IN THE COURT OF APPEALS 12/12/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00595 COA

L. H. AND L. H.

APPELLANTS

v.

STATE OF MISSISSIPPI and C.C.

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. MICHAEL H. WARD

COURT FROM WHICH APPEALED: HARRISON COUNTY FAMILY COURT

ATTORNEY FOR APPELLANTS:

DEMPSEY M. LEVI

ATTORNEYS FOR APPELLEES:

HERBERT WAYNE WILSON AND GAIL NICHOLSON

NATURE OF THE CASE: GRANDPARENT VISITATION RIGHTS

TRIAL COURT DISPOSITION: GRANDPARENT VISITATION DENIED AS NOT BEING IN CHILD'S BEST INTEREST

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

COLEMAN, J., FOR THE COURT:

In this opinion the child is identified by initials; and the names of her parents and grandparents have been changed to protect the child's anonymity. Jane and John Doe are the maternal grandparents of C. C., a minor, and are the parents of C. C.'s mother, Mary Smith. After Mary Smith was adjudicated to have abused C. C., the Does sought to have grandparent visitation rights established with C. C. However, the Harrison County Family Court entered a judgment that visitation with the Does was not in the best interest of C. C. We quote from the Does' brief to state the two issues which they argue require the reversal of the family court's judgment:

> I. Whether Jane and John Doe's rights to grandparent visitation are supported by statute.
>
> II. Whether the lower court erred as a matter of law in denying grandparent visitation rights to Jane Doe and John Doe on the grounds that it would not be in the best interest of the child.

We resolve these issues adversely to the Does and affirm the family court's judgment that C. C.'s visitation with the Doe grandparents is not in her best interest.

I. FACTS

Upon the divorce of her parents, the court placed C. C. in the custody of her father. The court awarded C. C.'s mother, Mary Smith, weekend visitations with her daughter C. C. The mother usually exercised her week-end visitations at the home of her parents, Jane and John Doe. These weekend visitations were effectively terminated when the family court determined that Smith had sexually abused C. C. The family court's order limited Smith's contact with C. C. to one-hour-long visits at the office of the Department of Human Services under the supervision of a social worker. C. C.'s grandmother, Jane Doe, attended these supervised visitations with Smith until an incident in November of 1992. On that occasion, the social worker who monitored the visitation sessions, Judy Sanders, determined that Mrs. Doe and Smith were engaging in conduct that was detrimental to C. C.'s psychological welfare. In response to both this incident and a letter from C. C.'s therapist, C. C.'s guardian ad litem motion was granted to suspend the supervised visitations between C. C. and her mother.

Jane and John Doe filed a motion in the Chancery Court of Harrison County to set grandparent visitation rights with C. C. pursuant to Mississippi Code Annotated § 93-16-3 (1972). The matter was then transferred to the Harrison County Family Court. The judge of that court, Michael Ward, had earlier adjudicated that the Does' daughter, Mary Smith, had sexually molested C. C. Following an unsuccessful motion for Judge Ward to recuse himself, the family court denied the Does' motion to set grandparent visitation rights on the grounds that such visitation by the maternal grandparents was not in the best interest of C. C. Consequently, the Does have not been able to visit C. C. since November 12, 1992.

II. FAMILY COURT HEARING

At the hearing, C. C.'s father, Bob Jones, testified that he opposed his daughter's visitation with the Does because they were "non-believers" of their daughter's guilt in abusing C. C sexually. Even though Jones did not believe that the Does would physically harm C. C., he expressed concern over the psychological and emotional damage that could result if the Does interrogated C. C. about her allegations that her mother had sexually abused her.

Testifying on behalf of the State was Judy Sanders who supervised the visits among Mary Smith, Jane Doe, and C. C. at the Department of Human Services. Sanders testified that she consistently had problems with both the mother and Doe, the grandmother, in terms of their whispering to the child, their failing to demonstrate consideration for the child's feelings, and their making statements to the child which questioned the C. C.'s allegations about her mother's abuse. Sanders cited specific examples of Smith's and Doe's improper behavior such as questioning C. C. about her father's physical condition and about how she was spanked by her father. In the presence of C. C., Smith and Doe accused the paternal grandmother, Sue Jones, of fabricating Smith's abuse of C. C.

Dorothy Smith, C. C.'s therapist for over two years, testified that she believed it was not in the best interest of C. C. to visit the Does. Smith explained her belief with the opinion that the Does were loyal to their daughter and were therefore likely to attempt to coerce C. C. into changing her original story of her mother's abuse. Smith further testified that a victim becomes "re-victimized" when the victim is in the same room or house as the perpetrator or perpetrator's family. Consequently, Smith did not recommend that C. C. have any type of unsupervised visitation with the Does.

While the Does indicated that they loved their grandaughter, they remained resolute in their belief that Smith, their daughter, did not abuse C. C. At the conclusion of the hearing during which the foregoing testimony was elicited for his consideration, the family court judge denied Jane and John Doe's motion to establish visitation rights for them. The Does have appealed that denial of their visitation rights.

