

**IN THE COURT OF APPEALS 10/15/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CA-00780 COA**

**ARTHUR RICHARD REEDER**

**APPELLANT**

**v.**

**ONEILA REEDER BYRD**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JASON H. FLOYD, JR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

PRO SE

ATTORNEY FOR APPELLEE:

FAYE SPAYDE

NATURE OF THE CASE: TERMINATION OF PARENTAL RIGHTS

TRIAL COURT DISPOSITION: TERMINATED FATHER'S PARENTAL RIGHTS

BEFORE FRAISER, C.J., BARBER, COLEMAN, AND SOUTHWICK, JJ.

COLEMAN, J., FOR THE COURT:

Oneila Reeder Byrd (Byrd), the former wife of Arthur Richard Reeder (Reeder), filed a Petition for Termination of Parental Rights against Reeder, her former husband, in the Harrison County Chancery Court. Byrd sought to terminate Reeder's parental rights to their daughter and only child, Nichole

Sherrie Reeder (Nichole). Reeder had been convicted of burglary and arson and was serving a sentence of eight years in the custody of the Mississippi Department of Corrections, which had assigned Reeder to serve his sentence in the South Mississippi Correctional Institute in Leakesville. Because the chancellor did not appoint a guardian ad litem to represent the interest of Nichole, the Reeder's seven-year-old daughter, as the Mississippi Supreme Court held he must in *Luttrell v. Kneisly*, 427 So. 2d 1384, 1387-88 (Miss. 1983), we reverse and remand.

## **I. Facts**

The Appellant, Arthur Richard Reeder, has "done time" on two occasions in the custody of the Louisiana Department of Corrections, the first of which occasions was from sometime in 1983 until 1986. Reeder was paroled in 1986, only to be incarcerated again on February 1, 1988, in Louisiana for violation of his parole in that state. Reeder was again released from the custody of the Louisiana Department of Corrections on January 31, 1991. After his release from prison in Louisiana, he returned to Harrison County where he first found employment off shore. He worked off shore for about four months, during which time he would work thirty days off shore and then spend seven days at home. He quit his off shore employment because his schedule of thirty days on and seven days off frustrated his visitation efforts with Nichole.

Reeder's next employment was as a night clerk in a convenience store, where he worked until July 20, 1992, when he was arrested and incarcerated in the Stone County jail. As we noted, subsequent to his arrest on July 20, 1992, Reeder was convicted of the crimes of burglary and arson, for which the circuit court sentenced him to serve eight years in the custody of the Mississippi Department of Corrections. Reeder will finish serving his sentence in the year 2000.

Reeder and Byrd were married on February 27, 1987; and their daughter Nichole was born on December 5, 1987. Reeder and Byrd were divorced on November 21, 1989, by a judgment of divorce rendered in the Harrison County Chancery Court. Chancellor Jason H. Floyd, Jr., granted the divorce on Byrd's complaint. Jason H. Floyd, Sr., father of the chancellor, represented Byrd in that matter. After her divorce, Byrd married Travis Byrd on March 3, 1990.

## **II. Litigation**

On May 27, 1994, Byrd filed a Petition for Termination of Parental Rights against Reeder. Faye Spayde, an attorney in Long Beach, represented Byrd from the beginning of this litigation through Reeder's appeal. In her petition, Byrd averred that "[i]t would be injurious and detrimental to [Nichole] to develop any relationship with [Reeder], and that it would be in the best interest of [Nichole] that the parental rights of her father, Arthur Richard Reeder, be terminated." Reeder further averred that she was entitled to have Reeder's parental rights terminated "[f]or the following causes: (a) Prolonged imprisonment of [Reeder]. (b) [a]bandonment for a period of more than one year. (c) [f]ailure to support." Of relevance to our decision to reverse and to remand this case is Byrd's prayer contained in the Petition "that a Guardian Ad Litem be appointed for the minor child and that upon a hearing hereon this Court will find and determine that the parental rights of ARTHUR RICHARD REEDER with respect to NICHOLE SHERRIE REEDER should be terminated." Reeder answered Byrd's petition. In his Answer, Reeder also prayed of the chancellor that he "appoint a guardian ad litem to protect the interest and general welfare of [Nichole]. On May 22, 1995, Chancellor Floyd heard the matter of whether Reeder's parental rights to Nichole ought to

be terminated. Pursuant to an order entered on April 21, 1995, the Harrison County Sheriff had transported Reeder from the South Mississippi Correctional Facility in Leakesville to Harrison County for the trial. Reeder represented himself at the trial. At the conclusion of the hearing, the chancellor advised Byrd and Reeder that he would take the matter under advisement before he rendered an opinion and a judgment in the matter.

