IN THE COURT OF APPEALS 06/04/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00261 COA

IN THE MATTER OF THE GUARDIANSHIP OF C.A.S., A MINOR: P.J.S. I AND C.C.S.

APPELLANTS

v.

R.L.S. AND P.J.S. II

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. TIMOTHY EDWARD ERVIN

COURT FROM WHICH APPEALED: TISHOMINGO COUNTY CHANCERY COURT

ATTORNEY(S) FOR APPELLANT:

MICHAEL MALSKI

ATTORNEY(S) FOR APPELLEE:

RONALD D. MICHAEL

NATURE OF THE CASE: GUARDIANSHIP AND CUSTODY OF A MINOR

TRIAL COURT DISPOSITION: GUARDIANSHIP AND CUSTODY GRANTED TO MATERNAL GRANDMOTHER AND HUSBAND

BEFORE THOMAS, P.J., BARBER, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This case involves the guardianship and custody of a minor child whose parents were fatally injured in an automobile accident. The paternal grandparents and the maternal grandmother and her husband, respectively, are the two sets of individuals who have requested custody. The chancery court awarded guardianship and custody to the child's maternal grandmother and her husband. We believe that the chancellor's decision was understandably a very difficult decision to make, particularly when both parties appear able to care for and raise the child. In this case, we find that the chancellor's decision was not manifestly wrong and therefore affirm the chancery court's order.

To maintain confidentiality, we have changed the names of each party as follows: Chris is the minor child; Tom is Chris's deceased father; Wanda is Chris's deceased mother. Connie and Peter are Tom's parents and Chris's paternal grandparents; Paula is Wanda's mother and Chris's maternal grandmother; and Robert is Wanda's stepfather and Chris's maternal stepgrandfather.

FACTS

Tom and Wanda, and their son Chris, were involved in an automobile accident on June 14, 1994, in which both Tom and Wanda were fatally injured. Paula and her husband Robert, Wanda's mother and stepfather, respectively, filed for and obtained temporary guardianship of Chris, who was eighteen months old at the time. Connie and Peter, Tom's parents, then filed a petition for general guardianship and custody of Chris. Paula and Robert also filed a cross-petition requesting general guardianship and custody. The Tishomingo County Chancery Court subsequently heard the case. Trial testimony indicated that Connie had the following medical conditions: ruptured discs, back problems, previous back surgeries, a spinal arthritic condition, asthma, and a lifting limitation of twenty-five pounds. Additionally, testimony showed that Peter suffered from the following medical limitations: broken bones, arthritis, a previous steel hip replacement, a prior nervous condition, depression, and a lifting limitation of forty pounds. Both Connie and Peter had previously been taking medications for one or more of their medical conditions. The court determined that both sets of grandparents were good people who wanted the best for their grandson. The court ultimately decided that it would be in Chris's best interests for the Paula and Robert to have custody. It based its order upon two main factors: (1) Connie's and Peter's medical maladies would likely continue and hamper their ability to care for Chris in the future and (2) Paula and Robert had provided a stable home environment and good physical care for Chris since he left the hospital following the automobile accident. The court's order further provided that Connie and Peter would have visitation rights. Connie and Peter now appeal the chancery court decision.

ANALYSIS

STANDARD OF REVIEW

The Mississippi Supreme Court has held that, in child custody cases, the best interests of the child remains paramount. *Ash v. Ash*, 622 So. 2d 1264, 1266 (Miss. 1993). An appellate court's limited scope of review requires that it not arbitrarily substitute its own judgment for that of the chancellor, who is in the best position to evaluate the factors related to the child's best interests. *Id.* (citation omitted).

I. DID THE CHANCERY COURT ERR IN EXCLUDING TESTIMONY THAT WANDA HAD EXPRESSED A PREFERENCE THAT CONNIE AND PETER, AND

NOT PAULA AND ROBERT, HAVE CUSTODY OF CHRIS IF ANYTHING HAPPENED TO HER OR TOM?

