

IN THE COURT OF APPEALS 02/27/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01088 COA

IN THE MATTER OF THE GUARDIANSHIP OF M.C.V., A MINOR: M.C.

APPELLANT

v.

J.M.C.B. AND F.H.

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. R.B. REEVES, JR.

COURT FROM WHICH APPEALED: AMITE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

JOHN H. OTT

ATTORNEY FOR APPELLEES:

T. PATRICK WELCH

NATURE OF THE CASE: WILLS, TRUSTS AND ESTATES--GUARDIANSHIP OF MINOR
CHILD

TRIAL COURT DISPOSITION: TRIAL COURT HELD THAT M.C. WAS NOT BIOLOGICAL
FATHER AND AWARDED GUARDIANSHIP TO J.M.C.B.

BEFORE THOMAS, P.J., COLEMAN, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

In this case, we are initially asked to find error in the chancellor's order for scientific paternity testing when paternity was at issue in a guardianship proceeding. Alternatively, we are urged to recognize, under equitable principles, parental rights in a person connected to the child neither by virtue of being married to the child's mother nor by biological parentage. Rather, these rights are said to arise largely by virtue of the fact that, for some period of time, the person operated under the mistaken impression that he was the child's biological father.

This dispute arose in a petition for guardianship filed in the Chancery Court of Amite County by the maternal aunt of a one-year-old child whose mother was deceased and who was in the physical custody of the purported father. Subsequent scientific testing procured under court order determined to a high degree of certainty that the purported father was not, in fact, the biological father of the child.

The chancellor declined to recognize any right of the purported father to the custody of the child and appointed the aunt as guardian. We cannot determine that he was manifestly in error in his determination. Mindful that the best interest of the child is, at all times, the primary consideration, and satisfied that the chancellor was guided by this principle in his decision, we affirm. *See Vance v. Lincoln County Dep't of Public Welfare*, 582 So. 2d 414, 416-17 (Miss. 1991); *Jefferson v. Dixon*, 573 So. 2d 769, 772 (Miss. 1990) (citing *In re Guardianship of Watson*, 317 So. 2d 30, 33 (Miss. 1975)).

I.

The Facts

M.C. is an adult resident of Amite County. For a number of years he was engaged in a romantic relationship with P.V., a Louisiana resident. The couple had a regular practice of being apart during the week, but sharing each other's company on weekends. During the time that this relationship was in progress, P.V. became pregnant and, in 1992, gave birth to M.C.V. in East Baton Rouge Parish, Louisiana. The Louisiana birth certificate indicated M.C. to be the natural father of the child, and when the child was christened in Baton Rouge, M.C. was listed on the christening certificate as the child's father. M.C. and P.V. were never married. Sadly, in October 1993, P.V. died, leaving M.C.V. and two additional children not involved in this litigation and never purported to be the children of M.C.

Prior to the mother's death, all three children lived with her in Louisiana. Some time after her death, M.C. obtained the physical custody of the child from the deceased mother's sister, who was providing care to all three children. Unable to regain custody, the child's aunt filed this proceeding seeking her appointment as guardian of the child. She was joined in the petition by one of the child's maternal great-grandmothers. M.C. answered, claiming his superior right to custody as natural guardian by virtue of the fact that he was the child's natural father.

Suggesting that M.C.'s assertion of fatherhood of the child was of questionable validity, the aunt moved that the child and M.C. be required to submit to paternity testing involving blood analysis. The chancellor ordered such testing to take place. M.C. filed no written response to the motion, and

no transcript of the hearing on the motion was preserved for our review. We are, therefore, unable to determine if M.C. resisted the motion, or, if he did, upon what ground he opposed the motion. Since one issue raised on appeal is the authority of the chancellor to order such tests, this deficiency in the record would ordinarily present some problem to this Court in attempting to resolve the threshold question of whether the issue was properly preserved for our review. It is well established that an appellate court will not normally consider issues not presented to the trial court for decision. *See, e.g., Davenport v. State*, 662 So. 2d 629 (Miss. 1995); *Chase v. State*, 645 So. 2d 829, 845 (Miss. 1994), *cert. denied*, 115 S. Ct. 2279, *reh'g denied*, 116 S. Ct. 20 (1995) (citations omitted). However, in view of the critical issue of the welfare of the child, we have elected to consider this alleged error on the merits, rather than dispose of it on procedural grounds.