Two days later, on May 24, 1995, the chancellor rendered his opinion in which he opined:

Nichole Sherry Reeder, now approximately seven and a half years old, has had the opportunity to be with her father, Mr. Reeder, only briefly and sporadically during her life. This absence is primarily, if not entirely, due to Mr. Reeder's incarceration in correctional institutions in the states of Louisiana and Mississippi. Nichole's natural father is presently a guest on the state of Mississippi's penal system. As a result of this continued incarceration, a father-daughter relationship has never formed between this parent and child.

Miss. Code Ann. Section 93-15-103(3)(e) specifically provides that substantial erosion of the relationship between a parent and a child caused at least in part by the parent's "prolonged imprisonment" may provide a basis for termination of that incarcerated parent's rights. The Court finds that these are the circumstances anticipated by the preceding code section, and must agree with the child's mother, it is in the best interest of the minor child, Nichole Sherrie Reeder, that the parental rights of her natural father, Arthur Richard Reeder, be terminated.

The next day, May 25, 1995, the chancellor rendered and entered a judgment in which it was ordered that the parental rights of Reeder to his daughter Nichole were terminated. Reeder appeals from this judgment.

### **III. Issues and the law**

Reeder presented five issues in his brief for this Court's resolution; but because we reverse and remand as matter of plain error pursuant to Mississippi Rule of Appellate Procedure 28(a)(3), we include only one of Reeder's five issues in this opinion. That issue is:

3). The presiding Chancery Court judge failed in disqualifying himself from these proceedings because of his involvement [sic] and relation to the attorney in a [sic] earlier proceeding that granted the original petition that gave [Byrd] custody of minor child in a divorce petitioned by [Byrd]. This had ultimately prejudiced the Court in rendering a fair and impartial decision in the petition to terminate the parental rights of [Reeder].

#### **A. The chancellor's failure to appoint a guardian ad litem for Nichole -- a matter of plain error**

The "Termination of Rights of Unfit Parents Law," Sections 93-15-101 through 93-15-111 of the Mississippi Code of 1972, is the statutory procedure which Byrd must follow to terminate Reeder's parental rights to their daughter, Nichole. Section 93-15-107 establishes who are parties to an action to terminate parental rights. Section 93-15-107 reads as follows:

In an action to terminate parental rights, the mother of the child, the legal father of the child, and the putative father of the child, when known, shall be made parties defendant. *A guardian ad litem shall be appointed to protect the interest of the child in the termination of parental rights.* A child may be made party plaintiff, and any agency holding custody of a minor shall act as party plaintiff.

Miss. Code Ann. § 93-15-107 (Rev. 1994) (emphasis added).

*Luttrell v. Kneisly*, 427 So. 2d 1384, 1385 (Miss. 1983), was a case in which the chancellor terminated the parental rights of the natural parents of Marie Luttrell and entered an adoption decree for her foster parents, Robert and Margaret Kneisly. The Mississippi Supreme Court reversed and remanded the chancellor's decree of adoption because he had made his findings based on the standard of proof of "preponderance of the evidence," whereas the constitutional standard ought to have been "clear and convincing" evidence. *Id.* at 1387. While the supreme court reversed because the chancellor "clearly relied upon an unconstitutional and impermissible standard of proof," *id.*, it further opined:

Because this case must be reversed and remanded to be retried under our present statutes on Termination of Rights of Unfit Parents, we deem it necessary to pass upon one other question presented on appeal, which is, the construction of Mississippi Code Annotated section 93-15-107 (Supp. 1982), which provides:

In an action to terminate parental rights, the mother of the child, the legal father of the child, and the putative father of the child, when known, shall be made parties defendant. *A guardian ad litem shall be appointed to protect the interest of the child in the termination of parental rights.* A child may be made party plaintiff, and any agency holding custody of a minor shall act as party plaintiff. (emphasis ours).

