

IN THE COURT OF APPEALS 01/16/96
OF THE
STATE OF MISSISSIPPI
NO. 94-CA-00657 COA

S. G.

APPELLANT

v.

T. W. M.

APPELLEE

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

TRIAL JUDGE: HON. JOHN C. ROSS, JR.

COURT FROM WHICH APPEALED: UNION CO. CHANCERY COURT (YOUTH COURT)

ATTORNEY FOR APPELLANT:

TALMADGE D. LITTLEJOHN

ATTORNEY FOR APPELLEE:

WILL R. FORD

NATURE OF THE CASE: CONTEST BETWEEN FATHER AND GREAT-GRANDMOTHER
FOR CUSTODY OF CHILD ALLEGEDLY ABUSED SEXUALLY BY CHILD'S FATHER

TRIAL COURT DISPOSITION: DISMISSED GREAT-GRANDMOTHER'S PETITION FOR
CUSTODY AND AWARDED CHILD'S CUSTODY TO FATHER

BEFORE FRAISER, C.J., COLEMAN, AND SOUTHWICK, JJ.

COLEMAN, J., FOR THE COURT:

In this opinion the names of the parties and family members have been changed to preserve the anonymity of M. M. M., the five-year-old child who is the subject of this appeal. Betty Smith, a maternal great-grandmother of M. M. M., a five-year-old girl, sought to obtain custody of M. M. M. from Robert Allen Jones, father of M. M. M., because he had allegedly sexually abused her. The chancellor who sat as Youth Court Judge awarded custody of M. M. M. to her father, Robert Allen Jones; from which award Betty Smith has appealed. In compliance with the standard of review appropriate for issues of child custody, we affirm that part of the final judgment of the Union County Youth Court which awarded Robert Allen Jones custody of his daughter, M. M. M., and granted him other collateral relief; but we reverse that court's assessment of the Guardian Ad Litem's fee and expense to the appellant, Betty Smith, and remand this case to the Youth Court for further action consistent with this opinion.

I. Facts

A. Prior to the initiation of the case *sub judice*

Robert Allen Jones and Mary Smith Jones were married on March 27, 1989. To their marriage one child, M. M. M., was born on August 6, 1989. On March 2, 1992, Robert Allen Jones filed a Complaint for Divorce and Other Relief against his wife, Mary Smith Jones, in which he sought both a divorce from her on the grounds of adultery and custody of M. M. M. Later that same day, Robert Allen Jones was arrested on the charge of sexual abuse of M. M. M. Mary Smith Jones had filed the affidavit which charged Jones with sexual abuse of his daughter that very day, March 2, 1992.

On April 2, 1992, the chancellor entered a Decree Granting Temporary Matters in which he recited that "[T]he parties [had] announced to the Court their agreement concerning temporary custody of their minor child, [M. M. M.]." Pursuant to the parties' agreement, the chancellor awarded temporary custody of M. M. M. to Betty Smith during her non-working hours and to Hattie Mae Woods during Betty Smith's working hours. Betty Smith was Mary Smith Jones's paternal grandmother; and Hattie Mae Woods was Robert Allen Jones's aunt. The decree further provided that Robert Allen Jones's visitation with his daughter must be in the presence of his aunt, Hattie Mae Woods, and that Mary Smith Jones's visitation with her daughter must be in the presence of Betty Smith. The chancellor further ordered the Union County Welfare Department to monitor the situation in both homes and report back to the court its findings "about how this temporary custody and visitation is proceeding."

On July 2, 1992, the chancery court granted a final decree of divorce to Robert Allen Jones and Mary Jones on the grounds of irreconcilable differences. The chancellor awarded joint legal custody of M. M. M. and physical custody to Mary Smith Jones. He granted Robert Allen Jones visitation rights with M. M. M. every weekend from 5:00 pm Friday until 5:00 pm Sunday until she began the first grade, when he would then have visitation every other weekend at the same times, and at other specified times during the year, which included one week at Christmas, and six weeks during the summer.

On August 27, 1992, less than two months after the chancery court granted the Joneses their divorce, the Union County Grand Jury indicted Robert Allen Jones for sexual battery on M. M. M. Regardless of this indictment, Jones continued his regular visitation rights with his daughter until February 13, 1993. On that date Tommy Mayo shot and killed Mary Smith Jones Mayo. Mary Smith Jones had

married Mayo after her divorce from Robert Allen Jones. According to the record, her homicide had been "ruled accidental." From February 13, 1993 until February 17, 1993, Robert Allen Jones exercised sole custody of M. M. M.

