

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 97-CA-01131 COA**

**S.N.C. AND J.H.C.**

**APPELLANTS**

**v.**

**J.R.D., JR.**

**APPELLEE**

DATE OF JUDGMENT: 08/26/97  
TRIAL JUDGE: HON. R. B. REEVES JR.  
COURT FROM WHICH APPEALED: FRANKLIN COUNTY CHANCERY COURT  
ATTORNEYS FOR APPELLANTS: JOHN L. MAXEY, II  
DAVID KEENER PHARR  
ATTORNEY FOR APPELLEE: DURWOOD J. BREELAND  
NATURE OF THE CASE: CIVIL - DOMESTIC RELATIONS  
TRIAL COURT DISPOSITION: DISMISSED PETITION TO TERMINATE PARENTAL  
RIGHTS AND FOR ADOPTION OF MINOR CHILD  
DISPOSITION: AFFIRMED - 2/9/99  
MOTION FOR REHEARING FILED: 2/22/99  
CERTIORARI FILED: 5/17/99  
MANDATE ISSUED:

BEFORE BRIDGES, C.J., PAYNE, AND SOUTHWICK, JJ.

BRIDGES, C.J., FOR THE COURT:

¶1. S.N.C. and J.H.C. (stepfather and natural mother) filed suit in Franklin County Chancery Court to terminate the parental rights of J.R.D., Jr.(natural father) and for adoption of the minor child by S.N.C. The chancellor found that the appellants failed to satisfy their burden by proving by clear and convincing evidence that J.R.D., Jr. had either abandoned the minor child or that he was mentally or morally unfit, as provided by Miss. Code Ann. § 93-15-103 (Rev. 1994). On appeal, S.N.C. and J.H.C. present the following issue for consideration: whether the chancery court ruling should be reversed because it constitutes manifest error and was not supported by credible evidence? Finding no error, we affirm.

**FACTS**

¶2. J.H.C. and J.R.D., Jr. were married on February 16, 1991, and eight months later, the minor child was born. The parties separated on March 15, 1992, and J.H.C. was granted a divorce on the grounds of habitual cruel and inhuman treatment on May 6, 1992. At the time of the divorce, J.R.D., Jr. moved to Midland, Texas to live with his parents. Both parties agreed to an order disposing of the issues of visitation and support which was dated October 27, 1992.<sup>(1)</sup>

¶3. J.R.D., Jr. made several visits to see the minor child from the date of the divorce until the date of trial. Specifically, J.R.D., Jr. visited with the minor child in July 1992, summer 1993, Christmas 1993, and summer 1994. The parties dispute as to whether or not J.R.D., Jr. visited with the minor child on Thanksgiving 1994.<sup>(2)</sup> In addition, a visit was scheduled for Memorial Day 1995, but was canceled by J.H.C., stating that they would be out of town. This visit was never rescheduled. With regard to child support, J.R.D., Jr. admitted that he did not send money on a regular basis based on the aforementioned order, but stated that J.H.C. was always asked if the minor child needed anything.

¶4. J.H.C. remarried in April 1994, and the petition to terminate J.R.D., Jr.'s parental rights and for S.N.C., J.H.C.'s husband, to adopt the minor child was filed approximately eighteen months later on October 11, 1995. James A. Torrey, the *guardian ad litem* who was assigned to represent the interests of the minor child, stated his concern as to the lack of contact by J.R.D., Jr. with the minor child, and that J.H.C. had assumed the majority of the parental responsibilities. The *guardian ad litem* concluded that J.R.D., Jr. had abandoned his legal and civil responsibilities, and recommended termination of his parental rights and adoption.

¶5. In his bench opinion, the chancellor stated:

It's undisputed that [J.R.D., Jr.] paid no support based upon the letter and the agreement that was entered by the court. He had little contact, only five or six visits over the period of time prior to the filing of this suit and basically no telephone calls except through his mother. His testimony is that he requested her on occasion to call, and he did not call because he and his former wife didn't get along and argued and fussed when they did call.

