IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 98-CA-00087-COA

J. L. W. W. AND M. F. W. **APPELLANTS**

v.

CLARKE COUNTY DEPARTMENT OF HUMAN SERVICES, BY CLAYTON R. BARNETT, SOCIAL SERVICES REGIONAL DIRECTOR, AND M. S. W., C. L. W., J. L. W., AND B. S. W., MINORS, BY AND THROUGH THEIR NEXT FRIEND CLAYTON R. BARNETT **APPELLEES**

DATE OF JUDGMENT:	12/18/1997
TRIAL JUDGE:	HON. SARAH P. SPRINGER
COURT FROM WHICH APPEALED:	CLARKE COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANTS:	JAMES N. POTUK
	LESLIE C. GATES
ATTORNEY FOR APPELLEES:	OFFICE OF THE ATTORNEY GENERAL
	BY: BRIDGETTE ELAINE WILLIAMS
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	ON REMAND FROM THE COURT OF APPEALS, THE CHANCELLOR FOUND THAT THE CHILDREN WERE UNAVAILABLE TO TESTIFY IN OPEN COURT ON A TERMINATION OF PARENTAL RIGHTS CASE.
DISPOSITION:	REVERSED AND REMAND FOR A NEW TRIAL - 07/20/99
MOTION FOR REHEARING FILED:	08/03/99; denied 10/12/99
CERTIORARI FILED:	10/20/99; granted 01/20/2000
MANDATE ISSUED:	

EN BANC.

THOMAS, J., FOR THE COURT:

¶1. J.L.W.W. and M.F.W. appeal the order of the chancellor terminating their parental rights, raising the following issues as error:

I. THE CHANCELLOR ERRED BY NOT FOLLOWING THE INSTRUCTIONS OF THE COURT OF APPEALS WHICH DIRECTED THE CHANCELLOR TO REQUIRE EVIDENCE AND DETERMINE WHETHER THERE ARE NOT OTHER MEANS OF TESTIFYING THAT WOULD ELIMINATE TRAUMA THAT WOULD BE CAUSED TO THE CHILDREN IF REQUIRED TO TESTIFY IN THE PRESENCE OF THEIR PARENTS.

II. THE DEPARTMENT OF HUMAN SERVICES AS THE PROPONENT OF HEARSAY STATEMENTS OF THE CHILDREN UNDER THE TENDER YEARS EXCEPTION TO THE HEARSAY RULE HAVE THE BURDEN OF PROVING THE CHILDREN WERE "UNAVAILABLE" AS REQUIRED BY THAT RULE WHEN THE DECLARANTS ARE NOT OFFERED AS WITNESSES.

III. THE PARENTS AT THE ORIGINAL TRIAL DID NOT WAIVE THE ISSUE OF WHETHER THE CHILDREN SHOULD BE PERMITTED TO TESTIFY BY CLOSED-CIRCUIT TELEVISION AS A CONDITION OF ADMISSION OF THE CHILDREN'S HEARSAY STATEMENTS CONSIDERING THAT THE DEPARTMENT OF HUMAN SERVICES PRESENTED NO EVIDENCE AT TRIAL OF ANY TRAUMA THAT MIGHT BE CAUSED TO THE CHILDREN BY HAVING TO TESTIFY IN THE PRESENCE OF THEIR PARENTS.

IV. THE CHANCELLOR ERRED IN LIMITING THE ISSUE TO WHETHER THE CHILDREN WERE "UNAVAILABLE" AT THE TIME OF THE ORIGINAL TRIAL, AND SHE SHOULD HAVE CONSIDERED WHETHER THE CHILDREN WERE "UNAVAILABLE" AT THE TIME OF THE REMAND HEARING.

V. THE DEPARTMENT OF HUMAN SERVICES FAILED TO MEET ITS BURDEN OF PROVING "UNAVAILABILITY" AND THE APPROPRIATE RELIEF IS TO GRANT A NEW TRIAL WITH DIRECTIONS THAT THE RELEVANT HEARSAY STATEMENTS TO LORI WOODRUFF SHOULD BE EXCLUDED UNLESS THE CHILDREN TESTIFY.

¶2. Finding error, we reverse and remand for a new trial.

FACTS

¶3. J.L.W.W. and M.F.W. are the natural parents of four minor children, namely M.S.W., born August 5, 1987, C.L.W., born August 12, 1989, J.L.W., born May 29, 1991, and B.S.W., born October 11, 1992. After notification of allegations of sexual abuse of J.L.W.W. and M.F.W.'s daughter, who at the time was five, and two sons, who were at the time ages three and one, the Clarke County Department of Human Services (D.H.S.) investigated and obtained custody of the children on May 14, 1992. When the fourth child was born, D.H.S. gained custody of that child on October 14, 1992, based on the adjudications of the other three children as abused. All four children remained in the custody of D.H.S. while it pursued an action to terminate the parental rights and free the children for adoption.