B. Initiation of case *sub judice* and pre-trial course of litigation

On February 17, 1993, Betty Smith and her son, Sam Albert Smith, who was the father of Mary Smith Jones Mayo, M. M. M.'s mother, then deceased, filed a petition for writ of habeas corpus in the Union County Chancery Court by which they sought to obtain custody of M. M. M. Pursuant to their petition, the chancery court entered its order to issue writ of assistance and writ of habeas corpus by which it "ordered that the temporary custody of M. M. M. be awarded instanter to her maternal great grandmother Betty Smith" and provided for the issuance of both a writ of habeas corpus and a writ of assistance. The writ of assistance directed "the Sheriff to take the custody of M. M. M. wherever she may be found and to deliver her to Betty Smith to await the further order of this Court." On the 18th day of February, 1993, the chancery court entered an order by which it transferred the petition for writ of habeas corpus to the Union County Youth Court pursuant to "the case of *In Interest of D. L. D.*, 606 So. 2d 1125 (Miss. 1992), which holds that the proper jurisdiction of all such matters [of sexual abuse of a minor] is in the Youth Court." This Order further provided that custody of M. M. M. should remain in Betty Smith and that Robert Allen Jones was "injoined from any contact with the child M. M. M. until further order of the Youth Court." After the matter had been transferred to it, the Union County youth court judge entered an order setting terms of visitation on March 8, 1993 by which it granted Robert Allen Jones visitation with his daughter every Saturday beginning March 9, 1993 from 9:00 a. m. until 6:00 p. m. and every Sunday from 1:00 p. m. until 6:00 p. m. with his aunt's, Hattie Mae Woods, supervising his visitation with M. M. M.

Section 43-21-107(3) of the Mississippi Code of 1972 created the Union County Youth Court as a division of the Union County Chancery Court because that county has no county court. A New Albany attorney, Frederick R. Rogers, sat as referee, or judge, of the Union County Youth Court. The chancellor, John C. Ross, Jr., sitting as youth court judge, eventually tried this case. Prior to trial, the youth court referee, Frederick R. Rogers, rendered and entered some preliminary orders in this case. In this opinion we designate the referee, Frederick R. Rogers, as the youth court judge; and we denote John C. Ross, Jr, as the chancellor even though he too sat as the judge of the Union County Youth Court.

On November 9, 1993, the State of Mississippi dismissed the indictment against Robert Allen Jones for sexual battery of M. M. M. On November 23, 1993, the youth court judge granted Appellee unsupervised visitation rights with the minor child beginning at 9:00 a. m. on November 25, 1993 through 6:00 p. m. November 28, 1993. On November 29, 1993, the Union County Youth Court conducted a hearing on the Smiths' Petition for Writ of Habeas Corpus. After this hearing, that court entered an Order dated December 13, 1993, by which it returned and restored custody of M. M. M. to Robert Allen Jones and granted Betty Smith temporary visitation with M. M. M. every other weekend from 5:00 p. m. Friday until Sunday at 5:00 p. m. "beginning December 3, 1993 until January 30, 1994." The Youth Court retained jurisdiction "until January 30, 1994, at which time all matters pending in this cause in Youth Court are hereby dismissed." On the left-hand margin of this Order beneath the Youth Court Judge's signature appears the following:

AGREED:

S/Thomas R. Trout

T. R. TROUT

ATTORNEY FOR PETITIONERS

S/Will R. Ford

WILL R. FORD

ATTORNEY FOR RESPONDENT

Three days later, on December 16, 1993, Sam Albert Smith and Betty Smith, by and through new counsel filed a petition for rehearing and temporary restraining order in the Union County Chancery Court in which they moved the chancery court:

[T]o be allowed to produce additional evidence as to the alleged sexual abuse and other matters pertaining to this minor child that would be in the best interest thereof, that the Honorable Mike Jones, Attorney General for the State of Mississippi, or his designee, be appointed as Guardian Ad Litem for said minor child, [M. M. M.], as expressly required under the provisions of Section 43-21-121(e) of the Mississippi Code of 1972 Annotated, as amended, . . . that this Court issue its Temporary Restraining Order . . . directing that said Motion act as supersedeas of the Referee's Order entered in this cause on December 13, 1993, and that visitation rights accorded unto the Petitioner, Betty Smith, be restored into her pursuant to the Order of this Court entered on February 18, 1993, . . . and that this Court issue Temporary Restraining Order prohibiting the enforcement of the Youth Court Order entered on December 13, 1993 pending further orders of this Court.

On the same day that this petition for rehearing and temporary restraining order was filed, the chancery court entered an order which stayed the December 13, 1993 order of the youth court and reinstated the chancery court's order entered February 13, 1993, which had awarded temporary custody of M. M. M. to Betty Smith. By its order rendered on December 18, 1993, the chancery court appointed Jeremy Eskridge, a lawyer in Tupelo, to serve as guardian ad litem for M. M. M. pursuant to the provisions of section 43-21-121 of the Mississippi Code of 1972.

