IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 92-CA-00682 COA

CONSOLIDATED WITH

NO. 93-CA-00019 COA

EMMYE SMITH JANOUSH WALKER, INDIVIDUALLY AND AS NATURAL GUARDIAN, NEXT FRIEND AND MOTHER OF JESSE BETH JANOUSH AND MILTON BRADFORD JANOUSH, MINORS, AND WILLIAM HARRISON WALKER, JR.

APPELLANTS

v.

JOHN JANOUSH

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HARVEY T. ROSS

COURT FROM WHICH APPEALED: BOLIVAR COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANTS:

WILLIAM P. MYERS

RICHARD B. LEWIS

ATTORNEY FOR APPELLEE:

ANDREW M. W. WESTERFIELD

NATURE OF THE CASE: DOMESTIC RELATIONS - PATERNITY

TRIAL COURT DISPOSITION: CUSTODY AWARDED TO BIOLOGICAL FATHER

BEFORE THOMAS, P.J., COLEMAN, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

The case now before the Court is a suit to establish paternity under Mississippi's Uniform Law on Paternity. *See* Miss. Code Ann. §§ 93-9-1 to -49 (1972). The contest involved a claim of paternity asserted by William Harrison Walker, Jr. (Walker) to twin children born to Emmye Janoush Walker during the time she was married to John Janoush (Janoush). Janoush, without conceding that Walker was the biological father of the children, asserted certain defenses to the action, which, if successful, would have resulted in an adjudication that Janoush was the father of the children for legal purposes.

The chancellor determined that, based upon the evidence, Walker was the biological father of the children and terminated Janoush's legal rights and obligations as a parent. Nevertheless, he ordered that the children continue to bear the last name of "Janoush" and he also awarded Janoush visitation rights with the children that appeared to be substantially in line with those traditionally associated with a non-custodial parent after a divorce.

The case is before us on an appeal, ostensibly brought by the children acting through their mother as next friend, urging that the chancellor erred in refusing to change the children's last name and in awarding Janoush visitation rights with the children. Janoush also appeals claiming error in the chancellor's adjudication that he was not the legal father of the children.

With the greatest respect for the efforts of the chancellor to work an equitable resolution of this very difficult case, and with full appreciation for the fact that he, as was his duty, tried to keep the best interest of the children paramount in his mind, we conclude that the judgment cannot withstand the legal challenges asserted against it. Because there are significant unresolved issues that have the potential for producing different results, we are unable to simply reverse and render the case. We, therefore, reverse and remand this case for further proceedings in accordance with the considerations and directions contained in this opinion.

I.

FACTS

John and Emmye Janoush, after fifteen years of marriage and extended unsuccessful attempts to have children, sought medical consultation for the problem. Medical testing revealed that at least a portion of the problem was associated with Janoush's low sperm count. Various medical procedures were attempted to attain a successful impregnation of Emmye Janoush, all of which failed. The couple ultimately agreed to try an artificial insemination procedure using a medically-screened anonymous third-party sperm donor. The procedure occurred in May 1986. In November of that year, Emmye Janoush gave birth to the twins. Janoush was listed as the father on the birth certificate, and

undertook the normal duties and responsibilities associated with fatherhood for the first five years of the twins' lives.

Mr. and Mrs. Janoush subsequently separated and were divorced on the ground of irreconcilable differences in May 1990. The divorce judgment recited that "[t]wo twin children were born of this marriage," and proceeded to adjudicate matters of custody, visitation and support in accordance with the written agreement of the parties. The agreement regarding custody included the following provision:

> g. The parties will have joint legal custody of the children which is defined as: The parties shall share the decision-making rights, the responsibilities and the authority relating to the health, education and welfare of the children. This obligates the parties to exchange information concerning the health, education and welfare of the children, and to confer with one another in the exercise of decision-making rights, responsibilities and authority.

Emmye Janoush subsequently married Walker. The proof is uncontradicted that, during the Spring of 1986, shortly before Emmye Janoush underwent the anonymous donor artificial insemination procedure, she and Walker had been involved in an intimate extramarital relationship. For reasons that are not particularly clear from a review of the relevant testimony of Walker and Emmye Janoush Walker, which at times seems to be rationalization rather than explanation, the couple took the children to a testing facility in Memphis, Tennessee, in December 1990, where Walker and the twins were subjected to scientific blood testing commonly referred to as "paternity tests." Janoush was not consulted concerning these actions. The tests, admitted into the evidence over Janoush's objection, revealed a high degree of probability that Walker was the biological father of the twins. Subsequently, the chancellor, on motion of the Plaintiffs, ordered that Janoush submit to scientific paternity testing pursuant to section 93-9-21 of the Mississippi Code of 1972. The test results excluded any possibility of Janoush being the biological father of the children.

