IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2015-CA-00652-COA

JANE DOE **APPELLANT**

v.

JOHN DOE **APPELLEE**

DATE OF JUDGMENT:	02/24/2015
TRIAL JUDGE:	HON. CYNTHIA L. BREWER
COURT FROM WHICH APPEALED:	MADISON COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT:	JOHN G. HOLADAY ANDY STEWART
ATTORNEYS FOR APPELLEE:	WILLIAM R. WRIGHT AMANDA JANE PROCTOR
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	GRANTED PETITION TO TERMINATE PARENTAL RIGHTS
DISPOSITION:	REVERSED AND RENDERED - 02/07/2017
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

LEE, C.J., FOR THE COURT:

¶1. Jane Doe[1] appeals the termination of her parental rights by the Madison County Chancery Court. Finding error, we reverse and render.

FACTS AND PROCEDURAL HISTORY

¶2. John and Jane Doe were divorced in 2009 on the ground of irreconcilable differences. They agreed to joint physical and legal custody of their sole minor child, who was born in 2007. On June 8, 2011, John petitioned the chancery court for a modification of custody, due

[1] Fictitious names are used for all parties involved in order to maintain confidentiality.

to concerns regarding Jane's drug abuse. On January 18, 2012, after one of Jane's relapses, John moved for emergency relief without notice to Jane. The chancellor granted the motion and temporarily awarded sole legal and physical custody of the child to John.

¶3. On August 21, 2012, the chancellor heard John's petition for modification. Sixteen days before the hearing, Jane's attorney's motion to withdraw was granted, and Jane appeared pro se at the hearing. The chancellor ruled from the bench, awarding John full custody. In her bench ruling, the chancellor gave Jane thirty days—until September 20—to provide proof of employment and two clean drug tests in order to receive supervised visitation with the child. John's counsel prepared the order, and filed it on September 21, 2012. Jane did not submit drug tests or proof of employment to the court by September 20, 2012.

¶4. John filed his original motion to terminate Jane's parental rights on January 29, 2013, and later amended the motion to include a petition for adoption of the child by Laura, his wife. Jane's counsel entered an appearance fourteen days before the hearing was held on July 15, 2014. When it became apparent that the parties would be unable to present all of the testimony in one day, the chancellor continued the hearing until August 11, 2014. At the hearing, there was extensive testimony about Jane's prior drug history and arrests. There was also testimony about how John and Jane abused drugs together during their marriage and how, with the child in the car, John was arrested for driving under the influence and possession of drug paraphernalia.

¶5. In addition to the testimony concerning Jane's drug use, there was also undisputed

testimony that Jane was currently clean and enrolled in Alternatives for Life and Recovery, a drug-rehabilitation program. Jane had enrolled in the program in December 2013 and had advanced in it before the hearing date. The record shows that she passed a number of drug tests before the first day of the hearing in July 2014. She was also clean from any illegal drugs for the second day of the trial in August 2014.

¶6. The testimony at trial also undisputedly showed that Jane was employed with her family business and lived in an apartment on her parents' property. And the record does not include any direct evidence that Jane ever abused drugs around the child when he was in her custody. She testified that whenever she used drugs, the child was with her mother or with John. Aside from an incident where the child accidentally cut himself with a razor in the bathroom, which was not alleged by any party to be Jane's fault, there was no evidence that the child ever suffered any physical harm when he was in Jane's custody.

¶7. The chancellor entered an order terminating Jane's parental rights on February 25, 2015. Jane's attorney did not receive notice of the judgment from the clerk's office until March 27, 2015. He then filed a motion to reopen the time for appeal, and the chancery court granted the motion without opposition from John's attorney. Jane noticed her appeal on April 16, 2015. The next day, the chancellor entered a judgment of adoption.

STANDARD OF REVIEW

¶8. "The chancellor's findings of fact concerning the termination of parental rights are viewed under the manifest error/substantial credible evidence standard of review." *W.A.S. v. A.L.G.*, 949 So. 2d 31, 34 (¶7) (Miss. 2007). "Therefore, we examine whether credible

proof exists to support the chancellor's finding of fact by clear and convincing evidence." *Id.* (citation omitted). "State statutes providing for the termination of parental rights are subject to strict scrutiny and [c]ourts may not add to the enumerated grounds." *Chism v. Bright*, 152 So. 3d 318, 322 (¶13) (Miss. 2014). Where "a chancellor misapprehends the controlling rules of law or acts pursuant to a substantially erroneous view of the law, reversal is proper." *Id.* at (¶12).