On January 27, 1994, Betty Smith filed a Petition for Permanent Custody of Minor Child in which she re-asserted the same facts originally alleged in the divorce proceeding between M. M. M.'s

parents, the grand jury indictment of August, 1992, and the two ex parte proceedings filed in February, 1993, and December, 1993. By its order dated February 4, 1994, the chancellor appointed Jeremy Eskridge to represent M. M. M. as her attorney. His appointment as M. M. M.'s attorney was in addition to -- not instead of -- his appointment as guardian ad litem for her. On February 14, 1994, the Guardian Ad Litem filed his Notice of Report and Statement of Position in which he recommended that the full custody of M. M. M. be immediately restored to her father, Robert Allen Jones.

C. Trial

The trial of this case began on March 23, 1994. At the end of that day, it was continued until April 18, 1994, when it was concluded. For their witnesses Betty Smith and Sam Albert Smith called (1) Betty Smith, (2) Dr. William L. Marcy, (3) Dr. Eldridge Fleming, (4) Kenny Adair, (5) Patsy Kidd, (6) Judy Taylor, (7) Laverne Saunders, (8) Kim Steward, (9) Robert Allen Jones as an adverse witness, (10) Sharon (Sherry) Potts, (11) Bobby Smith, son of Betty Smith and uncle of Mary Smith Jones Mayo, deceased, and (12) Sam Albert Smith, who, as we previously noted, was the son of Betty Smith and the father of Mary Smith Jones Mayo, deceased. As his witnesses, Robert Allen Jones called (1) himself, (2) Sandra Garrison, his sister, and (3) Hattie Mae Woods, his aunt. Gene L. Whittington, M. D., a pediatric gastroenterologist, and James E. Crowder, Ph. D., a psychologist with an office in Tupelo, testified for Robert Allen Jones by way of their depositions.

The crucial issue upon which the Smiths' claim for custody of M. M. M. would be decided by the chancellor was whether Robert Allen Jones had sexually molested his daughter. Thus, we relate in some detail the evidence relevant to this issue.

Dr. William L. Marcy, a physician who specialized in family practice in Tupelo, examined M. M. M. on February 21, 1992, one week after the alleged episode of M. M. M.'s sexual abuse by her father had occurred. Under Robert Allen Jones's counsel's voir dire on his credentials as an expert in the field of sexually abused children, Dr. Marcy acknowledged that he had attended several seminars on that subject, but only one of them included an instructor who was a physician. That physician had lectured for two hours. The other seminars had been for non-medical attendees such as social workers and related professions who were professionally concerned, with the topic of child abuse. In addition to these conferences which he had attended, Dr. Marcy related on voir dire that he had read articles in medical journals about this subject, and that he relied on the basic interviewing techniques for patients which were "a big part of your training in family practice." There was no specific instruction in diagnosing sexual abuse of children in his family practice residency at the University of Tennessee School of Medicine in Memphis, from which he had also received his M. D. degree.

On cross-examination, Dr. Marcy acknowledged that he had been able to conduct only "a sub-optimal exam" of M. M. M. on February 21, 1992. She was totally uncooperative, and two adults were required to hold her down for Dr. Marcy's examination. We quote Dr. Marcy's testimony:

Q. And you can't testify to this court that you made any reasonable examination of her vagina or her rectum?

A. On the first, on the first? I, I think I'd have to say it's a suboptimal examine. I think we got, uh and then even on the anal rectum, I just wrote probably normal because I couldn't, you know, she was, it was, it was a difficult exam that had to be done and we did the best we could and that's, that was it. I documented what it was.

Robert Allen Jones's counsel then asked Dr. Marcy about his report of February 21, 1992, the only report available to the Union County grand jury when it indicted Jones on August 27, 1992.

Q. This man was indicted in August of '92.

A. Oh, okay.

Q. This report was the basis for the indictment.

A. Okay. Based strictly on this report, I would, you know, like I said, I wouldn't consider a possibility to be an, you know, something to indict.

Dr. Marcy found no sexually transmitted diseases present, no sperm, no anal warts which can be transmitted through sexual intercourse. He did no culture. Dr. Marcy's recommendations were based upon "possibilities" of sexual abuse -- and not reasonable medical probabilities.

Dr. Eldridge Fleming, a psychologist, whom the Smiths called as their witness, testified that the worst thing that can be said about parents is that they abuse their children. He added that no stigma on a parent carries any more scars or stains than a charge of sexual abuse of a child. Dr. Fleming did not conclude that M. M. M. had suffered any detrimental effect from her father.