There ensued a lengthy hearing involving numerous witnesses and a substantial amount of acrimonious testimony concerning who, among the principals in the case, was, and had been, acting in the best interest of the children. The lengthy transcript offers little, if any, illumination upon the questions of law that, in the mind of this Court, must control the outcome of this litigation.

II.

PRE-LITIGATION BLOOD TESTING

We conclude that Janoush is correct in his assertion that the chancellor erred in admitting into evidence the pre-litigation blood tests conducted on the children and Walker. The admissibility of evidence of paternity testing is rigorously controlled by statute. The statutes specifically prescribe that such testing may be accomplished only upon an order of the court considering the matter and then provides detailed safeguards to ensure test reliability and security. Miss. Code Ann. §§ 93-9-21 to -23 (1972). Previous to a fairly recent amendment of the statute, only the individual against whom paternity was being asserted could even move for such testing. Absent such motion by the Defendant, the court was without authority to order that the tests be conducted. *See Deer v. State Dep't of Pub.*

Welfare, 518 So. 2d 649, 651 (Miss. 1988) (quoting Miss. Code Ann. § 93-9-21 (Supp. 1986)); *Johnson v. Ladner*, 514 So. 2d 327, 328 (Miss. 1987). The amendment expands those persons qualified to request the judge to order such tests, but it does not waive the requirement of a court order prior to the testing. If that requirement could be circumvented by simply obtaining the tests prior to commencing the litigation, then the restrictive nature of the statute would become meaningless. In practically all paternity testing, the interests of minor children are involved and their physical involvement is essential. The process involves an invasive medical procedure that carries with it some inherent health risks if not properly conducted. There must also be rigorous procedural safeguards in place to prevent the perpetration of a fraud. Certainly, when conducted by a reputable organization under a strict professionally-approved protocol, the health risks and the risks of fraud are minimized. It is these considerations, among others, that suggest the desirability of the prior consultation of the court before such tests are conducted. After-the-fact judicial inquiries into the reliability of extrajudicial testing appears more time consuming and less likely to provide the assurance of reliability in the testing that compliance with the statute readily affords. There is the additional public policy consideration that the law ought not to encourage a practice of subjecting children to unauthorized paternity testing by the unilateral action of either parent on the off chance that the result might prove useful in prospective domestic relations litigation. Our case law suggests that, once paternity is put in issue, the trial court has little discretion in ordering the testing to take place. *See Ivy v. Harrington*, 644 So. 2d 1218, 1221 (Miss. 1994). Nevertheless, it would appear to be within the inherent power of the court to reject frivolous requests. That safeguard is effectively removed by permitting the introduction of pre-litigation extrajudicial test results.

It also appears to this Court that Emmye Janoush Walker’s involvement in the procurement of this testing was in direct contravention of her obligations under the explicit terms of the divorce judgment regarding joint custody of the children. That judgment required that she and Janoush "share the decision-making rights, the responsibilities and the authority relating to the health, education and welfare of the children." Certainly, it appears beyond dispute that a provision such as this, that limits one parent’s authority to make such mundane decisions as whether orthodontic procedures are appropriate, must limit one parent’s authority to subject children to a procedure having the potential to so foundationally alter the course of their lives. Until the terms of that judgment were modified by a final order of a court of competent jurisdiction, Emmye Janoush Walker was not entitled to simply disregard the lawful orders of the court on the anticipation that the results of the violation would provide after-the-fact justification for her actions. Whether this consideration alone was sufficient to justify the total exclusion of the testing results or whether it simply exposed Emmye Janoush Walker to possible contempt proceedings is a question we do not need to answer. It simply points up the public policy considerations being served by refusing to admit test results procured without court authority and in a manner not contemplated by the applicable statute.

