6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00412 COA

P.K.C.G.

APPELLANT

v.

M.K.G.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. JOHN C. ROSS, JR.

COURT FROM WHICH APPEALED: PONTOTOC COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT:

MERRITT REED

ATTORNEY FOR APPELLEES:

ROY J. FARRELL

GUARDIAN AD LITEM: DAN J. DAVIS

NATURE OF THE CASE: CIVIL: TERMINATION OF PARENTAL RIGHTS

TRIAL COURT DISPOSITION: TERMINATION DENIED

MANDATE ISSUED: 7/8/97

BEFORE MCMILLIN, P.J., PAYNE, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

In this case the parties call upon the court system to resolve a problem that it is poorly equipped to resolve. Substantial evidence was introduced that the fatherThroughout this case we use generic descriptions of the parties, instead of names. of a Downs' Syndrome child had sexually abused her. Rather different, but also substantial evidence was introduced that because of the developmental problems of the child, the overwhelming-appearing evidence was not even credible. A court-appointed guardian ad litem found the evidence inconclusive. The chancellor found the evidence of abuse to be a sham perpetrated by an estranged wife who was simultaneously trying to terminate the father's parental rights, and to destroy him. King Solomon's task in perspective appears fairly simple.

The mother demands on appeal that we examine this evidence and find that it conclusively proves that the father's parental rights should be terminated. The strength of the facts is the only issue the parents raise. The guardian ad litem raises another issue. He states that the chancellor rejected all input from him at the end of the proceedings. The guardian argues that this was error, even though he finds no clear statutory obligation upon the chancellor.

FACTS

We only recount some of the evidence. The decision we make is not based on whose evidence is more compelling, as an appellate court can not weight the evidence in order to reach a factual decision properly reserved to the chancellor.

The child of the parties was born in 1984 and diagnosed with Down's Syndrome. As early as 1987 or 1988 the child exhibited behavior that experts testified could be construed as sexual in nature, such as hunching. Late in 1990 the symptoms of what some doctors diagnosed as sexual abuse became more pronounced. The mother testified that the girl pulled her panties down and pointed to her genital area, saying "Daddy do it." Other examples were detailed of such conversations and gestures indicating possible abuse.

In 1991 the mother filed for divorce. A hearing was held in August, 1991, on whether the father was abusing the daughter. The chancellor found inadequate evidence to support the allegations. The mother dismissed the complaint for divorce, later saying that she did so because she was alarmed that her husband would be awarded unsupervised visitation. In 1992 she again filed for divorce. The mother testified that the daughter had developed various phobias, including fear of water and bathing. The mother testified that the father had frequently bathed the girl. The daughter was also beginning to have uncontrolled bowel movements, a problem she did not normally have. During the pendency of the action, the father was awarded visitation. The mother asserted that improvements in her daughter's emotional state were set back after each visit with the father.

The state Department of Human Services recommended that the daughter be taken to a doctor who specialized in such cases. This doctor diagnosed the daughter with a trauma that was indicative of child sexual abuse. The child's vaginal opening was wider than it should have been, and part of her hymen was missing. A second doctor was consulted who had a similar diagnosis, and also believed there had been anal penetration. There were issues regarding the validity of the examinations and whether the doctors had any knowledge of the psychology of a Down's Syndrome patient who was

being questioned. The parties appear to agree that at the time of the exams the girl had an intellectual age of about three years, though her actual age was eight.

The young girl started at a new school in the fall of 1992. The mother taught at the same school. At the school some teachers became alarmed at the girl's sexual conduct and words. Among the incidents was frequent masturbating in class, pulling her dress up, and pointing to her vaginal area, sometimes with the statement "daddy do it."

It was also agreed that for some period of time the girl carried a plastic spatula, perhaps as other children might carry a stuffed animal or a favorite toy. At least one teacher and also other witnesses testified that the girl used the spatula in ways that the father argues, and the chancellor accepted, would explain the vaginal and rectal trauma.

In December 1992 the father filed for contempt, as the mother was not complying with an earlier visitation order. The mother counterclaimed for emergency relief to terminate visitation due to the alleged abuse. In time she filed in the divorce action for terminating the father's parental rights, or at least for denying all visitation. A guardian ad litem, attorney Dan Davis of Tupelo, was appointed.