¶4. Trial on the merits was conducted on February 9, 1995 and March 21 and 22, 1995 in the Chancery Court of Clarke County. The chancellor found clear and convincing evidence that both parents should have their parental rights terminated. As grounds for termination, the chancellor found the parents were responsible for a series of abusive acts concerning one or more of the children, and that an erosion of the

parent-child relations had occurred between the minor children and their parents. Aggrieved, J.L.W.W. and M.F.W. appealed.

¶5. The parents argued, among other things, that the chancellor erred in admitting certain statements under the tender years exception to the hearsay rule. The relevant hearsay statements were made by the children to a social worker, Lori Woodruff, who testified as an expert at trial. At that original trial, the attorney for D.H.S. questioned Woodruff about her initial interview with the young girl. The attorney asked Woodruff to relate the specific statements made by the child during the interview. The attorney for the father objected on the grounds of hearsay. After a discussion as to whether the statements were admissible under the business records exception to the hearsay rule, the chancellor allowed the statements under the tender years exception. In her ruling, the chancellor stated:

> Well, this witness is an expert, and I will make an exception on her interviews with these children. And, also, there is a section under Rule 803(25) which specifically deals with statements made from a child describing any act performed with or on the child is admissible if the Court finds, in a hearing, outside the presence of the jury, which we don't have here, the time, and circumstances of the statements made to determine if there is sufficient indicia of reliability. This witness has described her training to interview children in this manner, and I believe her testimony as to the way this interview has been conducted goes along the lines of this section, so I would allow her to testify.

¶6. The attorney for the father responded to the chancellor's ruling, pointing out that the rule requires not only a finding of sufficient reliability, but that the witness either testify or be unavailable to testify. To support his position that the children were not unavailable, the father's attorney read rule 804(a) into the record which addresses unavailability. The attorney for D.H.S. then argued that the children were unavailable under 804(a)(6) which states that "unavailability as a witness" in the case of a child, means that there is the "substantial likelihood that the emotional or psychological health of the witness would be substantially impaired if the child had to testify in the physical presence of the accused." Her argument follows:

> We would make the argument that the children, both of the - - all of the children in this case are unavailable under 804(a)(6). It has been thoroughly explored by the Guardian Ad Litem, and if he has any further questions regarding what happened to these children, it will be traumatic to them. Even some of the therapists that the children have seen, made that recommendation to the Department. And if the court would, you know, have a problem with that, or require some sort of hearing on that, I do have Dr. Paul Davey who is prepared to testify, later on, regarding other issues in this matter, shed some light on this matter for the court.

The chancellor then allowed the testimony.

¶7. The issue of the children's unavailability also came up after the original trial in the parents' motion to amend the judgment or grant a new trial. In the chancellor's ruling, she discussed the ages of the children and reiterated her finding that the children would not be able to offer any probative evidence of abuse that happened three years prior.[(1)]

¶8. The original appeal in this case was deflected to this court for disposition. Judge Southwick, writing for the majority of this court, authored an unpublished opinion handed down on June 17, 1997. *J.L.W.W. v. Clarke County D.H.S.*, 95-CA-01140 (Miss. Ct. App. 1997). Although unpublished and generally not quotable, the original opinion is the controlling law for this case, and we must quote the pertinent part

relative to the chancellor's duties on remand:

