IN THE COURT OF APPEALS 06/18/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00384 COA

A. T.

APPELLANT

v.

S. H. P.

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

ATTORNEY FOR APPELLANT:

LINDSEY C. MEADOR

ATTORNEY FOR APPELLEE:

JEFFREY A. LEVINGSTON

NATURE OF THE CASE: CUSTODY DISPUTE

TRIAL COURT DISPOSITION: CUSTODY OF B.C. AWARDED TO NATURAL MOTHER, S. H. P.

BEFORE FRAISER, C.J., McMILLIN, AND PAYNE, JJ.

McMILLIN, J., FOR THE COURT:

This is a custody dispute involving B.C., a female child presently ten years of age. Those contesting custody are B.C.'s natural mother and the child's presumptive paternal aunt, who had custody of the

child since late 1988, briefly by the agreement of the mother and thereafter pursuant to a February 1989 order of the County Court of the First Judicial District of Bolivar County, Youth Court Division. The custody issue now before this Court was heard by the Chancery Court of the First Judicial District of Bolivar County after the youth court proceeding was, by an order of that court, "fully and finally dismissed, and jurisdiction [was] transferred to the Chancery Court of the First Judicial District of Bolivar County . . . ." The chancellor ordered the return of the child's custody to the natural mother, and this appeal ensued.

The aunt raises two issues on appeal, which we find to be interrelated. We have recast the thrust of the appellant's argument as follows. Initially she alleges that the chancellor erred as a matter of law when he applied the presumption that a child's best interest is served by being in the custody of that child's natural parents. The aunt asserts that the presumption is not available to a parent who has previously been adjudicated to have abandoned or neglected the child. The aunt claims, rather, that in order to disturb the existing custody arrangement, the child's mother had the burden of proving, without the benefit of any presumption, that a change in custody would be in the best interest of the child. The aunt then concludes that the mother failed to carry the required burden in this case, so that the decision of the chancellor was a manifest abuse of discretion.

We have determined that there was no error of law in applying the natural parents' presumptive right to custody as an element in the chancellor's decision process. We also conclude that the chancellor's ruling was based upon substantial evidence bearing on the issue of the best interest of the child, and did not, in fact, rest solely upon a legal presumption arising in favor of the mother. Neither can we determine, based upon our review, that the chancellor was manifestly in error in his adjudication. Thus, it is our conclusion that the judgment must be affirmed.

I.

Facts

The child, B.C., was the third child born to the mother during a previous marriage that was later dissolved by divorce. There is evidence in the record that would suggest that this child's biological father was someone other than the mother's husband; however, it does not appear in the record that such a fact has ever been adjudicated in a proceeding where either potential father was a party. The mother was living alone in 1988 and apparently struggling financially, when she accepted an offer from her husband's sister (the appellant in this proceeding) to temporarily keep the children. Upon returning approximately one month later to regain custody of her children, she was informed that there was an existing court order preventing her from removing this child from the aunt's custody. As the result of a youth court proceeding, an order was entered in early 1989 removing custody of all three children from the mother on an adjudication of her neglect of the children. The record does not contain copies of the various youth court orders, but the parties seem to agree that the youth court placed the child in the custody of the aunt pursuant to authority of section 43-21-609(b) of the Mississippi Code of 1972. The two older children apparently spent some period of time with their father, but also eventually went to live in the aunt's home. While the placement of the children seems to have been directly with a relative, it is clear from the record that the Bolivar County Department of Human Services also maintained some responsibility of monitoring or supervising these children

during this period.

For the next several years, the mother's record in regard to the children was less than exemplary. Her visitation was sporadic, and at one time she completely dropped all contact with her children for a period in excess of one year. However, her performance improved beginning in August 1992, when she returned to live in the area, began faithfully to visit with the children, and submitted to DHS-mandated counseling. During this time she also remarried, established a home and obtained steady employment. She was also successful, in 1993, in regaining custody of the two older children without opposition from the Bolivar County DHS or any relative.

In October 1993, the youth court entered an order finally dismissing the youth court proceeding and purporting to transfer jurisdiction of the matter to the Bolivar County Chancery Court. The chancellor, without a jurisdictional objection from either party, subsequently considered a motion by the mother to expand her visitation rights with her daughter. Finally, in September 1994, the mother filed a petition in the chancery proceeding to have custody of the daughter returned to her. The sole respondent was the aunt since the DHS no longer had any involvement in the matter. The chancellor's decision to return custody of the child to the mother as the result of that hearing is the subject of this appeal.