A trial was held on issues of child custody, support, division of certain marital property, and on termination of parental rights. The trial was conducted on various days in January and March, 1995. While those issues were tried, agreement was reached over the divorce itself. A decree of divorce was entered on January 12, 1995.

At trial each parent had expert witnesses. The evidence already recounted on the girl's actions and statements was introduced. The father put on an expert that criticized the clinical examination techniques of the mother's witnesses, especially the use of anatomically-correct dolls and the allowing of the mother to be present while the doctor questioned the girl.

According to a brief filed by the guardian ad litem, he met with each parent separately and also with the daughter. He met in numerous conferences with all participants, including the judge. He participated in the trial and examined three of the witnesses. Near the end of the trial Davis asked the chancellor the manner in which Davis could best assist the chancellor, such as through a conference, a written report, or some recommendations. According to Davis's brief, the chancellor said not to worry about needing to give any input since "we were not dealing with termination of parental rights." Since this was an off-the-record conversation, whether Davis accurately heard or understood the chancellor cannot be reviewed. Of course, termination of the father's rights was exactly what the proceeding did involve. Regardless, Davis gave no report.

THE CHANCELLOR'S FINDINGS

After the trial, the chancellor denied the request that the father's parental rights be terminated. The chancellor's ruling was structured around the *Allbright* factors for determining child custody. *Allbright v. Allbright*, 437 So. 2d 1003 (Miss. 1983). The court found both parents to be loving and nurturing. Custody of the daughter was awarded to the mother. In deciding visitation, the chancellor specifically rejected the credibility of evidence of abuse by the father. Some of the evidence had earlier been introduced during a hearing in 1991, though not the expert testimony and teacher's

observations that we have described above. The court held that his 1991 decision regarding the evidence presented to him at that earlier date was res judicata in 1995. Thus he only considered the new evidence.

The chancellor concluded that the mother began "an aggressive campaign to establish sexual abuse by the father" immediately after the following incident. One of the mother's fellow teachers at the daughter's elementary school reported that the girl had drawn a picture that resembled a penis, and said that it was like "daddy's penis." The chancellor concluded that the two doctors who were then consulted based their findings on what the mother told them, not on proper examination of the daughter outside of the mother's presence. A third doctor who examined the girl at the request of the Department of Human Services said that he could not communicate with her. His conclusions were admittedly based on what the mother told him.

The chancellor determined that the "facts reveal an all too familiar situational consideration." His familiarity with the use of high-powered legal weapons in divorce and custody battles caused him to conclude that the mother here was raising "the ugly allegation of sexual abuse" in "an attempt to gain leverage" in the divorce.

The chancellor also found the allegations themselves to be "far fetched." There was no physical evidence linking the father to abuse. The spatula was acknowledged as something that the girl used in ways that would cause the physical effects to her genital area, and the chancellor did not find credible evidence that any person, much less a specific person such as the father, had also caused the physical trauma.

The court found that "most importantly" the witnesses had said that the daughter was difficult to understand because of her mental condition. Whatever the girl said had to be interpreted, even if the words themselves were enunciated well enough. The girl did not testify at trial. Implicitly, the chancellor was finding that an opportunity existed for misconstruing her statements or allowing the listener's own preconceptions to give meaning to the girl's comments.

DISCUSSION

There are special facts in this case, notably the mental condition of the alleged abuse victim. Though the nature of the evidence may therefore differ from other cases, we must still examine a trial court's ruling on custody and other matters using the normal deferential guidelines.

The supreme court has stated that "[t]he standard of review in child custody cases is quite limited. A chancellor must be manifestly wrong, clearly erroneous, or apply an erroneous legal standard in order for this Court to reverse." *Williams v. Williams*, 656 So. 2d 325, 329 (Miss. 1995). "This Court will affirm decisions of the chancellor, whenever based on credible evidence." *Williams*, 656 So. 2d at 329. Use of overly familiar words may actually show a lack of analysis, but one final consistent statement in the case law must also be recognized: the cardinal "consideration in all original child custody determinations is the best interest and welfare of the child." *Hayes v. Rounds*, 658 So. 2d 863, 865 (Miss. 1995), citing *Allbright*, 437 So. 2d at 1004.