> We find that the chancellor did not apply the proper legal standard in determining that the children were unavailable to testify under the tender years exception to the hearsay rule. We reverse and remand for specific findings. On the remaining issues, we find no error and affirm.
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> . . .
>
> In *Griffith v. State*, the Court reversed a conviction of felonious sexual penetration and remanded for a new trial where hearsay statements were admitted under the excited utterance exception to the hearsay rule. *Griffith v. State*, 584 So. 2d 383, 386 (Miss. 1991). In giving guidance to the lower court as to what it should do on remand, the court stated that unavailability under Rule 804(a)(6) should be read in conjunction with Rule 617 which allows a child sexual abuse victim to testify by way of closed-circuit television upon a finding by the court that "there is a substantial likelihood that the child will suffer traumatic emotional or mental distress if compelled to testify in open court and, in the case of criminal prosecution, if compelled to testify in the presence of the accused." *Griffith*, 584 So. 2d at 387. The court held that the availability of a child to testify is not measured solely in terms of trauma stemming from his physical presence but refers to the child's ability to communicate in a trial setting. *Id.* at 388.
>
> The Court in *Griffith* relied on the United States Supreme Court case of *Maryland v. Craig*, which held that the trial court must find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant, and the emotional distress that would be suffered by the child witness must be more than mere nervousness or a reluctance to testify. *Griffith*, 584 So. 2d at 387, citing *Maryland v. Craig*, 110 S.Ct. 3157, 3169 (1990).
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> In *Quimby v. State*, the Mississippi Supreme Court reversed a father's conviction of sexual battery of his five year old daughter and remanded for a new trial because the court allowed hearsay statements under the "catch-all" exception to the hearsay rule without an on the record finding of unavailability. *Quimby v. State*, 604 So. 2d 741, 747 (Miss. 1992). The Court stated that on remand, the court should use the guidelines set forth in *Griffith v. State* in allowing statements made by children in child abuse cases. *Quimby*, 604 So. 2d at 747. The Court pointed out that at the time *Quimby* was decided, the trial court did not have the benefit of the tender years exception to the hearsay rule, and that on remand, the court, after determining whether the child was unavailable, must then determine whether the statements were admissible under the tender years exception. *Id.* at 748.
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> The chancellor in this case based her ruling of unavailability on whether the testimony of the children would be probative on issues in the trial, which is not a determining factor of unavailability for purposes of the tender years exception to the hearsay rule. There are six factors to consider. The final factor of unavailability in the case of a child is the psychological effect testifying in front of the parents would have on the children. M.R.E. 804 (a) (6). While the attorney for D.H.S. stated that he had a psychologist prepared to say that testifying would be traumatic for the children, the chancellor did not require such testimony. In her rulings on the issue, the chancellor did not address the issue of whether testifying would be traumatic for the children and whether the trauma would substantially impair the children.
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> . . .

> Because the chancellor did not require that evidence be introduced on the issue of unavailability, reversible error occurred. Consistent with *Griffith* she must require evidence and determine whether the children would be traumatized by having to testify in front of their parents, that the trauma would be more than mere nervousness, and that there are not other means of testifying that would eliminate that trauma.
>
> We must now determine whether to reverse and remand for a new trial, or reverse and remand for specific findings. Both *Griffith* and *Quimby* reversed and remanded for a new trial. However, both were criminal cases with juries sitting as fact finders. We find that a new trial is not necessary in this case and remand for the chancellor to make specific findings in accordance with this opinion.
>
> If on remand, the chancellor finds that the children were not unavailable under 803(25) or 804(a)(6) as interpreted in *Griffith*, then she should grant the parents a new trial.

¶9. The case was remanded and a hearing conducted on December 18, 1997. Only a single witness was produced and examined at the hearing. Paul A. Davey was called and testified on behalf of D.H.S. Davey was offered as an expert in the field of psychotherapy, professional counseling, and psychometry with special interests in child abuse. Davey had testified in the previous trial and had previously met with the children. It was Davey's opinion that substantial harm would have come to the children if they had testified in the presence of their parents at the original trial.

¶10. The attorney for D.H.S. did not question Davey about whether this potential harm would have in any way been relieved or eliminated by alternate means of testifying such as closed-circuit television. The attorney representing the father attempted to question Davey about his opinion offered in another trial regarding these same children testifying by closed-circuit televison. This attempt was cut short by a sustained objection. The attorney for the father then continued to question Davey along these same lines by proffer. This exchange was in pertinent as follows:

> Q. (By Mr. Gates) [attorney for father] Do you recall having testified in another court proceeding that the children should be allowed to testify by a closed circuit television?
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> MS. WILLIAMS [attorney for D.H.S.]: Your Honor, I'm going to strongly object. That has nothing to do with this proceeding. It is not an issue here today and there -- it is not an issue before the court. The issue before the court is where it's very limited and specific reasons and it's beyond the scope of the issue today.
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> THE COURT: Argument on the objection, Mr. Gates?
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> MR. GATES: It's relevant if he testified that the children should be permitted to testify by closed circuit television.
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> . . .
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> MS. WILLIAMS: Your Honor, that was not raised at the trial on this matter. Counsel did not raise that issue at the trial of this matter and it is beyond the scope of this remand. Counsel should, if

counsel wanted to address that issue, he should have preserved his right to address it at trial. He failed to do so and we're beyond that now. He waived his right to do it and he didn't think -- he didn't raise it at trial and he shouldn't be allowed to raise it now.

MR. GATES: Yes. Let me, let me withdraw that and lay a predicate question.

THE COURT: All right. Question's withdrawn.

Q. (By Mr. Gates) Have you previously been a witness in a court proceeding with reference to whether or not these children should be permitted to testify but not in this court?

. . .