Now, the plaintiffs argue that in spite of the letter concerning the child support and in spite of the agreed order that [J.R.D., Jr.] was obligated to pay child support. That all parents are obligated, and I agree with that part. However, it's the court's opinion that this obligation was assumed by [J.H.C.] in this proceeding and [J.R.D., Jr.] had every right to rely on that assumption until he was notified otherwise. The testimony reflects that he was never advised that support was expected or needed. . . . But whatever was requested was provided.

Now, plaintiffs further argue that [J.R.D., Jr.] had abandoned [the minor child] for more than one year from May of 1994 to October of 1995 when the suit was filed. During this period of time frequent calls were made, scheduled visitation which had been arranged for May of 1995 was canceled by [J.H.C.] and the result was that there was no visitation although it was not the responsibility or altogether the responsibility of [J.R.D., Jr.]. . . .

However, based on the record this court is of the opinion that the plaintiffs have failed to prove by clear and convincing evidence abandonment or unfitness, either mentally or morally and it follows from that the best interest that [the minor child] would be served by dismissing the petition. . . .

Aggrieved by this ruling, the appellants have perfected this appeal.

## ARGUMENT AND DISCUSSION OF LAW

### I. WHETHER THE CHANCELLOR COMMITTED REVERSIBLE ERROR IN DISMISSING THE AMENDED PETITION TO TERMINATE PARENTAL RIGHTS AND FOR THE ADOPTION OF THE MINOR CHILD.

¶6. Our standard of review on appeal is as familiar as it is limited. "The chancellor's findings of fact are viewed under the manifest error/substantial credible evidence test." *Vance v. Lincoln Cty. Dept. of Public Welfare*, 582 So. 2d 414, 417 (Miss. 1991). If a chancellor fails to make findings of fact, this Court assumes that the issues were resolved in favor of the appellee. *Grafe v. Olds*, 556 So. 2d 690, 692 (Miss. 1990). In termination of parental rights cases, the burden of proof is also especially stringent. The proof must be clear and convincing that the natural parent either abandoned or deserted the child or is mentally or morally or otherwise unfit to rear or train the minor child. *Petit v. Holifield*, 443 So. 2d 874, 877 (Miss. 1984). Once the aforementioned has been established, the best interest of the child is to be considered. *Id.* In the case *sub judice*, the chancellor held that the burden had not been met, and that J.R.D., Jr. had not abandoned his minor child.

¶7. S.N.C. and J.H.C. argue on appeal that the chancellor made erroneous findings of fact that were unsupported by the credible evidence, including the recommendation of the *guardian ad litem*, in his determination that J.R.D., Jr. had not abandoned his minor child. S.N.C. and J.H.C. also contend that the chancellor applied an erroneously legal standard when he refused to allow the admission of evidence bearing on J.R.D.'s abuse of J.H.C. Furthermore, S.N.C. and J.H.C. argue that the chancellor was manifestly in error when he failed to find that J.R.D., Jr. was morally unfit to maintain his parental right to participate in the minor child's upbringing.

¶8. J.R.D., Jr. argues that the court cited substantial evidence to support his factual findings in the determination of whether J.R.D., Jr. had abandoned the minor child. J.R.D., Jr. contends that the court properly refused the evidence of the alleged abuse of J.H.C. as being remote and not a ground for termination of parental rights. Moreover, J.R.D., Jr. contends that the court correctly found that there was no evidence of any mental or moral unfitness. We agree.

¶9. Miss. Code Ann. § 93-17-7 (Rev. 1994) reads in part:

No infant shall be adopted to any person if either parent, after having been summoned, shall appear and object thereto before the making of a decree for adoption, unless it shall be made to appear to the court from evidence touching such matters that the parent so objecting had abandoned or deserted such infant or is mentally, or morally, or otherwise unfit to rear and train it, including, but not limited to, being within any of the grounds requiring termination of parental rights set forth in subsections (2) and (3)(a), (b), (d) or (e) of Section 93-15-103 in either of which cases the adoption may be decreed notwithstanding the objection of such parent, first considering the welfare of the child, or children, sought to be adopted.