In determining whether the chancellor committed a legal error, we must understand the statutory

framework for proceedings to terminate parental rights. Such a proceeding requires the appointment of a guardian ad litem. Miss. Code Ann. 93-15-107 (1996); *Luttrell v. Kneisly*, 427 So. 2d 1384, 1388 (Miss. 1983). A guardian was appointed in this case. This mandated guardian is not a mere formality, an extra "t" to cross or "i" to dot. The supreme court in a recent case "expressed its concerns about the importance of the role of the guardian ad litem . . .." *In Interest of R.D.*, 658 So. 2d 1378, 1383 (Miss. 1995). One comment from another case that the court quoted was this: "the guardian ad litem 'investigates, makes recommendations to a court, or enters reports' . . .." *R.D.*, 658 So. 2d at 1383, quoting *Short v. Short*, 730 F. Supp. 1037, 1038 (D. Colo. 1990). The guardian has "an affirmative duty to zealously represent the child's best interest." *In the Interest of D.K.L. v. Hall*, 652 So. 2d 184, 188 (Miss. 1995).

In this case part of the reason for the trial was the mother's desire to terminate the father's parental rights. The chancellor quite properly appointed a guardian ad litem, who actively participated in the proceedings. In this way a minor unable to understand the import of the proceedings, has an advocate for her best interests. This investigator and source of advice is independent of whatever other motivations could be affecting the adult parties. The guardian is not a decision-maker. Still, a guardian who performs his task appropriately is indispensable for a complete presentation of the case.

The chancellor's lengthy opinion makes no reference to any involvement by the guardian. There was no report or recommendations filed of record. The guardian's appellate brief states that the chancellor wanted no input from him. It is also clear that the guardian's view of the case was completely at odds with the chancellor's. The guardian assayed the evidence this way:

1) 49.5% chance the father had abused the daughter;

2) 49.5% chance no abuse had occurred, but that the mother and others were not fabricating any of the evidence; and

3) 1% chance that the mother was engaged in an attempt to use false allegations of abuse to impact the divorce and custody issues.

As the guardian pointed out, the chancellor in large part chose the third alternative as the basis for his decision.

The chancellor's conclusions are in no way controlled by the opinions of a guardian ad litem. The decision-maker is completely free to discount the views of the guardian. Yet the guardian ad litem, whose appointment was mandated by statute and who is required by court precedent zealously to protect the interests of the child, must be permitted in some form to have input after the trial and before a decision is reached. That was not done in this case. The guardian's views, based on what was heard at trial and anything independently investigated, might have led the chancellor to rethink some of the conclusions that were beginning to form. Instead, the chancellor might have factored in those contrary views, analyzed them as erroneous, and might have entered the same decision. Those two options and a range of other ones were within the chancellor's power.

In this case the chancellor may have formed strong conclusions about the evidence and decided no recommendations or report from the guardian would be useful. That may indicate that such a report, were it required now, would have little impact. No rule requires it, but it would be useful for review

of a decision that follows proceedings such as these for the chancellor to have in some way dealt in the record with the guardian ad litem's views. The guardian represents the person most affected, the minor, and that guardian may well lose perspective the same as anyone else. The chancellor is the one who represents blind justice, and no individual. For us to apply the extremely deferential manifest error standard to the conclusions that arbiter makes in a case with a statutorily required guardian, we hold that recommendations, a report, or other written or oral input from the guardian must occur.

Two years have passed since the chancellor's first decision. A lot may have occurred with this then-13, now 15-year old girl and her parents. Since the principal concern has to be the girl's best interest, we remand for additional proceedings that would allow relevant updated evidence to be presented if any party requests it. If the same guardian ad litem continues to serve, a report, recommendations, or other input from him must be provided that also addresses any new evidence. If for some reason that guardian does not serve and a new one must be appointed, then the chancellor should take steps to assure that a guardian ad litem's input -- the former one or the new one's -- regarding what transpired at the first trial is received.

No complaint is brought regarding that part of the chancellor's decision awarding primary custody to the mother, setting child support payments, refusing to divide the real property, denying other relief, and requiring each party to pay his or her attorney's fees. We leave those parts of the judgment unaffected by our remand.

THE JUDGMENT OF THE CHANCERY COURT OF PONTOTOC COUNTY OF APRIL 19, 1995, IS REVERSED ON THE ISSUE OF M.K.G.'S PARENTAL RIGHTS AND THE CAUSE IS REMANDED FOR ADDITIONAL PROCEEDINGS CONSISTENT WITH THIS OPINION. THE REMAINDER OF THE JUDGMENT IS AFFIRMED. COSTS ARE TAXED EQUALLY TO THE PARTIES.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.