It is impossible for this Court to predict the results of a properly-conducted paternity testing procedure involving Walker and the children obtained under the supervision and direction of the chancellor and in accordance with the applicable statute. Therefore, upon the exclusion of the improperly obtained paternity test involving Walker, we are unable to say that the remaining evidence, even considered in the light most favorable to Walker, was sufficient to overcome the presumption, which has been called the strongest presumption known in the law, that the children were the product of the marriage of Janoush and Emmye Janoush Walker, and that Janoush is,

therefore, the legal father of the children. *Ivy*, 644 So. 2d at 1221 (citing *Deer v. State Dep't of Pub. Welfare*, 518 So. 2d 649, 652 (Miss. 1988)). On the other hand, we concede that, had the chancellor properly excluded the pre-litigation paternity testing, Walker would have been entitled to petition the chancellor to order additional testing under court supervision, which had the potential to produce probative evidence on the issue. In those circumstances, we conclude that it would be improper to reverse and render on these facts, but conclude that the proper course is to reverse and remand this case for further proceedings in accordance with the provisions of this opinion.

Certain additional considerations in regard to the present posture of this proceeding are of concern to this Court, and will be addressed in the remainder of the opinion.

III.

PARTIES AND ALIGNMENT OF PARTIES

We are forced to conclude that there are substantial procedural problems apparent in this case that are revealed from nothing more than a simple review of the captions to the various pleadings. The action was originally commenced by Walker and Emmye Janoush Walker against Janoush. However, before Janoush answered the original complaint, an amended complaint was filed, which indicated that the Plaintiffs were "Jesse Beth Janoush and Milton Bradford Janoush, Minors, by and through Emmye Smith Janoush Walker, Individually and as Natural Guardian, Next Friend and Mother, and William Harrison Walker, Jr." The Defendants in the action, styled as respondents in the pleadings, are Janoush and, incredibly, Walker. This Court is aware of no principle of jurisprudence in this State that permits a person to bring suit against himself or herself. In the Georgia case of *Manry v. Hendricks*, the Georgia Supreme Court refused to let one member of a partnership sue another partner over partnership business prior to the final dissolution of the partnership. The court cited from the Encyclopedia of Pleading and Practice that "[t]he reason most frequently assigned for the rule under consideration rests upon *the principle that one can not be both a plaintiff and a defendant in the same suit either singly or with others." Manry v. Hendricks*, 15 S.E.2d 434, 438 (Ga. 1941) (citing 15 Enc. Pl. & Pr. 1011, 1015) (emphasis supplied).

It is further impossible to tell from the style of the case whether Emmye Janoush Walker is appearing individually, or merely as next friend of the children; however, the factual allegations of the amended complaint refer to her as a petitioner, apparently in her individual capacity. The prayer for relief seeks no individual relief for her, but deals only with Walker's claim of paternity of the children, and the consequences that should flow from such an adjudication.

We would concede that the foregoing considerations are essentially technical in nature and could be overlooked if we could be otherwise assured that all issues had been fully and fairly tried at the trial level. Yet, those considerations point out quite graphically that this case involved issues that had more than two sides. The outcome of this litigation will have, without question, life-altering implications for these children, and it seems essential that the chancellor ensure that these children's independent interests are represented in all phases of the proceeding. This consideration brings us to the next matter for discussion.

III.

GUARDIAN AD LITEM FOR THE CHILDREN

Janoush filed a motion early in the trial proceeding for the appointment of an independent guardian ad litem for the children. The motion was opposed by counsel for the children. Since the children were appearing in the proceeding through their mother as next friend, we assume that, whatever the technicalities were, counsel was taking direction from the mother in resisting the motion, since the children were only four years old at the time, and incapable of formulating any independent judgment on the issue. The chancellor, without written findings for his decision, denied the motion for appointment of a guardian ad litem. There was apparently a hearing on the motion, but there is no transcript of the hearing that would permit this Court any insight into the chancellor's reasoning.

The denial of a guardian ad litem for the children was not raised as an issue on appeal by Janoush. Nevertheless, because of the tremendous stake that these children had and still have in the outcome of this litigation, we have elected to consider this issue to determine if the denial of the motion so fundamentally undermined the integrity of the proceeding as to require this Court to note the matter as plain error.