Connie and Peter argue that at trial they should have been allowed to present testimony that Wanda had expressed her desire that they, and not the Paula and Robert, have custody of Chris if anything were to happen to her or Tom. They proffered testimonial evidence that: (1) Wanda said that she had not been raised properly in a church environment and that she wanted Chris raised in that manner; (2) prior to her mother's second marriage, her mother had been in compromising positions with other men, had abused alcohol, and that one of the men she dated had approached her while her mother did nothing about it; (3) Wanda felt closer to Tom's family and that her mother's failure to raise her properly was the reason that she quit school and married early; (4) Wanda said that her mother always had something better to do and never kept Chris; (5) Wanda was not raised in church and could not convince her mother to attend; and (6) Wanda said that her mother tried to convince her to divorce Tom, whom her mother did not like. Connie and Peter contend that evidence existed indicating that Wanda and Tom desired to have Chris raised in church and that Paula stated that she would not attend a church until she felt right in one and right about herself. They believe that they are financially, emotionally, and physically able to care for Chris. They argue that Chris's best interest lies in *their* having custody of him, particularly because Chris saw them every day prior to the death of his parents.

Connie and Peter specifically contend that the court erred when it excluded testimony that Wanda wanted them to have custody if something ever happened to Wanda or Tom. They argue that: (1) this evidence was not hearsay; (2) that it was admissible under Mississippi Rule of Evidence 803(3); and (3) if hearsay, the evidence still should have been admitted because child custody cases demand consideration of the child's best interests and therefore its admission.

Mississippi Rule of Evidence 803 lists the vast majority of recognized exceptions to the hearsay rule. One of these exceptions is the then existing mental, emotional, or physical condition of the declarant. M.R.E. 803(3). This rule states that a statement is not excluded from evidence if it is a statement of the declarant's then existing state of mind, such as intent, plan, motive, or design. *Id.* However, a statement of memory or belief to prove the fact remembered or believed is not admissible, unless it relates to the execution, revocation, identification, or terms of the declarant's will. *Id.* Statements that indicate an intention to do something in the future are admissible to prove that the intended act took place. *Id.* cmt.; *see also In re C.B.*, 574 So. 2d 1369, 1372 (Miss. 1990) (Rule 803(3) excludes statements of memory or belief to prove the fact remembered or believed except of those related to terms of a declarant's will). The Mississippi Supreme Court has also held that evidence could be admitted under the state of mind hearsay exception of Rule 803(3), in the criminal context, to show that an intent or plan was followed or carried out by related action. *Sherrell v. State*, 622 So. 2d 1233, 1236-37 (Miss. 1993).

In the present case, the trial court properly determined that the testimony in question was hearsay. Under Mississippi Rule of Evidence 801, the testimony clearly consisted of statements offered in evidence to prove the truth of the matter asserted. M.R.E. 801(c). Moreover, the testimony does not fall within the Rule 803(3) exception to the hearsay rule. As a statement of memory or belief offered

to prove the fact remembered or believed, the testimony is inadmissible, and it clearly did not relate to Wanda's will. Moreover, if her statements had indicated her intent or plan to do something in the future, and if it had been shown that related action had in fact taken place, then the testimony would have been admissible. However, that is not the case here. No proof exists in the record that any alleged intent or plan of Wanda was actually acted upon or carried out, nor were the statements offered to prove that an intended act or plan took place or was completed. We believe that this evidence was properly excluded as inadmissible. We do not find that the chancellor erred regarding this issue.

II. DID THE CHANCERY COURT ERR IN EXCLUDING TESTIMONY THAT WANDA DID NOT HAVE A GOOD RELATIONSHIP WITH HER MOTHER, THE APPELLEE PAULA?

Connie and Peter contend that the chancery court erred when it excluded testimonial evidence that Wanda did not have a good relationship with her mother. They argue that this evidence would have strengthened their argument that Wanda never wanted her mother to have custody of Chris. They believe that the evidence would have shown that Wanda thought that her mother failed to raise her properly and that her mother had questionable morals and a drinking problem, all affecting her mother's claim that she was fit to be Chris's custodial guardian.

Mississippi Rule of Evidence 401 states that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R.E. 401. "If the evidence has any probative value at all, the rule favors its admission." *Id.* cmt.; *see also Department of Human Servs. v. Moore*, 632 So. 2d 929, 933 (Miss. 1994) (evidence that is irrelevant and that has no probative value under Rule 401 has no tendency to make the proposition to be proved any more or less probable than without it and is therefore inadmissible). Hearsay statements offered into evidence to prove the truth of the matter asserted are inadmissible under Rule 801(c), but a then existing mental, emotional, or physical condition forms the basis of the state of mind hearsay exception. M.R.E. 803(3). However, this exception does not include a statement of memory or belief to prove the fact remembered or believed, unless it relates to the execution, revocation, identification, or terms of the declarant's will. *Id.*

In the present case, the chancellor excluded the proposed testimony because he determined that it was not relevant to the issue of whether Paula was a proper person to have guardianship and custody of Chris. He also determined that the evidence did not fall within the Rule 803(3) exception to the hearsay rule.