DISCUSSION

¶9. On appeal, Jane raises several issues. We find her argument regarding the statutory prerequisites, which must be met before considering the grounds for termination, to be dispositive and thus condense her issues as follows: (1) whether the chancellor erred in finding that the three statutory prerequisites were met by clear and convincing evidence, and (2) whether the chancellor erred in finding that the statutory grounds for termination of Jane's parental rights were met by clear and convincing evidence.

¶10. "Parents have a 'fundamental liberty interest in the care, custody, and management of their child' that cannot be taken away without clear and convincing evidence of the required statutory grounds for termination of parental rights." *Id.* at (¶13) (quoting *Santosky v. Kramer,* 455 U.S. 745, 754 (1982)). In light of this fundamental liberty interest, "termination of parental rights is a last resort." *Id.* at 323 (¶17).

I. Prerequisites to Terminate Parental Rights

¶11. At the time relevant to this appeal, Mississippi Code Annotated sections 93-15-101 to -111 (Rev. 2013) governed a termination-of-parental-rights proceeding. Section

93-15-103(1) provided three prerequisites that must be found before addressing the specific grounds for termination. *Chism*, 152 So. 3d at 322-23 (¶15). Specifically, section 93-15-103(1) stated:

> (1) When a child has been removed from the home of its natural parents and cannot be returned to the home of his natural parents within a reasonable length of time because returning to the home would be damaging to the child or the parent is unable or unwilling to care for the child, relatives are not appropriate or are unavailable, and when adoption is in the best interest of the child, taking into account whether the adoption is needed to secure a stable placement for the child and the strength of the child's bonds to his natural parents and the effect of future contacts between them, the grounds listed in subsections (2) and (3) of this section shall be considered as grounds for the termination of parental rights. The grounds may apply singly or in combination in any given case.

¶12. The Mississippi Supreme Court, in *Chism*, enumerated the prerequisites as follows:

> (1) the child has been removed from the home of its natural parents and cannot be returned to the home of his natural parents within a reasonable length of time or the parent is unable or unwilling to care for the child; (2) relatives are not appropriate or are unavailable; and (3) adoption is in the best interest of the child.

Chism, 152 So. 3d at 323 (¶15) (citing *In re Dissolution of Marriage of Leverock & Hamby*, 23 So. 3d 424, 428 (¶15) (Miss. 2009)); *see also Adams v. Tupelo Children's Mansion Inc.*, 185 So. 3d 1070, 1073 (¶9) (Miss. Ct. App. 2016).

¶13. We acknowledge that following both the termination of Jane's parental rights and the filing of this appeal, the statute has been amended by the Mississippi Legislature, such that the prerequisites are no longer applicable. Miss Code Ann. §§ 93-15-101 to -133 (Supp. 2016). However, an appellate court will "apply the version of the statute in effect [at the time.]" *See Estate of Elmore v. Williams*, 150 So. 3d 700, 701 n.1 (Miss. 2014). "A statute

will not be given retroactive effect unless it is manifest from the language that the Legislature intended it to so operate." *City of Starkville v. 4-Cty. Elec. Power Ass'n*, 909 So. 2d 1094, 1109 (¶41) (Miss. 2005) (citation omitted). Here, there is no language indicating retroactive intent. Rather, the effective-date provision for the statutes governing termination of parental rights as amended in the 2016 legislative session specifically states: "This act shall take effect and be in force from and after its passage [(approved April 18, 2016)]." Miss. Laws ch. 431, § 24 (H.B. 1240). Accordingly, we apply the version of the statute in effect at the time, which, in the present case, contained the three prerequisites as stated.

¶14. Here, the chancellor incorrectly applied section 93-15-103(1) in determining that the statutory prerequisites had been met. We turn to the factually analogous case of *Chism*, where our supreme court specifically addressed the application of the three prerequisites. *Chism*, 152 So. 3d at 322-23 (¶¶15-16).

¶15. In *Chism,* the Mississippi Supreme Court reversed the decision of the chancery court to terminate a father's parental rights—which this Court affirmed—holding that there was insufficient evidence to support the chancellor's finding that the father's parental rights should be terminated due to his ongoing behavior, specifically alcohol and drug addiction, which made it impossible to return the minor child to his care and custody. *Id.* at 322 (¶15).