MS. WILLIAMS: Your Honor, again, how, I know where counsel is going with this and he's trying to get in testimony one way that he knows he can't get in another way. This is totally irrelevant and I've said it before, counsel failed to raise this issue during the trial of this matter. If he wanted to get into the previous criminal proceedings, he should have raised that issue at trial when the issue of unavailability came up. He failed to do so. He can't do it now.

THE COURT: Mr. Gates?

MR. GATES: I have no idea what she's asking, but I'm simply asking him about another court proceeding involving these children where he testified about whether or not they should be permitted to testify under the circumstances under which that should be permitted.

THE COURT: All right. When this trial was originally tried before this court, the issue of whether or not these children should testify arose because they were subpoenaed to come to court, there was no request, whatsoever, before the court that the children testified by closed circuit television. The only request before the court was that they be called to the courtroom to testify and therefore, the objection is sustained.

MR. GATES: I'd like to proffer.

THE COURT: On proffer.

(ON PROFFER BY MR. GATES)

Q. (By Mr. Gates) Do you recall having testified in a proceeding in another court about circumstances under which the children should be allowed to testify?

A. I was trying to recall this morning driving here how many times and how many different opinions I have testified in matters involving these children and I -- I couldn't, I couldn't recall, I wasn't exactly sure. I have testified in a small number of cases in different venues regarding these children.

Q. Did you testify in support of the position that they should be permitted to testify by closed circuit T.V.?

A. I testified -- my recollection is that I testified in different venue and different hearing about the prospect of closed circuit and I'm not sure if I'm remembering this group or not but I believe that the

issue at issue was also raised regarding video tape, yes.

Q. Okay. And was your position that they should be permitted to testify either by closed circuit T.V. or video tape?

A. My position was, at that time, that testimony that was, was much more preferable, in my opinion, much more viable than the prospect of the children coming into the courtroom. My testimony at that time was that I believed that they could function in a closed circuit setting provided that some consideration given to their, their age and their developmental status. For instance, there are things that you can do in a room whether it's a closed circuit camera to, to not draw attention to the camera and to detract from the camera so that the child, you know, toys and animals and other childlike things around, the child doesn't necessarily focus their attention as it is necessarily drawn to the camera and I believe that they could be able to function in that circumstance. However, as I said that was at another hearing.

MR. GATES: That will conclude my proffer on that, Your Honor.

THE COURT: All right. Would the attorneys approach the bench, please.

(Off the record)

THE COURT: Let me just make a preliminary statement and you can make whatever statements you want to -- any attorney. The court called the attorneys to the bench to examine a portion of the Court of Appeals opinion with regard to the Griffith Case. This court has been directed to determine whether or not the children were available to testify. And the specific portion of the opinion which the court is reviewing is -- states as follows: "consistent with Griffith, she must require evidence and determined whether the children would be traumatized by having to testify in front of their parents. That the trauma would be more than mere nervousness and there are not other means of testifying that would eliminate that trauma".

The court ruled on the objection and Mr. Gates proceeded with the proffer, based on the court's ruling. And the reason for the court's ruling was because the closed circuit testimony issue never came before the court when this case was originally tried; however, this court is concerned that I do not want to make a type of error by not following the directions for the Court of Appeals that [would] required this hearing to be held again. So out of an abundance of caution, I brought this to the attention of the attorneys. Ms. Williams, I believe you wish to address this issue for the record.

MS. WILLIAMS: Yes, Your Honor. Counsel, the court is certainly correct in the portion of the Court of Appeals opinion that it just read; however, I would stress to the court that the court should focus its attention on the beginning of that sentence which states, "consistent with Griffith" and I would represent to the court that in Griffith, at the time of the trial on the merit[s], rule and I believe it's 617, the closed circuit, the -- yeah, 617, the rule that addresses closed circuit television. At the time of the trial on the merit[s] in Griffith, that rule was not on the books. It did not exist at the time of the trial on the merit[s]; therefore, when the Supreme Court remanded it, it directed the court to allow the attorneys to look at Rule 617 on remand. I would point out to the court that Griffith goes on to say that the issue of unavailability should be determined on a case by case basis. And I would state to the court that at the time of this trial on the merits, Rule 617 was on the books. Counsel had every

opportunity at the trial of the merits to raise that issue and he failed to do so. And I would state to the court that his failure to do so was a waiver of that issue and should not be addressed on this remand. To allow counsel to address that issue now on remand, would be totally inconsistent with Griffith. And I would ask that the court not allow this line of question.

THE COURT: Mr. Gates?