Dr. Gene L. Whittington, a pediatric gastroenterologist with Le Bonheur Children's Medical Center in Memphis, stated in his July 10, 1992 report to Dr. Jim Googe, a New Albany pediatrician who had also examined M. M. M. and who had referred her to Dr. Whittington, that:

"I have examined this child carefully and in my opinion she has no evidence of sexual abuse and her introitus is entirely normal. Someone has allegedly said that she has a thickened hymen or this, that or the other. It appears entirely normal to me. Her anal exam is also entirely normal. . . . [I]t is my professional opinion that she has not been sexually abused."

Dr. James E. Crowder, a clinical psychologist, testified that he found no evidence that M. M. M. had been sexually abused. He found that the minor child had an affectionate relationship with the appellee and saw no reason why the Appellee should not have full custody of M. M. M. Robert Allen Jones testified that he had never abused his daughter sexually or in any other way and that after he learned of the allegations of his sexual abuse of M. M. M., he arranged for Jim Googe, M.D. to examine her, and that Dr. Googe had referred her to Dr. Whittington in Memphis for his examination.

The Smiths' accused Robert Allen Jones of but one episode of sexual abuse of his daughter, and it occurred on the weekend of Valentine's Day, February 13 - 15, 1992. Sandra Garrison, Robert Allen Jones's sister, testified that she was present during her brother's 1992 Valentine's visitation with M. M. M. She testified that M. M. M. made no complaints of any mistreatment by her father. She further testified that Robert Allen Jones was a good father, that he had a good relationship with M. M. M., and that M. M. M. was very excited about being with her father, whom she loved very much. Hattie Mae Cotton, Robert Allen Jones's aunt, testified that M. M. M. was at her home on the Valentine 1992 weekend and that she the child was not afraid and did not complain about her father.

After both parties had rested, the chancellor on his own motion requested M. M. M.'s guardian ad litem and court-appointed counsel, Jeremy Eskridge, to file his report with the Court. In his report, Eskridge wrote that he was "of the opinion and recommends to the court that the full custody of [M. M. M.] be immediately restored to respondent Robert Allen Jones and that all further proceedings in this matter be terminated with prejudice." When the chancellor asked him to file his report with the court (The record reflects that he had filed it on February 14, 1994.), Eskridge, who had attended and participated in the entire trial of two days, advised the chancellor:

[I]n the report I stated that that was my conclusion as of that time, and it was subject to the obvious possibility that evidence at this hearing would change that conclusion [that the full custody of [M. M. M.] be immediately restored to respondent Robert Allen Jones]. I can only say to the Court that the evidence has reinforced the conclusion in my mind, and I stand by that recommendation.

The chancellor instructed the guardian ad litem to submit to the Court his statement for his services as guardian ad litem and counsel for M. M. M. Eskridge submitted a statement for \$3,000.00 for those services.

Because of the two-day length of the trial and the number of witnesses who had testified, the chancellor took the matter under advisement. On May 6, 1994, he rendered an opinion and judgment of the court in which he made the following findings:

The court is of the opinion and so finds that the minor child was not sexually abused by the father, the respondent. This finding is predicated upon the following: 1) The age of the child at the time of the alleged incident (3 ½ years old) and the extreme possibility of suggestibility and susceptibility; 2) the great disparity in the medical experts presented to the Court in the form of the findings of Dr. Marcy and Dr. Whittington; 3) the great opportunity available to coax the minor child by the mother, Kathy Jones in 1992, and the petitioner, Betty Smith, and the maternal aunt in 1994, and 4) most significantly, the fact that the initial (and only) incident of alleged sexual abuse was brought by the mother, Kathy Jones, at a time when she and the respondent [Robert Allen Jones] were about to engage in a heated divorce proceeding that would involve child custody; and 5) finally, the report of the Guardian Ad Litem.

Pursuant to these findings, the chancellor: (1) found "the Motion to Dismiss by Robert Allen Jones to be well taken;" (2) denied all other relief requested by the Smiths as the original petitioners; (3) immediately returned custody of M. M. M. to her father, Robert Allen Jones; (4) awarded Betty Smith visitation rights with M. M. M. "the first weekend of each month from Friday at 5:00 p. m. until Sunday at 5:00 p. m. beginning June 3, 1994; and (5) assessed the cost of Jeremy Eskridge's services as guardian ad litem and counsel for M. M. M. to Sam Albert Smith and Betty Smith. They were ordered to pay these costs within 60 days of the judgment. In response to further motions filed by the Smiths and Eskridge, the chancellor rendered an order on August 9, 1994, which provided "that the payment of the Guardian Ad Litem's fees as authorized by the prior Judgment of this Court by the Appellants herein [Sam Albert Smith and Betty Smith] be, and the same is, hereby suspended until this case is decided by the Mississippi Supreme Court."