¶10. Miss. Code Ann. § 93-15-103 (Rev. 1994) provides in pertinent part,

(3) Grounds for termination of parental rights shall be based on one or more of the following factors:  
(a) A parent has deserted without means of identification or abandoned and made no contact with a child under the age of three (3) for six (6) months or a child three (3) years of age or older for a period of one (1) year; or (b) A parent has been responsible for a series of abusive incidents concerning one or more children; or

....

(e) When there is an extreme and deep-seated antipathy by the child toward the parent or when there is some other substantial erosion of the relationship between the parent and child which was caused at least in part by the parent's serious neglect, abuse, prolonged and unreasonable absence, unreasonable failure to visit or communicate, or prolonged imprisonment.

Thus, in deciding upon whether or not a party should be permitted to adopt a child, the court must first determine that one of the grounds for adoption is present: (1) desertion or abandonment or (2) moral unfitness. *Natural Mother v. Paternal Aunt*, 583 So. 2d 614, 618 (Miss. 1991). "The adoption statute also requires a definite adjudication that the best interest of the child is promoted or enhanced by the proposed adoption." *Id.*; *Ainsworth v. Natural Father*, 414 So. 2d 417, 421 (Miss. 1982).

Abandonment is defined as:

[A]ny course of conduct on the part of a parent evincing a settled purpose to forego all duties and relinquish all parental claims to the child. It may result from a single decision by a parent at a particular point in time. It may arise from a course of circumstances. The test is an objective one: whether under the totality of the circumstances, be they single or multiple, the natural parent has manifested his severance of all ties with the child.

*Ethredge v. Yawn*, 605 So. 2d 761, 764 (Miss. 1992).

¶11. In the case at bar, there was evidence that J.R.D., Jr. visited his daughter four or five times since the parties divorced. According to the record, J.H.C.'s attorney drafted an order requesting that due to the distance between the parties, it would be in the minor child's best interest if visitation was not specified since the parties have been cooperative with one another thus far. However, there was testimony concerning a letter sent by J.H.C. restricting J.R.D., Jr.'s visitation with the minor child. As the chancellor stated, J.R.D., Jr., his mother, and his father, "accepted the restrictions, made no protest, and complied with it." Thus, it is apparent to this Court that although J.R.D., Jr. should have made more of an effort to spend time with the minor child, J.H.C. also contributed in limiting his visitation.<sup>(3)</sup>

¶12. Moreover, the record reveals that there was sufficient evidence that J.R.D., Jr. made contact through frequent telephone calls. This Court acknowledges that although these calls were made primarily by J.R.D., Jr.'s mother, J.R.D., Jr. had requested her to make the calls since he and J.H.C. argued when they spoke to one another. Moreover, this Court is not convinced that J.R.D., Jr. was not present during Thanksgiving 1994. In any event, it is this Court's opinion that if the May 1995 visit would have taken place, which was canceled by J.H.C., there would be no issue of abandonment.

¶13. S.N.C. and J.H.C. also argue that J.R.D., Jr. failed to pay child support. We agree with the chancellor that "all parents are obligated to pay child support." However, it is this Court's opinion that J.R.D., Jr. had every right to rely on the aforementioned order which stated that J.H.C. had assumed this obligation until

otherwise notified. Moreover, the supreme court has held that failure to pay child support alone is insufficient to constitute abandonment. *In Re Adoption of a Female Child*, 412 So. 2d 1175, 1175 (Miss. 1982). Thus, this Court finds that the chancellor properly found that S.N.C. and J.H.C. failed to prove that J.R.D., Jr. had abandoned the minor child for the requisite one year statutory period.