Preliminarily, we must observe that, had the specific issue been raised by Janoush on appeal, there appears little doubt that the facts of this situation and the established case law of this State would require us to conclude that the chancellor committed a manifest abuse of discretion in denying Janoush's motion. While all the adult parties had certain emotional and financial stakes in the outcome of the litigation, the parties most significantly impacted by any decision were unquestionably the two children. The outcome of the litigation had the potential to have the most profound impact on the remainder of their lives as children, and, beyond that, had implications that they will carry to the end of their days. Such matters as inheritance rights, future association with extended family, and the psychological impact of severing established emotional and psychological bonds, were all at issue, directly or indirectly. And yet, for the litigation that would finally decide these issues, these four-year-old children were essentially placed at the mercy of the decisions of their mother. For her part, the mother was then married to one party claiming biological parenthood and was divorced from another party still attempting to maintain a legally-binding parental relationship with the children. The record also reveals quite clearly that the mother had a significant degree of animosity for the defendant, Janoush. The idea that these children's independent interests were being given due consideration under these circumstances would, at best, appear highly questionable. These doubts are further strengthened by the fact that counsel for the children also acted as counsel for Walker, a situation not reasonably calculated to ensure consideration for the independent, and possibly conflicting, interests of the children.

The Mississippi Supreme Court had, at the time this case was heard, considered a similar factual situation, and, upon remand of a paternity proceeding for other errors, "strongly suggested" the advisability of appointing an independent guardian ad litem for the children in order that "a just determination" could be obtained. *Williams ex rel. Baker v. Williams*, 503 So. 2d 249, 253 (Miss. 1987). In that case, the Supreme Court observed, as we have here, that "[t]he interest of the mother may or may not be co-extensive with the interest of the child" and suggested the need for "a person who is unbiased and independent of the natural mother to insure protection for the child's best interests." *Id.* at 252-53. Those words have equal application in this case, and, as we have already observed, the issue is further complicated by the fact that the interests of Walker were also apparently

being advanced as if they were one with the children's. This situation essentially deprived the chancellor of the independent and aggressive presentation of potentially competing and possibly antagonistic positions that mark the foundation of our adversarial judicial system. If the natural mother and the children do not necessarily have "co-extensive" interests, then certainly neither do the children and a third party attempting to disrupt long-established psychological bonds between the children and the person that, until these matters arose, was for all purposes their father. This appears especially true when the effort is based upon nothing much beyond the results of a biological testing procedure obtained under circumstances that are, themselves, not above criticism.

There may be other considerations that do not readily appear in the present state of the record that would bear upon whether it was in the best interest of the children to align themselves with Janoush and resist Walker's efforts to establish paternity. The results of scientific paternity testing, though they create a presumption, are not conclusive. Miss. Code Ann. § 93-9-27 (1972). The result reached on retrial before this chancellor, or as the result of a jury trial, to which Janoush would appear to be entitled under section 93-9-15 of the Mississippi Code of 1972 should he so request, cannot be predicted and could be altered by evidence, as yet unknown, developed and presented on behalf of the children. The interest of the children in this litigation is independent of that of their mother, independent of that of Janoush and independent of that of Walker. The extent that the children's interests runs parallel with, or counter to, any of the interests of these other parties is not a decision properly to be made by the mother, especially in the situation where the mother's, and therefore the children's, sole legal advice comes from the same counsel as that representing one of the parties seeking to establish his paternity.

IV.

RES JUDICATA, COLLATERAL ESTOPPEL, EQUITABLE ESTOPPEL, AND LACHES

The significance of the position taken by the children in this litigation can be demonstrated by the fact that, if the suit is advanced solely by Walker or by Walker and Emmye Janoush Walker with the children being unwilling defendants, there may be equitable defenses that can be asserted against the adults that are not available against the children. For example, as to Emmye Janoush Walker in her individual capacity, the defense of collateral estoppel may well apply. That defense was refused in *Williams ex rel. Baker v. Williams,* 503 So. 2d 249 (Miss. 1987). It had been advanced on the theory that parenthood had already been adjudicated, at least by implication, in a prior divorce action. The Mississippi Supreme Court refused to apply the doctrine of res judicata or collateral estoppel on the basis that the plaintiff in the subsequent action was the child. The Court reasoned that the child had not been a party to the divorce proceeding, and, therefore, "the child, if not formally a party, is not bound by a paternity determination in a marital dissolution action." *Id.* at 254. Likewise, as to both Emmye Janoush Walker and Walker, the defenses of equitable estoppel and laches may be available, since the *Williams* case denied those defenses only as against the child on the ground that "[t]his is the child's suit, and the mother's actions cannot be imputed to the child to invoke these doctrines." *Id.* at 255 (citation omitted). If, upon the full investigation of this case, the guardian ad litem determines it to be in the best interest of the children to align them as defendants along with Janoush, there does not appear to be anything in the *Williams* case that would prevent the assertion of these possible defenses against the remaining plaintiff or plaintiffs. We do not attempt to prejudge the outcome of asserting any such possible defenses, but merely observe that the outcome is not

automatically predicted by the rationale in *Williams*.