Sam Albert Smith and Betty Smith have appealed from the judgment of the chancery court. Robert Allen Jones has cross-appealed on the issues of the chancellor's refusal to award him an attorney's fee and the frivolous nature of the Smiths' appeal, for which he claims that he ought to be awarded all costs, expenses, and attorney's fees for the defense of the Smiths' appeal.

III. Issues and the law

In her brief, the Appellant, Betty Smith, states the following issues by which she seeks to reverse the Union County Youth Court's opinion and judgment which denied her custody of her great-grandchild, M. M. M., and ordered her to pay the guardian ad litem's fee, reimburse his expense, and pay all other costs of court:

I. Did the trial court err in awarding the custody of the minor child to the Defendant, Robert Allen Jones?

II. Did the trial court err in refusing to award the custody of the minor child to the Plaintiff, Betty Smith?

III. Did the trial court err in relying on the "report of the Guardian Ad Litem" to the extent and in the manner set forth in the Judgment of the court entered in this cause?

IV. Did the trial court err in ordering Sam Albert Smith and Betty Smith to pay the Guardian Ad Litem's fee?

V. Is the Judgment of the trial court contrary to the overwhelming weight of the evidence presented to the Court?

VI. Is the Judgment of the trial court contrary to the law?

In his cross-appeal, Robert Allen Jones presents but one issue for this Court's consideration, which is:

VII. The trial court erred in refusing to award attorney's fees to the Appellee, Robert Allen Jones.

Four of Betty Smith's, Issues, which are numbers I., II., V., and VI, are but restatements of this appeal's dominant issue of whether the chancellor erred in awarding the custody of M. M. M. to her father, Robert Allen Jones. Thus, we consider all four of them under the following topic:

A. Did the trial court err in awarding the custody of the minor child to the Appellee, Robert Allen Jones, and not to the Appellant, Betty Smith?

Smith v. Jones, 654 So. 2d 480 (Miss. 1995) involved the issue of whether a child had been sexually abused by her mother. Because of the similarity of the issue in that case to this issue in the case *sub judice*, we quote from that opinion to establish the standard of review which the Mississippi Supreme Court applies to issues such as this one:

This Court's familiar standard of review applies. "On appeal this Court will not reverse a Chancery Court's factual findings, be they of ultimate fact or of evidentiary fact, where there is substantial evidence in the record supporting these findings of fact."

This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. This Court will not reverse the chancellor's ruling unless his judicial discretion is abused.

Id. at 485-86 (citations omitted).

At issue in *McKee v. Flynt*, 630 So. 2d 44, 46 (Miss. 1993), was whether the parents or both sets of the grandparents of the child were entitled to custody of the child. The supreme court reversed and remanded the chancellor's award of custody of the child to the paternal grandparents for six months and to the maternal grandparents for six months of the year because "the chancellor did not make a

finding of unfitness of these parents." The supreme court observed:

The law has long been in Mississippi that the natural parents of a child have the right to nurture and care for their child. The parent is the child's natural guardian; however, if this person is not fit to carry out the responsibilities of this guardianship, the chancery court may appoint a suitable person to fulfill such duties.

This Court considers the denying of a parent the custody his or her child a serious matter and does not treat this issue lightly. In a custody dispute between the parents of a child and that child's grandparents, there is a presumption that it is in the best interest of that child to remain with the natural parents.

In order to overcome this presumption there must be a clear showing that the parent has (1) abandoned the child, or (2) the conduct of the parent is so immoral [as] to be detrimental to the child, or (3) the parent is unfit mentally or otherwise to have the custody of his or her child. Absent clear proof of one of the above circumstances, the natural parent is entitled to custody of his or her child.

Id. at 46-47 (citations omitted).

Our review of the foregoing pronouncement of jurisprudence made by the supreme court persuades us that the Appellee, Robert Allen Jones, is entitled to the custody of his daughter, M. M. M., unless, of course, as the Appellant, Betty Smith, alleged, he did sexually abuse her when she visited him during the Valentine's Day weekend in February, 1992. Clearly Robert Allen Jones's sexual abuse of his daughter would be "conduct of the parent . . . so immoral [as] to be detrimental to the child." The chancellor expressly found "that the minor child [M. M. M.] was not sexually abused by the father [Robert Allen Jones]." Under the standard of review which the Mississippi Supreme Court has established to determine error in issues such as this one, the chancellor's finding should be affirmed if it is "supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied."