The paternity tests revealed a zero probability that M.C. was the biological father of the child. Dissatisfied, M.C. moved for a second test by another testing agency at his expense. The chancellor granted that motion. That test also suggested that the possibility of M.C.'s paternity was non-existent.

A hearing was held, in which evidence was presented both on the issue of M.C.'s paternity and on the situation of the child since her mother's death. The chancellor thereafter entered a judgment awarding guardianship of the child to the aunt, and this appeal ensued.

II.

The Issue of Paternity and Blood Testing

Although it is not exactly clear from the Appellant's brief, we conclude that one issue he wishes to present for consideration on appeal is the authority of the chancellor to order scientific paternity testing in this situation. It cannot be questioned that such an intrusive procedure, no matter how probative the result, is not within the authority of the court under our general rules of procedure. The Mississippi Rules of Civil Procedure are patterned extensively after the Federal Rules, but noticeably different in that Mississippi omitted any rule parallel to Federal Rule of Civil Procedure 35, which permits a federal court to order a party, or a person under the legal control of a party, to submit to a physical examination.

The authority to require such testing must, therefore, be found elsewhere. The only authority to compel such testing procedure appears in the provisions of the Mississippi Uniform Law on Paternity. *See* Miss. Code Ann. §§ 93-9-1 to -71 (1972). M.C. makes the argument that a petition to determine paternity under this section can only be brought "upon the petition of the mother, or father, the child or any public authority chargeable by law with the support of the child . . ." Miss. Code Ann. § 93-9-9(1) (1972). Since the child's maternal aunt does not fall within any of these classes of people, the argument proceeds, the court was without authority to order the scientific testing contemplated by section 93-9-21, which authorizes the court to order testing "on its own motion or on motion of the plaintiff or the defendant . . ." Miss. Code Ann. § 93-9-21(1) (1972).

We give a somewhat broader interpretation of when the provisions of the State's paternity laws can be invoked than that argued for by M.C. In this case, M.C. was made a party to a guardianship

proceeding on the basis that he had physical custody of the child. In choosing his ground to resist the petition for appointment of a guardian, M.C. affirmatively asserted his superior right to the custody arising out of the fact that he was the child's biological father. This assertion, although not called such in the pleadings, takes on the nature of a counterclaim. The assertion of fatherhood was denied by the petitioning aunt. Since the child was born out of wedlock, there was no presumption of paternity operating in M.C.'s favor. Under such circumstances, our laws have established that scientific testing, under the direction and control of the court, is admissible evidence on the question, and that such evidence may be sought by either side or by the court, on its own motion. The statute, though written generally in contemplation of a contest between the natural father and either the mother, the child, or a state agency providing support for the child, does not restrict by name those capable of moving for testing. Instead, it simply indicates that, once paternity has been put in issue, no matter by what party, either party, or the court, may request such testing. We consider this language broad enough in the context of this case to authorize the chancellor, on the motion of the petitioning aunt, to order the testing. We note that, alternatively, once paternity was at issue, it was within the authority of the chancellor to order such testing on his own motion. Given the facts of this case, we harbor little doubt that, even without the prompting of the child's petitioning maternal aunt, the chancellor would have, in due course, sought the guidance to be obtained from this highly reliable, readily available, evidence before ruling on the issue of paternity. In that context, therefore, any alleged error said to arise out of the fact that the moving force for the testing was the maternal aunt would have to be seen as harmless.

For purposes of clarity in our decision, it should be understood that we specifically reject the aunt's contention that, by requesting a second testing after the initial test indicated no paternity, M.C. waived any objection to the chancellor's original order. That argument is somewhat akin to saying that a party unsuccessfully objecting to the introduction of certain evidence waives any right to subsequently attack the authenticity of the evidence.