V.

PATERNITY TEST RESULTS FOR JOHN JANOUSH

The fact that Janoush was conclusively shown not to be the biological father of the children does not, by virtue of the unique facts of this case, adversely conclude his claim to legal parenthood. The possibility existed at the time of birth, and, in fact, still exists from a legal standpoint, that Emmye Janoush Walker's pregnancy was produced as the result of the artificial insemination program. Although Mississippi has not decided the issue directly, this Court has little doubt that public policy considerations would prevent a husband who willingly participated in such a program from subsequently denying his parental responsibilities to a child based upon his unquestioned lack of biological connection. On the same considerations, it does not appear that a divorcing mother would be heard to seek to terminate her former husband's paternal rights in the child based solely upon this same proposition. The evidence, therefore, of the paternity testing of Janoush, excluding his biological parenthood, is essentially irrelevant to the outcome of this case. If, for whatever reason, this litigation is concluded without an affirmative adjudication of Walker's biological parenthood, then those legal rights of fatherhood accruing to Janoush under the terms of the divorce decree will continue unabated by the discovery in this case of a fact that must be seen to have been highly likely all along -- that he was not the biological father of the twins.

VI.

THE ISSUES OF JANOUSH'S VISITATION AND THE CHILDREN'S LAST NAME

Without in any way attempting to predict or anticipate the outcome of this proceeding on remand, we would provide this additional guidance to the chancellor. It does appear to the satisfaction of this Court that Walker is correct in his assertion that, if he is adjudicated to be the biological and, therefore, the legal father of the children, it is not within the discretion of the court to award visitation rights to Janoush. Such an adjudication would sever any legal rights or connections between Janoush and the children that may have previously existed, and we are aware of no authority that permits a chancellor to award visitation rights in minor children to a person, who, in the eyes of the law, is a stranger to those children. For the same reason, should that be the outcome, we likewise believe that it would be an abuse of discretion to require the children to maintain the last name of Janoush over the objection of the natural mother and the legal father.

VIII.

CONCLUSION

It is difficult to discover what public policy is being served by permitting litigation of this nature on these facts. Seemingly valid public policy considerations, however, appear to have been foreclosed to this Court by such decisions as *Adoption of Karenina v. Presley*, 526 So. 2d 518 (Miss. 1988) (father of child born during mother's marriage to another allowed to sue to establish paternity), *Williams ex rel. Baker v. Williams*, 503 So. 2d 249 (Miss. 1987) (minor child permitted to sue presumed father and present stepfather to assert that stepfather was true biological parent as result of illicit

relationship during marriage of mother to presumed father), and *Ivy v. Harrington*, 644 So. 2d 1218 (Miss. 1994) (putative father permitted to sue to establish paternity of children born during mother's marriage to another man). Nevertheless, we do have the authority, and indeed the responsibility to ensure that, if such proceedings are to be entertained, the best interests of the innocent children are protected. We are convinced that they have not necessarily been protected to date, but are confident that, to the extent possible, they will be in the remaining course of this very difficult litigation. In furtherance of that purpose, we direct the following:

Upon remand, it would appear that the following should be accomplished: (a) the unequivocal appearance in the proceeding of Emmye Janoush Walker in her individual capacity. She is a necessary party since the proceeding has the potential to alter previous legal rights granted her under the judgment of divorce dissolving her marriage to Janoush; (b) the appointment of an independent guardian ad litem for the children meeting the criteria set out in *Williams ex rel. Baker v. Williams*, 503 So. 2d 249, 252-53 (Miss. 1987); (c) the provision of adequate time for the guardian ad litem to fully investigate the matter and to determine what position the children should assume in the litigation; (d) a rehearing of the matter before the chancellor, or before a jury, should Janoush elect to assert his right under section 93-9-15 to such a jury trial.

THE JUDGMENT OF THE BOLIVAR COUNTY CHANCERY COURT IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS ARE TO BE DIVIDED EQUALLY BETWEEN THE APPELLANT AND THE APPELLEE.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.