¶16. Abby and Jim Chism were married in 2003 and had one child, Johnny, in 2004. *Id.* at 319 (¶2). Following their divorce in 2008, Abby and Jim shared joint legal custody of Johnny, though Abby had primary physical custody, and Jim had regular, unrestricted visitation. *Id.* However, Abby petitioned the chancery court for emergency modification of

Jim's visitation rights following an incident where Jim fell asleep at a fast-food drive-through with the car in park while Johnny was in the car. *Id.* at (¶3). Jim was arrested for public intoxication, but Johnny was not harmed by the incident. *Id.* The chancellor entered an order of modification restricting Jim to supervised visitation, among other restrictions. *Id.* at 319-20 (¶4). As a condition of visitation, Jim was required to report to his duties with the United States Army, which he failed to do. *Id.* at 320 (¶4). He was also ordered to submit to drug testing and commit to a drug-rehabilitation facility in order to reinstate visitation, which he failed to comply with for nearly one year. *Id.* Once Jim finally completed an initial alcohol treatment program, he sought to resume visitation with the child, but his attempts were unanswered. *Id.* Jim filed a complaint for contempt, and Abby answered with a counterclaim for termination of parental rights. *Id.*

¶17. In the months leading up to trial, Jim failed two court-ordered drug tests and entered another rehabilitation program. *Id.* at (¶6). Shortly after exiting this rehabilitation program, he burglarized his neighbor's home while intoxicated. *Id.* And he entered yet another rehabilitation program. *Id.* The trial occurred over a series of dates spanning seven months. *Id.* at 320-21 (¶¶7-8). On one occasion during that period of time, "Jim consumed large amounts of alcohol and Xanax and broke into a neighbor's house, where he passed out. A neighbor found him unresponsive and called 911. Medical personnel resuscitated Jim, and he was later arrested." *Id.* at 320 (¶7). Jim also admitted to the court that he had tampered with two previous drug tests. *Id.* at 321 (¶8). Ultimately, the chancellor terminated Jim's parental rights, based upon the grounds that Jim exhibited "ongoing behavior which would

make it impossible to return the minor child to his care and custody because he has a diagnosable condition, specifically alcohol and drug addiction, unlikely to change within a reasonable time which makes him unable to assume minimally[] acceptable care of the child." *Id.* at 322 (¶15).

¶18. Despite Jim's drug and alcohol addiction, criminal activity and arrests, and other failings, the supreme court reversed the chancellor's decision to terminate Jim's parental rights, noting that the three prerequisites set forth in section 93-15-103(1) had not been met. *Id.* at 323 (¶17). Specifically, the supreme court noted that the child was not removed from his natural parents, and that Jim was not unable or unwilling to care for the child. *Id.* at (¶16). Further, the supreme court stated that the "chancellor's finding that Jim was unable to assume minimally acceptable care" was contradicted by other evidence. *Id.* Because the prerequisites necessary to invoke grounds for termination of parental rights were not met, the court declined to consider the grounds upon which termination was based. *Id.* at 323-24 (¶17).

¶19. In the instant case, it is undisputed that Jane struggles with a drug addiction, which in large part is the basis for the termination of her parental rights by the chancellor. But, like *Chism*, the three prerequisites of section 93-15-103(1) were not met. The chancellor recited the three prerequisites for terminating parental rights; however, the chancellor's application of those prerequisites does not accord with our caselaw.

¶20. Finding that the first statutory prerequisite had been met, the chancellor cited to the orders that restricted Jane's custody and visitation with the child. The chancellor wrote, "The

Court removed [the child] from [Jane's] custody because of her drug use and has been unable to allow [the child] to return to [Jane's] custody because returning the child to the home would be damaging to the child." The child has not, however, been removed from the home of his natural parents. Rather, just as in *Chism*, Jane's custody and visitation were restricted due to her substance abuse. The statute does not address a loss of *custody*; it deals with a removal from the *home*. A restriction of custody and visitation does not constitute a removal from the home. And the child was not "unable to be returned to the home of his natural parents within a reasonable length of time." The record indicates the child has been living with a natural parent, his father, John, since January 2012.

¶21. And like *Chism*, the record does not support a finding that Jane was "unable or unwilling" to care for the child. At the time of trial, Jane had made attempts to visit with the child, and had entered several rehabilitation programs—having successfully completed the most recent one. The evidence showed she had been clean of illegal drugs for six months (since February 2014) at the time of trial in July and August. And John did not contend that she had since relapsed. There was also testimony at trial that family members were available and willing to help facilitate and supervise visitation. Jane has also continued to appear in court, at times pro se, in her attempts to maintain her visitation rights. Further, adoption by Laura is not needed to "secure a stable placement for" the child. He was in a stable placement, living with John and Laura; and Jane did not petition the chancery court for custody of the child.