¶14. After careful review of the record, this Court also finds that the chancellor correctly held that the issue of the alleged abusive incident between J.H.C. and J.R.D., Jr. did not involve the minor child and thus, was inadmissible within the confines of the statute. *See* Miss. Code Ann. § 93-15-103 (Rev. 1994). Furthermore, there was no evidence introduced that J.R.D., Jr. is morally unfit to rear and train the minor child.

¶15. Therefore, viewing the evidence before us in the light of the above authorities, it is this Court's opinion that the conduct of J.R.D., Jr. does not evince a settled purpose to forego all parental rights and relinquish all parental claim to the minor child. Although J.R.D., Jr. is hardly an ideal parent, we are unable to say that S.N.C. and J.H.C. have proven by clear and convincing evidence that J.R.D., Jr. has abandoned his child or that he is unfit within the meaning of the law. We agree with the chancellor where he stated:

The court may very well feel that [J.R.D., Jr.] has not done what he ought to do. He should have done more. He indicates that part of the failure was because of the fact he had no lawyer. Part of the failure[,] and I think is more likely[,] he was relying on his mother to attend to it for him. . . . But we as grandparents cannot handle the affairs of our children. They are responsible themselves, and they must make the decision and make their own way. But that's not the question whether I think he's done enough or not. The question is whether or not the plaintiffs have proven their case by clear and convincing evidence.

Consistent with the above, the chancellor was not manifestly in error in dismissing S.N.C.'s and J.H.C.'s petition for termination of parental rights and adoption of the minor child. This issue is without merit.

**¶16. THE JUDGMENT OF THE FRANKLIN COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL OF TAXED TO THE APPELLANTS.**

**McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, AND SOUTHWICK, JJ.,  
CONCUR. PAYNE, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY LEE,  
J.**

**IRVING, J., NOT PARTICIPATING.**

PAYNE, J., CONCURRING:

¶17. While I reluctantly agree with the majority that there is insufficient basis on the record before us to overrule the chancellor's decision, I write separately to emphasize two points. First, and most importantly, I want to emphasize that this decision does not hold that because the biological parents chose not to have the chancellor order child support, and instead left the question open, that this in any way affected the minor child's *vested* right to support. I comment on this point to discourage a possible misreading of our decision here as endorsing the chancellor's original decision not to order child support as an appropriate action simply because the parents agreed to such an open arrangement. Public policy forbids parents from contracting away their minor children's rights to support. *Lawrence v. Lawrence*, 574 So.2d 1376, 1381 (Miss. 1991)(citing *Calton v. Calton*, 485 So.2d 309, 310 (Miss. 1986)).

¶18. Second, I am troubled by what appears to be a total disregard for the findings of the *guardian ad litem* in this case. While the special chancellor complied with his statutory duty to appoint this independent voice for the minor child, and he acknowledged the work of the *guardian ad litem*, it seems that the findings of the *guardian ad litem* were not given proper weight. However, the statute only requires that such an individual be appointed and places no directives as to how the information should be utilized by the trial court. It seems to me that the independent findings of the *guardian ad litem* as to the child's best interest should be given significant, though not conclusive, weight. However, since this is an issue properly left for the Mississippi Legislature and not for this Court, I comment only to identify a concern.

¶19. With these two concerns stated, I concur in the judgment.

**LEE, J., JOINS THIS SEPARATE WRITTEN OPINION.**

1. This order drafted by the appellant's attorney stated that the appellant had sufficient resources with which to support herself and the minor child, and that it would be in the best interest of the minor child for the court not to require court-ordered child support at the current time. Additionally, the order stated that due to the distance between the location of the parties' home, it would be in the best interest of the child if visitation not be specified inasmuch as the parties have been cooperative with each other thus far.

2. This particular date is significant according to the appellant because if the appellee was not present during the Thanksgiving 1994 visit, then he would have had no contact with the minor child for a period of over a year which, according to statutory law, would constitute abandonment.

3. Scheduled visitation for May of 1995 was canceled by J.H.C., thus resulting in no visitation by J.R.D., Jr. The chancellor found that this was not the responsibility or altogether the responsibility of J.R.D., Jr.