The statute, as written, is clear and unambiguous. It unequivocally mandates that a guardian ad litem be appointed to protect the interest of a child in a termination of parental rights proceeding. The statute is clearly mandatory and not permissive.

*Id.* We can only interpret the supreme court's opinion to mean what it says and to say what it means, which is that in every action to terminate parental rights, the chancellor must comply with the mandate of section 93-15-107 that a guardian ad litem be appointed to protect the interest of the child in the termination of parental rights. In the case *sub judice*, both Byrd in her petition and

Reeder in his answer to Byrd's petition prayed that the chancellor appoint a guardian ad litem to protect Nichole's interest. Nevertheless, the chancellor never appointed a guardian ad litem to protect Nichole's interest.

The Mississippi Supreme Court has reversed a trial judge's decisions as a matter of plain error in other cases. *See Chamblee v. Chamblee*, 637 So. 2d 850, 866 (Miss. 1994) (Because virtually no evidence was presented at trial that would constitute a finding that her child's visiting the mother in the presence of any male companion not related to her by blood or marriage would be harmful to the child, the chancellor's decision on this point constituted manifest error and should be reversed and remanded.); *Grubb v. State*, 584 So. 2d 786, 789 (Miss. 1991) (Sentence of life imprisonment for kidnaping conviction by trial court based upon guilty plea constituted plain error; defendant could not be sentenced to life imprisonment unless jury fixed penalty at life, and trial judge only had authority to fix penalty at not less than one year and no more than 30 years pursuant to statute.); *Gray v. State*, 549 So. 2d 1316, 1321 (Miss. 1989) (Since the Mississippi Supreme Court's authority to note "plain error" was clear, it determined that an eight-count indictment against this defendant which charged two different crimes on two different dates against two different victims was improper as a matter of plain error).

Here we find as a matter of plain error that the chancellor erred reversibly when he failed to appoint a guardian ad litem to protect the interest of Nichole's, and we therefore reverse and remand this case for further proceedings consistent with this opinion.

**B. The presiding Chancery Court judge failed in disqualifying himself from these proceedings because of his involvement [sic] and relation to the attorney in a [sic] earlier proceeding that granted the original petition that gave [Byrd] custody of minor child in a divorce petitioned by [Byrd]. This had ultimately prejudiced the Court in rendering a fair and impartial decision in the petition to terminate the parental rights of [Reeder].**

This Court has intentionally ignored the five issues which Reeder included in his brief for our resolution because upon remand of this case so that the chancellor can appoint a guardian ad litem for Nichole, some or all of the present issues might become moot or metamorphosed after a new hearing on the merits of Byrd's petition to terminate Reeder's parental rights. With regard to the issue of whether the chancellor ought to have recused himself in this matter because his father represented Byrd when the chancellor granted to Byrd her divorce from Reeder, we observe that the Harrison County Chancery Court's assignment of another chancellor to conduct the hearing in this case would eliminate this issue. *See Jenkins v. Forrest County Gen. Hosp.*, 542 So. 2d 1180, 1182 (Miss. 1988) (Interest of justice would best have been served had judge recused himself from hearing matter in light of fact that judge's brother was a senior partner in law firm which represented one of the defendants.).

#### **IV. Conclusion**

Section 93-15-107 of the Mississippi Code requires the chancellor to appoint a guardian ad litem "to protect the interest of the child in the termination of parental rights." In *Luttrell v. Kneisly* the

Mississippi Supreme Court held that it was mandatory, not discretionary, for the chancellor to appoint a guardian ad litem. Mississippi Rule of Appellate Procedure 28(a)(3) affirms this Court's option "to notice plain error not identified or distinctly specified." The chancellor did not appoint a guardian ad litem to protect Nichole's interest in the matter of terminating her father's parental rights. *Luttrell* renders the chancellor's failure to appoint a guardian ad litem error; and this Court does therefore reverse and remand this case to the chancery court for further proceedings which are consistent with this opinion.

**THE JUDGMENT OF THE HARRISON COUNTY CHANCERY COURT IS REVERSED AND REMANDED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE, ONEILA REEDER BYRD.**