II.

The Scope of Review

On appeal of a chancery matter of this type, our scope of review is well-established. As to issues of law, we review the matter *de novo*. *Yarbrough v. Camphor,* 645 So. 2d 867, 869 (Miss. 1994). This is the standard applicable to our consideration of the claim that the chancellor erred in applying the legal presumption that a child's best interest is served by being in the custody of a natural parent.

On the other hand, an allegation that the chancellor erred because his decision was against the weight of the credible evidence is subject to a different scope of review. We may reverse a chancellor's adjudication on that basis only upon a finding that there has been a manifest abuse of discretion. *Sellers v. Sellers,* 638 So. 2d 481, 483 (Miss. 1994) (citations omitted). This is the standard we must apply in considering appellant's argument that the mother failed to meet her burden as petitioner in this case.

III.

Errors of Law

There is no doubt that the chancellor in this case relied upon the long-established presumption in favor of the natural parent in a custody dispute with a non parent. The "Findings of Fact and Conclusions of Law" filed as a part of the record state that "[o]ur Supreme Court has consistently recognized a strong presumption in favor of a parent against a third party . . . ." In the concluding portion of the document, he states, "Perhaps reluctantly the Court has concluded that the

presumption in favor of the parent is determinative of the question here and custody should be awarded to the mother."

There is extensive authority for application of such a presumption in a number of different situations. It has been applied in youth court proceedings seeking removal of children from a home. *See* Miss. Code Ann. § 43-21-613 (1972); *In re M.R.L.*, 488 So. 2d 788, 789 (Miss. 1986). It has been applied in chancery proceedings seeking termination of parental rights. *Carson v. Natchez Children's Home*, 580 So. 2d 1248, 1257 (Miss. 1991). It has been applied in adoption proceedings when the natural parent opposes the adoption. *Cook v. Conn*, 267 So. 2d 296, 299 (Miss. 1972). It has also been applied in cases such as this, where a relative or other interested third person seeks to obtain or maintain custody of a child over the objection of the natural parent. *Sellers*, 638 So. 2d at 484 (citations omitted).

The aunt argues on appeal that, in a situation such as now exists, the applicability of the presumption is not available, as a matter of law, to a parent currently out of custody when there has been a previous adjudication of abandonment or neglect. In support of that proposition, the aunt cites the recently decided case of *Copiah County Dep't of Human Servs. v. Linda D.*, 658 So. 2d 1378 (Miss. 1995). We conclude this argument to be without merit for two reasons.

In the first instance, the appellant has confused the issue of the applicability of a presumption of law with the issue of what the primary consideration of the chancellor should be in ultimately deciding a custody case. She argues that, by asserting reliance upon the presumption in reaching his decision, the chancellor has applied the wrong standard, that standard being the best interest of the child. The application of the presumption does not establish a disregard for the proper standard to be considered by the chancellor. In fact, one articulation of the presumption clearly indicates that it is with the proper standard in mind that the presumption comes into play. Thus, in *Stoker v. Huggins*, the court stated that "[i]t is presumed that *the best interests of the child will be preserved* by it remaining with its parents or parent." *Stoker v. Huggins*, 471 So. 2d 1228, 1229 (Miss. 1985) (emphasis supplied) (quoting *Rodgers v. Rodgers*, 274 So. 2d 671, 673 (Miss. 1973)).

Secondly, we do not conclude that the *Linda D.* case has removed the availability of the presumption in any case involving a custody dispute between a parent and a non parent. A fair reading of the *Linda D.* case, relying as heavily as it does upon the evidence concerning the fitness of the natural mother, seems more properly to support the proposition that, in that case, whatever presumption the natural mother enjoyed, there was substantial evidence to overcome the presumption. It must be observed that, though the *Linda D.* opinion is quite lengthy, nowhere in the opinion does it specifically discuss the applicability or inapplicability of the presumption other than to quote without comment from an Illinois appellate court decision that mentions "a presumption that a parent has first call upon the custody of a child." *Linda D.*, 658 So. 2d at 1388 (quoting *Estate of Cherry Whittington*, 463 N.E.2d 1314, 1317 (Ill. App. Ct. 1984)). In the face of such wide application of the presumption in this State in almost every conceivable setting relating to custody, we cannot conclude that the *Linda D.* decision, silent as it is on the subject, has made such a fundamental change in the jurisprudence of this State solely by implication. It further does not appear equitable to suggest the irrevocable forfeiture of the presumption in favor of the natural parents once the State has intervened to protect a child even though the intervention at the time may have been fully warranted. Otherwise, once a parent had lost custody of a child to a third party through an adjudication of abandonment or