We recall that of the expert testimony adduced by either the Smiths or Robert Allen Jones, only Dr. Marcy was of the opinion that M. M. M. had been sexually abused. However, under cross-examination he admitted that such sexual abuse was a "possibility." At no time did he opine that "to a reasonable medical certainty" M. M. M. had been sexually abused." No other expert testified that M. M. M. had been sexually assaulted. Dr. Whittington was of the opinion that she had not been sexually assaulted.

In *Newsom v. Newsom*, 557 So. 2d 511, 515 (Miss. 1990), a case which involved the issue of the

sexual abuse of children by their father, the Mississippi Supreme Court explained the deference it would pay chancellors in the matter of their weighing conflicting expert opinion:

Consistent with this court's standard of review, we find that the Chancellor was not manifestly wrong in finding that there was insufficient evidence of sexual abuse of Katie and Adam. On conflicting evidence, the Chancellor made a finding of fact which has ample support in the record.

It is settled law that the weight to be accorded expert opinion evidence is solely within the discretion of the judge sitting without a jury. While he may not arbitrarily fail to consider such testimony, he is not bound to accept it. In the ultimate analysis, the trier of fact is the final arbiter as between experts whose opinions may differ as to precise causes . . .

Id. at 515.

The Mississippi Supreme Court has emphasized that in determining the custody of a child, the best interest of the child is the "the polestar consideration . . ." *Worley v. Jackson*, 595 So. 2d 853, 856 (Miss. 1992), and the court's "touchstone." *Tedford v. Dempsey*, 437 So. 2d 410, 417 (Miss. 1983). But for the allegation of the episode of sexual abuse which occurred during the Valentine's Day week-end, there simply was no other evidence that Robert Allen Jones was unfit as a parent. In *Carter v. Taylor*, 611 So. 2d 874, 877 (Miss. 1992), another case in which the natural father, a widower, won his contest with his child's maternal grandmother for custody of his child, the Mississippi Supreme Court observed: "The father is either fit or not fit and if he is a fit person, the custody of the child cannot be awarded to [the maternal grandmother]." Except for the allegation of his sexual abuse of M. M. M., there is nothing in the record of this case to support a finding that Robert Allen Jones was an unfit father. In view of: (1) a parent's priority to the award of custody of his or her children as opposed to the claims of third parties, (2) the best interest of M. M. M., which must be the "touchstone" of this opinion and our "polestar" consideration, and (3) the chancellor's finding that Robert Allen Jones did not sexually abuse his daughter, which finding this Court finds to be consistent with the appropriate standard of review, we affirm the chancellor's award of custody of M. M. M. to her father, Robert Allen Jones.

B. Did the trial court err in relying on the "report of the Guardian Ad Litem" to the extent and in the manner set forth in the Judgment of the court entered in this cause?

We rely on *In Interest of R. D.*, 658 So. 2d 1378 (Miss. 1995) and a case cited in that opinion to resolve this issue adversely to Appellant, Betty Smith. In *Linda D.* the Copiah County Chancery Court adjudicated that R. D. and B. D., children of Linda D., were neglected and ordered that they be removed from their mother and that their custody be placed with the Petitioner, the Copiah County Department of Human Services (DHS). *DHS. Id.* at 1379. Later, the chancery court entered an order which returned these two children to their mother, Linda D. *Id.* DHS, the children's Court Appointed Special Advocate, Sally Garland (CASA), through independent counsel, Jim Kitchens, moved for reconsideration; but the court denied their motion. *Id.* DHS and CASA appealed from that denial. *Id.* An issue in the appeal was whether the chancellor's failure to appoint a guardian ad litem to represent Linda D.'s two children violated due process. *Id.* at 1382. In its holding that the failure to appoint a guardian ad litem for the two children was error, the supreme court quoted with approval from the case of *Shainwald v. Shainwald*, 395 S.E. 2d 441, 444 (S.C.Ct.App. 1990):

We reject the mother's somewhat novel argument that guardians ad litem should be precluded altogether from giving opinions regarding custody. . .

Linda D., 658 So. 2d at 1383. The Mississippi Supreme Court did not quote the following from the *Shainwald* opinion, but this Court finds it relevant to this issue:

We hold the extent to which a guardian ad litem is permitted to testify and give an opinion or recommendation in a child custody case is left to the sound discretion of the trial judge.

Shainwald, 395 S.E. 2d at 444.

In *Linda D.* the supreme court also addressed the mother's objections to the testimony of certain social workers and the CASA in which they expressed their opinions regarding the best interests of the children. On this matter, the supreme court wrote:

In the case at bar, as in *Shainwald*, we note similar argument of counsel for the mother, objecting to the admission of testimony from CASA and social workers. Dispositional hearings in youth courts are very informal, allowing for hearsay testimony as well as reports from various individuals or agencies who have information concerning the well being and "best interest" of the minors before the court. Social workers at dispositional hearings should therefore be allowed to give their opinions regarding the "best interest" of minors based upon their investigations and personal observations. Whether to allow testimony is determined by the sound discretion of the chancellor.

