mississippi have not appropriated funds for indigent parent representation[.]”

¶6. The court then ordered MDCPS to advance Bynum’s appointed counsel a \$900 retainer. While MDCPS did not object to the order, it did not pay the retainer. So Bynum’s appointed counsel moved for payment. The appointed lawyer calculated his fee based on the time expended representing Bynum, whose parental rights ultimately were terminated. The court granted Bynum’s counsel’s motion, ordering MDCPS to pay \$3,750 in attorney’s fees.

Discussion

¶7. MDCPS has appealed. It does not contest the chancery court’s finding that Bynum was entitled to appointed counsel. Nor does it challenge the amount of attorney’s fees as being unreasonable. Rather, the agency takes issue with the court’s directive that it, as plaintiff in the termination proceeding, pay these fees.

¶8. MDCPS argues the Legislature—by adopting Section 93-15-113(2)(b)’s provision for counsel for certain indigent parents in involuntary-termination proceedings—never intended MDCPS bear the costs of the appointed attorney’s fees. MDCPS suggests the Legislature instead meant “for the State Defender’s Office to provide representation for indigent parents in termination of parental rights cases.” To support its view, MDCPS points to Mississippi Code Section 99-18-13 (Supp. 2019), which the Legislature amended in 2016 in the same session it adopted Section 93-15-113(2)(b).³ But according to MDCPS, Section 99-18-13

³ In 2016, the Legislature added the following provision to Section 99-18-13:

“is not available for use” because the “Legislature did not provide funding for the State Defender’s Office to take on this responsibility this year.” And because the State Defender’s Office has not been funded to represent indigent parents in termination proceedings, MDCPS insists “the current statutory scheme for paying for counsel for indigents” is Mississippi Code Section 99-15-17.

¶9. Section 99-15-17 directs that court-allowed fees and expenses incurred by an indigent defendant’s appointed counsel be paid by the county. But Section 99-15-17 applies only to the “compensation for counsel for indigents appointed as provided in Section 99-15-15” Miss. Code Ann. § 99-15-17. And Section 99-15-15 is not applicable here because it applies only for the appointment of counsel “[w]hen any person shall be charged with a felony, misdemeanor punishable by confinement for ninety (90) days or more, or commission of an act of delinquency.” Miss. Code Ann. § 99-15-15. Further, Section 99-15-17 requires payment by the “the county in which the *prosecution* was commenced.” Miss. Code Ann. § 99-15-17 (emphasis added).

¶10. Importantly, neither Section 99-15-15 nor Section 99-15-17 was amended in 2016 to include indigent parents in involuntary-termination proceedings. So contrary to MDCPS’s argument, Section 99-15-17’s statutory scheme—requiring that Mississippi counties pay attorney’s fees and expenses of indigent criminal defendants prosecuted in their respective

(2) The State Defender may provide representation to parents or guardians who have been determined by the youth court judge to be indigent and in need of representation in an abuse, neglect or termination of parental rights proceeding or appeal therefrom. Representation may be provided by staff or contract counsel including, but not limited to, by contract with legal services organizations.

county—by its own terms does not apply. Section 99-15-17 makes no mention of fees and expenses of indigent parents facing involuntary termination of their parental rights.⁴ And to expand this statute to include indigent parents, as MDCPS urges, this Court would have “to interfere with the Legislature’s right to expend public funds.” *Wilson v. State*, 574 So. 2d 1338, 1340 (Miss. 1990) (acknowledging “that the issue of compensation for an attorney appointed to defend an accused in a criminal case is a legislative matter rather than a judicial matter”).

¶11. There is a discretionary provision that the State Defender “may provide representation to parents or guardians who have been determined by the youth court judge to be indigent and in need of representation in an abuse, neglect or termination of parental rights proceeding or appeal therefrom.” Miss Code Ann. § 99-18-13(2). But the only Legislative guidance on attorney’s fees for indigent parents in an involuntary-termination proceeding is found in Section 93-15-113(b)(2) itself. And Section 93-15-113(b)(2) is clear: “The setting of fees for court-appointed counsel and the assessment of those fees *are in the discretion of the court.*” (Emphasis added.) So contrary to MDCPS’s position, the assessment of fees of court-appointed counsel in an involuntary-termination proceeding does not require the court to follow a statutory scheme. Instead, the statute makes clear the court should exercise its discretion.

⁴ We also note that Mississippi constitutionally requires that “[t]he expenses of criminal prosecutions shall be borne by the county in which such prosecution shall be begun.” Miss. Const. art. 14, § 261. Mississippi’s constitution does not impose similar burdens on the county in which involuntary terminations are initiated.

¶12. And the chancery court’s discretionary decision to order MDCPS to pay Bynum’s attorney’s fees based on the agency’s role as plaintiff in termination proceedings appears reasonable. This is especially true in light of this Court’s decision in *In re Adoption of K.M.J.*, 758 So. 2d at 405. In that case, an adoption proceeding involving termination of parental rights, the chancery court apportioned a significant percentage of the guardian ad litem’s fees to MDCPS’s predecessor, the Mississippi Department of Human Services (MDHS). The chancellor based this assessment on the other parties’ inability to pay. This Court affirmed the apportionment, finding the chancery court had reached “[a]n equitable solution” that should not be disturbed on appeal. *Id.* In doing so, this Court noted MDHS’s role as plaintiff in the termination proceeding and its financial responsibility “for the care and the general expenses involving children in its custody.” *Id.*

¶13. The chancery court here crafted a similar equitable solution. Bynum, who had been declared indigent, was unable to pay his attorney’s fees. And the chancellor recognized that “Covington County and the State of Mississippi have not appropriated funds for indigent parent representation”—something MDCPS does not challenge on appeal. That left MDCPS, the plaintiff that initiated the involuntary-termination proceeding and the agency now “financially responsible for the care and the general expenses involving children in its custody.” *Id.*; see Miss. Code Ann. § 43-26-1(6) (Supp. 2019) (directing MDCPS to provide certain programs and services formerly provided by MDHS). Thus, the chancellor’s decision that MDCPS should pay Bynum’s attorney’s fees was not an abuse of discretion.

Conclusion

¶14. In affirming the chancery court, we emphasize that we are not directing MDCPS to pay for indigent parents' attorney's fees in *all* cases involving Section 93-15-113. The Legislature—the only branch of government that could mandate such blanket financial responsibility—has made no such provision. Instead, the Legislature has left the issue of setting and assessing court-appointed counsel's fees to the court's discretion. Based on the circumstances and the court's reasoning in the case before this Court, we find the chancery court did not abuse its discretion by ordering MDCPS to pay Bynum's attorney's fees.

¶15. **AFFIRMED.**

RANDOLPH, C.J., KITCHENS AND KING, P.JJ., COLEMAN, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.