neglect, that parent would appear to face an almost insurmountable hurdle in ever being able to recover custody. That simply is not the law of this State, nor do we think that it ought to be the law.

The *Linda D.* case, which involved a youth court proceeding pursuant to a fairly detailed statutory scheme, has no direct application to this chancery proceeding. In Bolivar County, as in other counties where youth court jurisdiction is vested in a court other than chancery, the chancery court has no jurisdiction to proceed under the Youth Court Act. *See* Miss. Code Ann. § 43-21-107 (1972). Because the youth court proceeding in this case had been finally dismissed, its previous custody orders carry no present legal authority and vest the aunt in this case with no right of custody paramount to that of the child's mother. Thus, the proposition that the mother in this case had the same burden as the mother in the *Linda D.* case does not stand up to logical analysis.

This case is simply a custody dispute between the contestants. While the proof of the prior conduct of the parties, as evidenced to some degree by the youth court record, is probative on the fundamental issue facing the chancellor -- the best interest of the child -- those previous adjudications, now dismissed, cannot be said to heighten the burden placed upon the mother to obtain custody of her daughter beyond that applied in previous similar chancery proceedings involving a custody contest between a parent and third-party. That standard has been stated by the Mississippi Supreme Court as follows:

> The general rule is: It is presumed that the best interest of a child will be preserved by his or her remaining with the surviving parent. In order to overcome this presumption there must be a clear showing that the parent has (1) abandoned the child, or (2) the conduct of the parent is so immoral to be detrimental to the child, or (3) the parent is unfit mentally or otherwise to have custody.

Rutland v. Pridgen, 493 So. 2d 952, 954 (Miss. 1986) (citations omitted).

IV.

The Weight of the Evidence

Having determined that the chancellor did not err as a matter of law in considering the impact of the natural parent's presumption of right to custody in arriving at his decision, we must, nevertheless, address the question of whether the decision was wrong on the facts. We are permitted to reverse on this basis only upon the conclusion that the chancellor committed a manifest abuse of discretion in adjudicating as he did. *Sellers,* 638 So. 2d at 483. We note the lengthy and detailed recitation of the facts relied upon by the chancellor in reaching his decision. These facts include essentially all of the elements that would appear to properly bear upon his ultimate decision.

While we concede that there has been a prior adjudication of neglect of the child and the proof demonstrates a subsequent period of abandonment of any contact with the child by the mother, there

is also evidence of a substantial rehabilitation of the mother and earnest efforts by her over an extended period of time to reestablish her relationship with the child. That the mother is apparently capable of properly caring for young children at this point in time seems essentially beyond dispute, since the proof is uncontradicted that the remaining two children were recently returned to her custody without objection from either the aunt or the local DHS authorities. Certainly the chancellor considered the length of time the child had been in the aunt's care and the inevitable trauma associated with a disruption of that relationship as militating against a change, thereby rendering him "reluctant" to interfere. Yet, in the difficult balancing process that must be involved in any decision such as this one, it appears to the satisfaction of this Court that the chancellor concluded that the presumption in favor of the natural parent, accompanied by the evidence of the substantial rehabilitation of the mother and evidence of her present ability to properly care for her child, were enough to overcome the negative aspects of the mother's prior conduct, which she appeared to have permanently put behind her. Though the issue is admittedly close, as the chancellor candidly concluded, it is not the prerogative of this Court to attempt to second-guess the chancellor. Such difficult decisions are properly vested in the chancery court. Our duty is limited to seeking out and granting appellate relief only in those cases where a manifest abuse of discretion has occurred. We can discover no such abuse in this case, and we must, therefore, affirm.

THE JUDGMENT OF THE BOLIVAR COUNTY CHANCERY COURT AWARDING CUSTODY OF B.C. TO HER NATURAL MOTHER IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT, A.T.

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