MR. GATES: Your Honor, I respectfully disagree with counsel and I think the prudent course that the court take would be to consider this testimony that was just given by way of proffer and I mean, it's up to the court to determine whether or not I, on behalf of my client, waived the right to have the children examined by closed circuit television. But my statement to the court, I don't feel that I waived that. Under the circumstances of this particular case, I don't think, I know I wasn't intending to waive anything, if I did. But my position is that they should be called and I don't care if they get up here in front of the court or if they do it by closed circuit T.V., but I think they should be witnesses in this case. The point that's at stake here is my client's rights to confront witnesses against him and I think the Mississippi Supreme Court has said that this is fundamental and we're going to protect this right as much as we can, consistent with protecting the children. And I think their basic overall position is that we're going to honor this right as much as we can under the circumstances that exist. And I would submit to the court that the better procedure would be to allow these children to be witnesses by closed circuit television. And then at that time, all the problems, any problem that would have existed, would -- there would be no problem.

. . .

MS. WILLIAMS: Your Honor, it wasn't raised, it wasn't raised at the trial. It was not raised in his brief in support of his appeal. Not at all. Rule 617 was not addressed not one single time. He didn't even -- it's evidence by the fact that he subpoenaed the children. Not one single time [sic] subpoenaed the children at the time of trial. Not one single time rule 617 or closed circuit T.V. ever mentioned in the trial of the merits. And I -- whether he intended to do that or did not intend to do that, he did not do it and that can't be changed. And to allow him to do it now would be contrary to the interest of justice and totally inconsistent with the Griffith Case.

. . .

THE COURT: The court has reviewed the portion of Griffith vs. State which is referred to in the Court of Appeals opinion and has also reviewed Rule 617. The court is satisfied that the court did make the correct ruling with regard to the evidence that was presented on proffer. Due to the fact that there was never a request before this court on the original trial of this civil action for the children to testify by closed circuit television, this court does find that it did make the correct ruling. Please continue.

. . .

MS. WILLIAMS: Your Honor, I just had a couple of questions --

. . .

THE COURT: All right. So we're still on proffer then. Please continue, Ms. Williams.

(CROSS-EXAMINATION ON PROFFER BY MS. WILLIAMS)

Q. (By Ms. Williams) Mr. Davey, in the criminal proceeding that was just addressed on proffer, that was a totally different matter than what is before this court today; is that correct?

A. In fact, I've been -- I've tried to be careful with my, in my answers this afternoon in terms of saying as -- couching things in terms of those previously outlined or as previously stated in my testimony. What I was asked about in this matter, the questions that I've been asked have been related to whether or not the children could come into the courtroom with their parents present and in my opinion, in all probability, would they be able to function and be a party, a part of the legal proceedings and would they be able to function as witnesses. And that was the -- I was attempting to limit my testimony to those particular matters because that's what was addressed in the prior hearing in this case.

Q. Okay. And that was a different issue from that criminal proceeding, was it not? Let me rephrase. In the criminal proceeding, was the sole issue closed caption, excuse me, closed circuit television? Do you recall?

A. I don't immediately recall to tell you the truth. I've testified in this, in matters involving these children several times up to today and I don't immediately recall what it was, but I don't recall being asked any questions about closed circuit television or video taping in this matter.

Q. Let me just wrap it up, Mr. Davey, 'cause I realize that was some time ago. But do you recall whether or not, in the criminal proceeding, the issue of closed circuit television -- was that at your recommendation?

A. I remember being asked, I -- no. I remember being asked some questions about that and responding to those in that other matter.

Q. But, you did not recommend that the children be allowed to testify that way, did you?

A. That wasn't my idea. I was asked questions about the viability of testimony by closed circuit T.V.

MS. WILLIAMS: No further cross on proffer, Your Honor.

¶11. The chancellor issued her order and opinion on the same day as the hearing. Her opinion reads in pertinent part as follows:

THE COURT: This matter is on remand from the Court of Appeals for this court to make findings of fact with regard to a specific issue, and that specific issue is whether or not two minor children, [excluded to preserve privacy], were available to testify in the trial that was conducted in this courtroom in February and March of 1995.

. . .

When the two minor children were subpoenaed to testify this court did not allow them to testify and the Court of Appeals found that this court committed reversible error when it did not require evidence to be introduced on the issue of unavailability. That hearing has been held today.

The issue is whether or not the children were available to testify at the trial previously, not whether they should be available if they were required to come to court today.

Paul Davey has very clearly testified before this court that the minor children, [excluded] would suffer emotional and psychological trauma if they were forced to testify. He felt that they would come to harm if they were required to testify in the presence of their parents under the circumstances which were given to him which was the trial of this civil action in February and March of 1995.

. . .

Based on the foregoing findings the court is satisfied that [excluded] would have been traumatized by having to testify at the trial which was held in February and March of 1995 and that that trauma would have been more than mere nervousness and that they would have had difficulty in communicating any information to this court.