¶22. In *Chism*, the supreme court stated:

> Simply because Jim might not be the best choice to be Johnny's full-time custodial parent certainly does not mean that he is "unable to care" for Johnny. This Court "has never allowed termination of parental rights only because others may be better parents." Second, it is undisputed that Jim wants to be a part of Johnny's life and that they have a very loving relationship, which evidences that Jim is not unwilling to care for him.

Id. at 323 (¶16) (quoting *W.A.S.*, 949 So. 2d at 35 (¶10)).

¶23. The same is true in the instant case. Just because Jane may not be the best choice to be the child's full-time custodial parent certainly does not mean she is unable to care for the child. While it may be true that John is a better parent, that has never been sufficient for termination of parental rights. Jane has demonstrated a desire to be a part of the child's life, which evidences she is not unwilling to care for him. We reiterate that "termination of parental rights is a last resort." *Id.* at 323 (¶17). And where it is possible to secure a stable environment for the child without the termination of parental rights, alternatives such as custody and guardianship should be considered. Miss. Code Ann. § 93-15-103(4) (Rev. 2013); *Chism*, 152 So. 3d at 323 (¶17). John and his wife, Laura, have full custody of the child, and Jane's visitation was restricted due to her addiction. Given these circumstances, there is nothing that evidences that the child was not in a stable home environment.

¶24. The chancellor also found that "Jane continues to abuse drugs, go into treatment, fail to complete the treatment and relapse," as well as stated that the "child does not have a strong bond with Jane." But these findings were contrary to credible evidence presented at trial. There was substantial credible evidence at trial that Jane had successfully completed a drug rehabilitation program and taken multiple drug tests, which were all, after January 2014, negative for illegal drugs. At the time of trial, Jane was also participating in a pretrial

diversion program, which she did complete, complying with the program's requirements, which included multiple negative drug screens. There was no evidence at trial that Jane abused drugs in the presence of the child, nor had she ever harmed the child. At the time of trial, Jane was gainfully employed, had repaired estranged relationships with her parents, and was overseeing her parents' property while they were overseas. Jane testified that she always wanted to see her son and care for him. The guardian ad litem stated in her report that she believed Jane loved the child, the child referred to Jane as "mommy [Jane]," and the child had no negative feelings toward Jane. Upon review of the record, we find that the chancellor erred in finding the three prerequisites were met by clear and convincing evidence.

¶25. In sum, John and Laura did not prove the statutory prerequisites found in section 93-15-103(1), which must be met before invoking any ground for termination. As such, it is not necessary to address the specific grounds for termination cited by the chancellor, or whether the termination was in the child's best interest. However, notwithstanding that the prerequisites were not met, we—in response to the issues presented in this appeal and in light of the Legislature's recent amendment of the statute which removed the prerequisites—briefly address the grounds for termination.

II. Grounds for Termination

¶26. After reciting that the three prerequisites had been met, the chancellor cited two grounds for terminating Jane's parental rights. Grounds for termination must be shown by clear and convincing evidence. *A.B. v. Lauderdale Cty. Dep't of Human Servs.*, 13 So. 3d 1263, 1266 (¶14) (Miss. 2009).

A. Diagnosable Condition Unlikely to Change

¶27. The chancellor cited to Mississippi Code Annotated section 93-15-103(3)(e): "The parent exhibits ongoing behavior which would make it impossible to return the child to the parent's care and custody: (i) Because the parent has a diagnosable condition unlikely to change within a reasonable time such as alcohol or drug addiction . . . ." The chancellor went on to find that "[Jane] is a drug addict who is unlikely to change within a reasonable time, and is unable to assume minimally acceptable care of [the child]." Our review of the record shows that this ground was not met by clear and convincing evidence. While it is undisputed that Jane struggled with a drug addiction and failed numerous attempts at rehabilitation, the uncontroverted evidence at trial was that she had successfully completed a drug-rehabilitation program and had several negative drug screens. Jane had been clean for at least six months, and there is no indication by John that she has since relapsed.

¶28. This Court has previously cited to the supreme court's decision in *In re V.M.S.*, 938 So. 2d 829 (Miss. 2006), acknowledging that the "termination of a mother's parental rights was not supported by the evidence where the mother had a history of drug abuse and bipolar disorder, but she was attempting to stay in contact with the child and making an effort at rehabilitation." *J.J. v. Smith*, 31 So. 3d 1271, 1276 (¶22) (Miss. Ct. App. 2010). We again recognize *In re V.M.S.*'s applicability to the instant case. In *In re V.M.S.*, the supreme court stated:

> [T]he circumstances of the case wholly fail to rise to such a level required by the statute to necessitate terminating [the mother's] parental rights to [her child]. Though [the mother] may not be fit to be awarded custody, the termination of her parental rights is inappropriate and is not justified from the

record before us and the applicable law.