On remand, if CASA volunteer Garland is properly appointed as the children's CASA by

order of the chancellor, there should be no problem with her being allowed to testify and give an opinion or recommendation at disposition concerning these minors as determined in the sound discretion of the chancellor. Trained, qualified laypersons such as CASA volunteers may be appointed guardian ad litem also if the chancellor deems advisable in his sound discretion.

However, a better method might be for the judge in his sound discretion, to appoint a CASA volunteer to assist the children and also appoint a well qualified and competent attorney as guardian ad litem to represent the minors, thus safeguarding the minors legal rights.

Linda D., 658 So. 2d at 1383-84.

In the case *sub judice* the chancellor appointed Jeremy Eskridge, a Tupelo attorney, to serve as guardian ad litem for M. M. M. He had filed his Notice of Report and Statement of Position with the chancery court on February 14, 1994, and, according to his Certificate of Service, had served a copy of that report on Betty Smith's attorney on February 9, 1994. Earlier in this opinion we noted that in his report, Eskridge opined and recommended that custody of M. M. M. "be immediately restored to respondent, Robert Allen Jones," but that he "recognize[d] that his conclusions [were] subject to revision in the event that evidence received at the hearing so require[d]."

Notwithstanding Betty Smith's counsel's notice of the guardian ad litem's recommendation that custody of M. M. M. be restored to her father, he did not call him for the purpose of cross-examination about his reasons for making this recommendation. At the conclusion of the hearing on its second day, the guardian ad litem advised the chancellor that "I can only say to the Court that the evidence has reinforced the conclusion in my mind, and I stand by that recommendation." "On the court's own motion," the chancellor requested that the guardian ad litem's report be filed. This Court notes that Betty Smith's counsel did not object to the filing of the report as the chancellor had requested.

The guardian ad litem's report was but one of five factors, among which was "the great disparity in the medical experts presented to the Court in the form of the findings of Dr. Marcy and Dr. Whittington," on which the chancellor relied in awarding custody of M. M. M. to her father. If "Social workers at dispositional hearings [in Youth Court] should . . . be allowed to give their opinions regarding the 'best interest' of minors based upon their investigations and personal observations," which the Mississippi Supreme Court held in *Copiah County Department of Human Services v. Linda D.*, 658 So. 2d 1378, 1383 (Miss. 1995), then it was not error for the chancellor to rely on the opinion of the Guardian Ad Litem about to whom the custody of M. M. M. should be awarded.

C. Did the trial court err in ordering Sam Albert Smith and Betty Smith to pay the Guardian Ad Litem's fee?

In our consideration of this issue, we recall the following events. First, the Smiths filed their original Petition for Writ of Habeas Corpus in the Chancery Court of Union County. Secondly, of its own motion, that court transferred the case to the Youth Court of Union County in accordance with *DeLee v. Wilkinson County*, 606 So. 2d 1125 (Miss. 1992). Thirdly, in their Petition for Rehearing and Temporary Restraining Order filed on December 16, 1993, in the Union County Youth Court after this case had been transferred to it, the Smiths moved "that the honorable Mike Jones, the Attorney General for the State of Mississippi, or his designee, be appointed as Guardian Ad Litem for the minor child, M. M. M., as expressly required under the provisions of Section 43-21-121(e) of the Mississippi Code of 1972 Annotated, as amended, as was done in the case of *DeLee v. Wilkinson*, 606 So. 2d 1125 (Miss. 1992)." Instead, the chancellor, who was then acting as Youth Court Judge pursuant to Section 43-21-107(3) of the Mississippi Code of 1972, appointed Jeremy Eskridge as the guardian ad litem for M. M. M.

After the chancellor, who was sitting as Youth Court Judge, rendered his Opinion and Judgment of the Court on May 6, 1994, he rendered a Supplement to Opinion and Judgment of the Court on May 12, 1994, in which he awarded the guardian ad litem "a commission in the amount of \$3,000.00, plus expenses of \$46.33." He then assessed these sums "to petitioners, Sam Albert Smith and Betty Smith, to be paid within sixty days of the date of the court's judgment of May 6, 1994." The petitioners, Sam Albert Smith and Betty Smith, filed their Motion for New Trial or in the Alternative, Amendment of Judgment and Application for Stay of Judgment, in which they asserted that the guardian ad litem's fees should be paid by Union County pursuant to Section 43-21-125 of the Mississippi Code of 1972. The guardian ad litem filed a Response . . . to Petitioners' Motion for Post-Judgment Relief in which he stated to the court:

The guardian, quite naturally, has no concern about the identity of the party who actually pays his fees and expenses but he is constrained to note that the statute cited by petitioners appears to be in the form of permission or a grant of authority to the county to pay fees of a guardian ad litem functioning in Youth Court. It does not read as a mandate.