An issue came up during the hearing with regard to a particular ruling of this court as to the use of closed circuit television or video tape in providing the testimony of the children for the consideration of the court and to satisfy the confrontation rights of the defendants and the court is satisfied that due to the fact that that issue was not before this court at the original trial, that is not something that the Court of Appeals is requiring that the court consider at this time.

Rule 617 does require that a motion be filed and a hearing be held on whether or not closed circuit television could be used to show a child's testimony and that issue never came up before the court in the original trial and should the Appellate Court have found that that was something that this court should consider that direction should have been included in the remand and the court is satisfied that that is not an issue that the Appellate Court required this court to consider for the limited purposes of this hearing.

This court does find that the children were not available under 803(25) or 804(a)(6) as interpreted in Griffith and therefore the parents are not entitled to a new trial of this civil action.

¶12. From another unfavorable ruling by the chancellor, the parents appeal the chancellor's decision to us.

ANALYSIS

I.

THE CHANCELLOR ERRED BY NOT FOLLOWING THE INSTRUCTIONS OF THE COURT OF APPEALS WHICH DIRECTED THE CHANCELLOR TO REQUIRE EVIDENCE AND DETERMINE WHETHER THERE ARE NOT OTHER MEANS OF TESTIFYING THAT WOULD ELIMINATE TRAUMA THAT WOULD BE CAUSED TO THE CHILDREN IF REQUIRED TO TESTIFY IN THE PRESENCE OF THEIR PARENTS.

II.

THE DEPARTMENT OF HUMAN SERVICES AS THE PROPONENT OF HEARSAY STATEMENTS OF THE CHILDREN UNDER THE TENDER YEARS EXCEPTION TO THE

HEARSAY RULE HAVE THE BURDEN OF PROVING THE CHILDREN WERE "UNAVAILABLE" AS REQUIRED BY THAT RULE WHEN THE DECLARANTS ARE NOT OFFERED AS WITNESSES.

III.

THE PARENTS AT THE ORIGINAL TRIAL DID NOT WAIVE THE ISSUE OF WHETHER THE CHILDREN SHOULD BE PERMITTED TO TESTIFY BY CLOSED-CIRCUIT TELEVISION AS A CONDITION OF ADMISSION OF THE CHILDREN'S HEARSAY STATEMENTS CONSIDERING THAT THE DEPARTMENT OF HUMAN SERVICES PRESENTED NO EVIDENCE AT TRIAL OF ANY TRAUMA THAT MIGHT BE CAUSED TO THE CHILDREN BY HAVING TO TESTIFY IN THE PRESENCE OF THEIR PARENTS.

IV.

THE CHANCELLOR ERRED IN LIMITING THE ISSUE TO WHETHER THE CHILDREN WERE "UNAVAILABLE" AT THE TIME OF THE ORIGINAL TRIAL, AND SHE SHOULD HAVE CONSIDERED WHETHER THE CHILDREN WERE "UNAVAILABLE" AT THE TIME OF THE REMAND HEARING.

V.

THE DEPARTMENT OF HUMAN SERVICES FAILED TO MEET ITS BURDEN OF PROVING "UNAVAILABILITY" AND THE APPROPRIATE RELIEF IS TO GRANT A NEW TRIAL WITH DIRECTIONS THAT THE RELEVANT HEARSAY STATEMENTS TO LORI WOODRUFF SHOULD BE EXCLUDED UNLESS THE CHILDREN TESTIFY.

¶13. This entire appeal is predicated on two rulings made by the chancellor in the original trial. In that trial, D.H.S. attempted to introduce hearsay statements of the children. Such was objected to by the parents. The chancellor eventually allowed the hearsay statements to be introduced under M.R.E. 803(25), the tender years exception to the hearsay rule. The parents then attempted to have the children declared available to testify so that if D.H.S. wanted to introduce the hearsay evidence it could do so, but only if the children also testified. D.H.S. argued that the children were unavailable under M.R.E. 804(a)(6), in that the children would be psychologically traumatized if required to testify. The chancellor held that the children were unavailable to testify because their testimony would not be probative on issues in the trial. In essence, the rulings of the chancellor were adverse to the parents in two ways. First, the chancellor allowed the statements into evidence. Second, by declaring that the children were unavailable the parents were deprived the ability to question the children.

¶14. M.R.E. 803(25) allows statements made by a child of tender years describing any act of sexual contact performed with or on the child by another. But before doing so, the court must find in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide substantial indicia of reliability, and the child either testifies or is unavailable as a witness. M.R.E. 804 sets out six determining factors for unavailability. Since the chancellor based her ruling of unavailability on whether the testimony of the children would be probative on issues in the trial, which is not one of the six

determining factors of unavailability, and no other evidence was introduced on the issue of unavailability, we held that reversible error occurred.