III. STANDARD OF REVIEW

In *Parker v. Parker*, 641 So. 2d 1133 (Miss. 1994), the Mississippi Supreme Court enumerated the applicable standard of review in matters of this kind:

> Our scope of review in domestic relations matters is limited by our familiar substantial evidence/ manifest error rule. This Court will not disturb the findings of the Chancellor unless the Chancellor was manifestly wrong, clearly erroneous or an erroneous standard was applied. In other words, "[o]n appeal [we are] required to respect the findings of fact made by a chancellor supported by credible evidence and not manifestly wrong." If we find substantial evidence supporting the chancellor's fact findings, they are beyond our power to disturb.

Parker at 1137 (citations omitted).

IV. ISSUES

I. Whether Jane and John Doe's right to grandparent visitation is supported by statute.

There is no common law right to grandparent visitation and therefore, "[s]uch right, if any, must come from a legislative enactment." *Matter of Adoption of a Minor,* 558 So. 2d 854, 856 (Miss. 1990) (citing *Olson v. Flinn*, 484 So. 2d 1015, 1017 (Miss. 1986). Therefore, the Does rely on Mississippi Code Annotated § 93-16-3 (1972), which states:

> (1) Whenever a court of this state enters a decree or order awarding custody of a minor child to one (1) of the parents of the child or terminating the parental rights of one (1) of the parents of a minor child, or whenever one (1) of the parents of a minor child dies, either parent of the child's parents who was not awarded custody or whose parental rights have been terminated or who has died may petition the court in which the decree or order was rendered or, in the case of the death of a parent, petition the chancery court in the county in which the child resides, and seek visitation rights with such child.
>
> (2) Any grandparent who is not authorized to petition for visitation rights pursuant to subsection (1) of this section may petition the chancery court and seek visitation rights with his or her grandchild, and the court may grant visitation rights to the grandparent, provided the court finds:
>
> > (1) That the grandparent of the child had established a viable relationship with the child and the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child; and
> >
> > *(b) That visitation rights of the grandparent with the child would be in the best interests of the child.*
>
> (3) For purposes of subsection (3) of this section, the term "viable relationship" means a relationship in which the grandparents or either of them have voluntarily and in good faith supported the child financially in whole or part for a period of not less than six (6) months before filing any petition for visitation rights with the child or the grandparents have had frequent visitation including occasional overnight visitation with said child for a period of not less than one (1) year.

Id. (emphasis added). It is evident by their testimony that the Does can prove the existence of a viable

relationship with C. C. through her past visits at the Does' home. Additionally, this Court agrees with the Does regarding the benefits that flow from a healthy relationship between grandparents and a grandchild. However, the evidence sufficiently demonstrates that in the case *sub judice* there was hardly a healthy relationship between the Does and C. C. Thus, this Court affirms the family court's judgment that it was not in the best interest of C. C. for her to have visits with her maternal grandparents, the Does.

This Court cannot consider an argument that Mary Smith did not sexually abuse C. C. because that issue was previously adjudicated. The doctrine of *res judicata* precludes any such contention by the Does. On this issue, this Court concludes that while Section 93-16-3 of the Mississippi Code of 1972 provides for a grandparent's visitation with a grandchild, the evidence in the case *sub judice* did not support the Does' visitation with C. C.

II. Whether the lower court erred as a matter of law in denying grandparent visitation rights to Jane Doe and John Doe on the grounds that it would not be in the best interest of the child.

The Does assign as manifest error the factual determinations used by the family court judge to buttress his decision to deny them visitation with their granddaughter. In his opinion, the family court judge found:

> The Court is of the opinion and so finds by a clear preponderance of the evidence that to permit visitation of the child by her maternal grandparents is clearly not in the child's best interest. The Court has had the opportunity to hear the witnesses and view their demeanor. It was clear to the Court that Mr. Jones has the best interest of C. C. in mind. He fears what the grandparents will say to the child. The Court fears the same, based on the testimony of the former Department of Human Services Social Worker, Judy Sanders, who overheard the mother and grandmother state to the child, "Sue Jones made this up. Sue Jones is lying on us."
>
> There is no question in this case but that C. C.'s mother abused her, her denials to the contrary notwithstanding. There is no question but that the maternal grandparents also dispute the adjudication of abuse. C. C. has been in therapy over two years. Her therapist believes and in the estimation of the Court, rightly so, that visitation is definitely not in C. C.'s best interest. When that opinion is considered in context with the other evidence adduced, namely: a) the whispering during prior visits; b) the statements of the mother and grandmother to the child calling into question the allegations made by the child (which, by the way, the Court found to be true); c) the obvious disregard the maternal grandparents have for the prior findings of abuse as made by this Court; d) the sole agenda on the part of the maternal grandparents to "clear" their daughter's name; e) the disbelief by the maternal grandparents that their daughter molested their grandchild which said disbelief, if conveyed to the child, could easily result in significant emotional and psychological trauma to the child.

In light of the above findings, we cannot find that the family court's decision to deny the Does visitation with their granddaughter, C. C., was manifest error. It appears to this Court that the family court's decision was not only based on the behavior of Mary Smith and Mrs. Doe at the supervised visitations but also on the testimony of Dorothy Smith, C. C.'s therapist of two years. Furthermore, Judy Sanders' testimony indicated that both Smith and Doe were informed of the rules of visitation prior to the fiasco that transpired during the supervised visit in November of 1992. Thus, we conclude that there was substantial evidence to support the family court's decision to deny the Does visitation with C. C.

THE HARRISON COUNTY FAMILY COURT JUDGMENT FOR THE DEFENDANTS IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANTS.

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