We believe that the testimonial evidence was irrelevant to the issue of what was best for Chris. Evidence of Wanda's alleged relationship with her mother had no probative value as to whether Paula and Robert were the more appropriate persons to have custody of Chris. The mother-daughter relationship had no tendency to show who should have custody any more or less clearly than without that evidence. Moreover, the evidence is irrelevant regarding whether or not it is hearsay. Even if it was offered to prove the truth of the matter asserted--that Wanda and her mother did not have a good relationship--the actual relationship between Wanda and her mother is irrelevant both to

considering the present best interests of Chris and to the question of who would be the most appropriate individuals to have custody. Therefore, the Rule 803(3) hearsay exception is likewise inapplicable. We do not find that the chancellor erred on this issue.

III. DID THE CHANCERY COURT ERR IN GIVING INSUFFICIENT WEIGHT TO THE PREFERENCES OF WANDA AND TOM REGARDING THE RELIGIOUS UPBRINGING OF CHRIS?

Connie and Peter believe that the chancellor failed to give sufficient weight to their religious affiliations, and Paula's alleged lack thereof, in making his decision concerning guardianship and custody. They believe that this failure constituted reversible error.

Our scope of review regarding child custody precludes arbitrarily substituting our judgment for that of the chancellor who is generally in the best position to evaluate the factors related to the best interests of the child. *Ash*, 622 So. 2d at 1266 (citation omitted). The Mississippi Supreme Court has held that the Mississippi Constitution provides that no preference shall be given to any religious sect or form of worship and that the free exercise of all religious sentiments and different modes of worship are to be held sacred. *Muhammad v. Muhammad*, 622 So. 2d 1239, 1243 (Miss. 1993) (citing Miss. Const. art. III, § 18). The *Muhammad* court quoted the United States Supreme Court by stating that our government cannot compel affirmation of a repugnant belief nor penalize or discriminate against persons or groups because they have religious beliefs abhorrent to the authorities. *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)). Moreover, the court has stated that, in considering the best interests and welfare of the child, the *Albright* factors are to be analyzed when making a child custody decision. *Hayes v. Rounds*, 658 So. 2d 863, 865-66 (Miss. 1995). "Differences in religion, personal values and lifestyles should not be the sole basis for custody decisions." *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983).

In the present case, the chancery court allowed witnesses for Connie and Peter to testify that: (1) Wanda and Tom wanted Chris to be raised in church and (2) Paula stated that she would never go to church. The court also allowed Paula to deny having said she would never go to church and to state that she would attend church only when she felt right about being there and when she felt good about herself.

We believe that some of the testimony regarding this issue was hearsay, but the court nevertheless admitted it without objection from Paula and Robert. The chancellor, as the trier of fact, ultimately heard this evidence. He decided the custody issue based upon all the evidence before him. His opinion noted that, in his quest for the most stable, long-term home for Chris's benefit, Connie's and Peter's health problems would continue to confound their ability to provide the best care possible for Chris in the future. Moreover, nothing in the record suggests that Paula and Robert would discourage or prevent Chris from attending church. Likewise, nothing prevents Connie and Peter from encouraging church attendance during their visitation times. The record indicates that the chancellor considered all the evidence before him. Although the chancery court opinion did not mention the issue of religious preferences, we cannot say that the chancellor was in error or that he failed to give this issue sufficient weight and consideration.

CONCLUSION

A child custody decision is sometimes a difficult one for a chancellor to make, especially when the chancellor found that both parties requesting custody are good and caring people. We hope that both parties to this litigation set aside any differences they may have had prior to and during litigation and begin anew to ensure the best possible future for Chris. We believe that the chancellor reached a result based on his evaluation of the factors related to Chris's best interests. We do not find that he was manifestly in error and therefore affirm the order of the chancery court.

THE ORDER OF THE CHANCERY COURT OF TISHOMINGO COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.

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