¶15. It is self-evident that when we reverse a chancellor it is because of something that chancellor did or failed to do at trial. In our original opinion, we reversed because the chancellor failed to require evidence on the issue of unavailability as found in M.R.E. 803(25) and defined under M.R.E. 804(a)(6). We did not order a new trial for if the children at the time of the original trial were in fact unavailable then the chancellor committed no error in admitting the hearsay evidence without the testimony of the children, and a new trial would not be warranted. However, if the children were available to testify then the hearsay statements should have only been allowed accompanied by the children's testimony, and a new trial should be ordered. Therefore, we remanded for a determination of the unavailability of the children at the time of the original trial. It goes without saying that it makes no sense to remand for a determination of the unavailability of the children at the time of the remand hearing.

¶16. The crux of the matter before us now, and the question which we wanted answered on remand was: in order to introduce the hearsay statements did D.H.S. also need to have the children testify? To answer this question, the chancellor on remand needed to determine if the children were unavailable. In our original opinion, we specifically described what "unavailable" meant and what the chancellor was to do, namely "[c]onsistent with *Griffith* she must require evidence and determine whether the children would be traumatized by having to testify in front of their parents, that the trauma would be more than mere nervousness, *and that there are not other means of testifying that would eliminate that trauma*. . . . If on remand, the chancellor finds that the children were not unavailable under 803(25) or 804(a)(6) as interpreted in *Griffith*, then she should grant the parents a new trial." (emphasis added).

¶17. D.H.S. wanted to introduce the hearsay statements not accompanied by testimony from the children. To do this D.H.S. had the burden to produce evidence to show: (1) the children would be traumatized by having to testify in front of their parents; (2) that the trauma would be more than mere nervousness; and (3) that there are not other means of testifying that would eliminate that trauma. D.H.S. had this burden for it was the proponent of the hearsay evidence absent testimony from the children. D.H.S. could have also introduced this evidence if it had the children testify, but as stated above, D.H.S. did not want to do this. D.H.S. clearly met its burden for (1) and (2) but failed to offer anything on (3).

¶18. At the hearing on remand, the court and D.H.S. took the position advanced now in this appeal that since the parents at the trial did not file a motion pursuant to M.R.E. 617 to have the children questioned by closed-circuit television, that the parents waived any objections when D.H.S. sought introduction of the hearsay statements with no proof on the possible use of closed-circuit television instead of live testimony. As the chancellor noted, the provisions of this evidentiary rule are of fairly recent origin. The one precedent reviewed by the chancellor regarding the definition of unavailability of a child witness under M.R.E. 804(a)(6), had found that the rule "must be read in conjunction with Rule 617 . . . ." *Griffith v. State*, 584 So. 2d 383, 387 (Miss. 1991). Accordingly, she determined that by applying the requirements of *Griffith* such testimony can only occur "upon *motion* and hearing in camera."

¶19. With deference to the chancellor, we do not agree that *Griffith* should be interpreted as incorporating the procedural requirements of M.R.E. 617 into the "unavailability" analysis of M.R.E. 804(a)(6). A party who is seeking to introduce the testimony of a child witness through closed circuit television should file a motion alerting the court and other parties of that request. M.R.E. 617(a). That was not the reason for our

prior decision. We did not remand to determine whether the chancellor should have allowed the children to testify at the parents' request, but instead we remanded in order to review whether hearsay statements by the children should have been admitted at D.H.S.'s request. D.H.S. had to show that the declarants were unavailable because of the emotional trauma that testimony would cause. "Unavailability" includes proof that there are no meaningful alternatives to in-court testimony. In providing the predicate for introduction of this hearsay, D.H.S. had to show that closed-circuit television *was not* an option. The parents did not have to prove that it *was* an option. Consequently, whether the parents filed a motion under Rule 617 had no effect on D.H.S.'s evidentiary burden.

¶20. We acknowledge that at the original trial of this case not only was there no motion for closed circuit television testimony, there also was no mention of the possibility. Here, the chancellor at the original trial found that it was not necessary for D.H.S. to introduce evidence of unavailability. Therefore, the issue of available options was never reached.

¶21. The chancellor had to find that the "emotional or psychological health of the witness would be substantially impaired if the child had to testify in the physical presence of the accused." M.R.E. 804(a)(6). If the courtroom or other intimidating features of the normal setting for testimony are the problem, then less traumatic settings in the presence of the accused must be considered. *Griffith*, 584 So. 2d at 387. It is that analysis that would require video testimony or some other alternative, regardless of whether there is a pending motion. Moreover, M.R.E. 617(b) provides that the judge herself can act on her own motion. M.R.E. 804(a)(6) as interpreted by *Griffith* would trigger the need for the judge to do so if Rule 617 procedures are even relevant to this consideration.