In re V.M.S., 938 So. 2d at 837 (¶17). Here, there was not sufficient credible evidence to show that Jane was a drug addict unlikely to change within a reasonable time such that she was unable to assume minimally acceptable care of the child. The record evidences her efforts at rehabilitation and attempts to stay in contact with her son. Therefore, this ground for termination was not met by clear and convincing evidence.

B. No Contact for Over One Year

¶29. The chancellor also found that Jane's parental rights should be terminated based upon her having "no contact with [the] child[,] . . . three (3) years of age or older[,] for a period of one (1) year," citing Mississippi Code Annotation section 93-15-103(3)(b) (Rev. 2013). Again, the grounds for termination of parental rights, including no contact for over one year, must be proven by clear and convincing evidence. *A.B.,* 13 So. 3d at 1266 (¶14). The chancellor found that Jane "showed no proof of her efforts to maintain contact with the child since January 2012." The evidence simply does not support this finding to the clear-and-convincing standard as required. Rather, Laura testified that she and John were in contact by phone with Jane in the spring of 2012. Though Laura denied it, Jane testified that during this phone call she asked to speak to her son and was told he was at school. Jane also testified that she had difficulty reaching John and Laura. John and Laura both testified that John had changed his phone number, reportedly due to telemarketing calls. John also testified that for a period of time prior to changing his number, he often would not answer his phone due to the telemarketing calls. And Laura testified that she and John did not notify

Jane of the new number. John also admitted that he and Laura moved in August 2013 and did not notify Jane of their new address.

¶30. As stated, Jane's visitation was suspended in February 2012 due to a failed drug test. She testified that she was unable to resume visitation because she knew she was unable, at the time, to pass two consecutive drug tests as required by the chancery court. Furthermore, Jane testified she believed, although mistakenly, that she was under a no-contact order by the chancery court, rather than a no-visitation order. And while John and Laura testified that Jane had made no attempts to contact or visit the child, Laura also testified she feared Jane would take the child because she was driving by their home and going to the soccer fields to see the child. There was also testimony that the son of one of Jane's friends had told the child that his "mommy [Jane]" loved him. John and Laura even notified the police of these incidents, and a no-contact order was put into place.

¶31. Upon our review of the record, showing that John, at times, did not answer his phone and had changed both his phone number and his address without notifying Jane, and that Jane had spent extended periods of time in drug treatments in an effort to get clean, we find there was not clear and convincing evidence showing that Jane made no contact with the child for over one year. Furthermore, John and Laura's assertion of this ground is belied by their testimony that they had spoken with Jane, that she was driving around their home and the neighborhood in hopes of seeing the child, and that Jane had given the child a message through her friend's son. The record also shows that trial, which was initially set for October 2013, was continued until July 2014 because of Jane's participation in Teen Challenge, a

drug rehabilitation program. As such, it is evident that Jane could not visit the child for a significant portion of time due to the trial court's orders, her participation in drug-treatment programs, and John and Laura's change of numbers and address without notification to her.

¶32. We hold that the three prerequisites set forth by section 93-15-103(1) were not met, and therefore, grounds for termination should not have been invoked. Therefore, we reverse and render the judgment of the chancery court terminating Jane's parental rights. We further hold that the grounds relied upon for termination of parental rights were not met by clear and convincing evidence.

III. Adoption of the Child

¶33. At oral argument, John's counsel confirmed—and Jane's counsel learned for the first time—that the chancellor had finalized the adoption of the child by Laura, one day after this appeal was filed. As such, the adoption was not included in the issues on appeal. Because it is not properly before this Court, we decline to address it, except to say that because the issue of termination of parental rights was on appeal, the chancellor lacked authority to grant the adoption.

¶34. **THE JUDGMENT OF THE MADISON COUNTY CHANCERY COURT TERMINATING THE NATURAL MOTHER'S PARENTAL RIGHTS IS REVERSED AND RENDERED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.**

IRVING, P.J, BARNES, ISHEE, GREENLEE AND WESTBROOKS, JJ., CONCUR. CARLTON AND FAIR, JJ., CONCUR IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. GRIFFIS, P.J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION. WILSON, J., NOT PARTICIPATING.