III.

In Loco Parentis Issue

M.C. cites the Court to *Farve v. Medders*, 241 Miss. 75, 128 So. 2d 877 (1961), for the proposition that, casting aside considerations of biological parenthood, he stood *in loco parentis* to the child, and by virtue of such position, had rights to the custody of the child superior to those of the child's maternal aunt. *Farve v. Medders* dealt primarily with the issue of whether those asserting *in loco parentis* rights were bound by an adjudication in a proceeding to which they were not a party. *Id.*

Since M.C. was a party to this proceeding, *Farve* does not have direct application. We realize that, in the proper case, the Mississippi Supreme Court has recognized the doctrine to vest certain rights in parties not related to a child by blood or marriage; however, we observe that M.C., at no time, advanced this alternative theory at the trial level. We note that M.C. could have unquestionably sought to have himself appointed legal guardian of the child under this alternative theory, in the event he failed to convince the chancellor that he was the biological father. We find nothing in the pleadings or in the record of the hearing directly asserting such a theory.

Nevertheless, there was substantial evidence developed in the record as to the circumstances of the care provided for the child during her stay in M.C.'s custody, including the fact that a substantial portion of the child's day-to-day care was being provided, not by M.C., but by a woman living nearby and related to him by marriage. As we have stated earlier, we have no cause to doubt that the chancellor viewed the evidence in light of making a decision that served the best interests of the child. He did not base his decision solely upon the issue of biological parenthood, and in discussing his ruling, considered M.C.'s continued assertion of fatherhood despite the scientific proof, and analyzed the prospects for the child under both alternatives of custodial care available to him. This implicitly informs this Court that the chancellor considered the same issues that would have been before him had the issue of *in loco parentis* been affirmatively pled.

Having considered the two opposing choices available to the chancellor from the standpoint of the best interests of the child, we are unable to determine that the chancellor was manifestly in error in his decision. Under those circumstances, it is the duty of this Court, on appeal, to affirm the chancellor's determination. *See Mississippi State Dep't of Human Serv. v. Barnett*, 633 So. 2d 430, 434 (Miss. 1993); *Vance*, 582 So. 2d at 417.

IV.

Necessary Parties and Other Procedural Defects

M.C. also attacks the award of guardianship on the failure of the chancellor to make the natural father of the child a party to the proceeding by publication, once it was determined that M.C. was not the natural father. This attack appears to be predicated on the proposition that the unknown natural father was a necessary party to the proceeding. The law is not clear as to exactly who are the necessary parties to a guardianship proceeding. *See, e.g., Jefferson*, 573 So. 2d at 771. Certainly, *Jefferson* suggests the propriety of providing reasonable notice to known next of kin, but even this case does not require that the next of kin be made formal parties. The notice contemplated in that case appears to be simply adequate actual notice sufficient to permit the next of kin to intervene should that kinsperson desire. It is undisputed in this case that the biological father of this child remained unknown and had expressed no interest in the child during the course of its life through the culmination of the guardianship proceeding. In those circumstances, and in the absence of a clear statutory or case law mandate to the contrary, we conclude that the unknown natural father was not a necessary party to this proceeding.

M.C. suggests other procedural defects in the proceeding arising primarily out of the fact that the petitioning guardian was not a Mississippi resident at the time of her appointment. The safeguards for out-of-state guardians appear designed primarily to protect the estate of the ward, rather than the person of the ward. It was never suggested that the child in this case was possessed of any estate. On the contrary, it appears undisputed that the child would be totally dependent on others for her support and maintenance. The court inquired as to the capability and the willingness of the child's aunt to furnish that support and maintenance, and was apparently satisfied with the prospective guardian's response. We find nothing in that ruling that would suggest the necessity of a reversal of the chancellor's order to permit M.C. to relitigate issues not directly related to these alleged procedural defects, and we, therefore affirm.

**THE JUDGMENT OF THE CHANCERY COURT OF AMITE COUNTY IS AFFIRMED.
COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

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