¶22. Since it was D.H.S. who wished to introduce the hearsay statements, it was D.H.S. to demonstrate that no reasonable alternative existed. It was for the chancellor ultimately to make that determination. D.H.S. is not exonerated from its obligation under M.R.E. 804 because the parents had not filed a motion under M.R.E. 617.

¶23. The only evidence produced at the remand hearing concerning alternate means of testifying was that offered in a proffer by the parents in questioning D.H.S.'s only witness, Davey. Davey's opinion offered about these same children but in a criminal matter was "[m]y testimony at that time was that I believed that they could function in a closed circuit setting provided that some consideration given to their, their age and their developmental status." Given the fact that D.H.S. offered no evidence for part of their evidentiary burden, and the fact that Davey, D.H.S.'s own witness, testified that at the time of the criminal matter the children could testify via closed-circuit television, leaves us no choice but to declare that these children were available at the time of the original trial to testify at least by way of closed-circuit television or video deposition.

¶24. We therefore reverse the chancellor and order a new trial. One final note. At the new trial, it will be up to D.H.S. to decide whether it wants to attempt to introduce the hearsay evidence again. If it decides to do so, a new determination under M.R.E. 803(25) and all that it entails, including availability or unavailability of the children as witnesses, must be made again. In this opinion, we have held that the children were available at the original trial to testify at least by way of closed-circuit television or video deposition. At the new trial, whether the children are available and can testify either in open court, by closed-circuit television, video

deposition, or some other means, or whether the children are unavailable to testify, remains to be seen.

¶25. **THE JUDGMENT OF THE CLARKE COUNTY CHANCERY COURT IS REVERSED AND REMANDED FOR A NEW TRIAL. ALL COSTS OF THIS APPEAL ARE ASSESSED TO APPELLEES.**

McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES, DIAZ, IRVING, AND LEE, JJ., CONCUR. PAYNE, J., DISSENTS WITH SEPARATE OPINION. MOORE, J., NOT PARTICIPATING.

PAYNE, J., DISSENTING:

¶26. In the first consideration of this case, I filed a dissent because I believed that the chancellor had sufficient information from the *guardian ad litem* that in person testimony would traumatize these abused children even further. On remand, the psychologist testified that the children would be traumatized if they had to testify before their parents and that it would be more than just embarrassment. When asked about recommending that the children be allowed to testify on closed circuit television, he responded that such was not his idea. I can certainly infer from that statement that he was saying that there was no method that he believed could be used that would not traumatize the children.

¶27. These children, at the hands of their parents, have been subjected to horrors that will leave them scarred for life and now we want to subject them to a new trial six or seven years after the fact, and after at least four years of trying to put their past behind them and trying to get their lives back together because a DHS attorney failed to ask one magic question about "other viable means of testimony"? The majority has made a factual finding that there were "other means of testifying that would eliminate that trauma." Just because Paul Davey had earlier stated that the children might have been able to function better in a closed circuit setting under certain considerations than in open court confrontation with their parents does not say that that means would eliminate the trauma. I believe that we go too far in making that determination at this level.

¶28. I would renew my language from my dissenting opinion in the first time we considered this case:

I would take this opportunity to point out that chancellors function in courts of equity and therefore, should not be required to conform to a rigid literal interpretation of the law. Clearly, the chancellor in the present case found these children to be unavailable. I can find no error in this determination and am opposed to remanding this case so that the chancellor can tell us again what we already know: the children *are* unavailable.

¶29. These children had been adjudged abused children by the youth court. There is no reason for us to be playing word games over parental rights in favor of the perpetrators. I would affirm.

1. The matter of the children's unavailability first was raised in a preliminary hearing, when the court addressed whether the children were going to testify. The guardian ad litem responded:

Mr. Kramer: I wish them held unavailable. They're child - - they're children. They can't testify. The youth court has held them unavailable. They are abused children by these parents, according to the youth court, and, therefore, they are to have no contact with those parents and are not to confront

those parents.

Mr. Gates, attorney for the father, then asked the chancellor to defer ruling on the issue until other testimony was presented. The court stated:

The Court: And the facts surrounding this case occurred two years ago, three years ago, I would find that their testimony probably would not be probative to any issue before the court, so at this time, I would find that they are unavailable to testify. If it occurs in the course of trial that their testimony is essential, and that can be shown to the court, the court would reconsider this ruling at that time.

Thus the chancellor's initial decision on unavailability was solely based on her conclusion that the testimony was not probative.