He then pointed out that many contests in Youth Court are "between the government or its agency, on the one hand, and the child and/or his parents, on the other hand." Thus, he argued the legislature had passed Section 43-21-121(5) to make "special arrangements" which would "enable attorneys to participate in those proceedings as guardians ad litem" by permit[ing] a county to pay a reasonable guardian's fee out of its general fund. He continued that "[I]n this case, the controversy was . . . pure civil litigation over the custody of a child, initiated only the actions of private individuals and bitterly contested by private individuals." He concluded that "[E]quity should require that where . . . a clear cut result has been achieved in favor of respondent . . . and against the petitioners who initiated them, then the expense of that proceeding should be imposed upon those petitioners and not upon the government in the form of the county treasury."

After some additional responses and intervening orders, the Youth Court entered an Order "[T]hat the payment of the guardian ad litem's fee as authorized by the prior Judgment of this Court by the Appellants be, and the same is, hereby suspended until this case is decided by the Mississippi

Supreme Court." This Court has recited the foregoing procedural history with what may seem to be too much detail for two reasons. The first reason is to recognize the chancellor's possible uncertainty about who should be held responsible for paying the guardian ad litem's fee and expense. The second reason is to demonstrate that no party to this litigation referred to or relied upon Section 43-21-205 of the Mississippi Code of 1972, which, in pertinent part, reads:

In proceedings under this chapter, no court costs shall be charged against any party to a petition, and no salaried officer of the state, county or any municipality, nor any youth court counselor, nor any witness nor any expert witness shall be entitled to receive any fee for any service rendered to the youth court or for attendance in the youth court in any proceedings under this chapter

Miss. Code Ann. § 43-21-205 (1972). Neither did any party mention Mississippi Rule of Civil Procedure 17(d) which provides:

Whenever a guardian ad litem shall be necessary, the court in which the action is pending shall appoint an attorney to serve in that capacity. In all cases in which a guardian ad litem is required, the court must first ascertain a reasonable fee or compensation to be allowed and paid to such guardian ad litem for his service rendered in such case, *to be taxed as a part of the cost in such action.*

M. R. C. P. 17(d) (emphasis added). We cite Rule 17(d) because we interpret it to mean that in a civil case the guardian ad litem's fee is included in the term of "court costs" when a court assesses "court costs" to a litigant. Section 43-21-205 provides that "in proceedings under [the Youth Court] chapter, no court costs shall be charged against any party to a petition."

This Court finds that the chancellor's requiring Sam Albert Smith and Betty Smith to pay the guardian ad litem's commission of \$3,000 and expense of \$46.33 violates Section 43-21-205 of the Mississippi Code because it requires them as petitioners in Youth Court to pay "court costs," which Rule 17(d) includes within the definition of "court costs." We are aware that this litigation was between private litigants; but the petitioners initially sought to pursue their claim for custody of M. M. M. in the chancery court where her parents had been divorced. It was the chancery court that of its own motion transferred the case to the Union County Youth Court pursuant to the *DeLee* case.

We reverse the chancellor's assessment of the guardian ad litem's fee to the Smiths and instead assess the payment of the guardian ad litem's fee to Union County because Section 43-21-205 requires that "no court costs shall be charged against any party to a [Youth Court] petition." We remand this part of the chancellor's opinion and judgment so that he may amend his Opinion and Order rendered on May 6, 1994, to assess the payment of the guardian ad litem's fee and expense to Union County pursuant to Section 43-21-121(5) of the Mississippi Code of 1972.

D. The trial court erred in refusing to award attorney's fees to the Appellee, Robert Allen Jones.

This issue has two facets, the first of which is the chancellor's failure to award Robert Allen Jones an attorney's fee for his representation in the Union County Youth Court. The second facet is his request that this Court award him an attorney's fee for his having to defend Betty Smith's appeal which is "frivolous pursuant to Rule 38 of the Miss. Sup. Court Rules." To support his argument on the first facet of this issue, Robert Allen Jones relies on Section 93-5-23 of the Mississippi Code of 1972, the pertinent part of which reads as follows:

If after investigation by the Department of Public Welfare or final disposition by the youth court or family court allegations of child abuse are found to be without foundation, the chancery court shall order the alleging party to pay all court costs and reasonable attorney's fees incurred by the defending party in responding to such allegation.

Miss. Code Ann. § 93-5-23 (1972). He argues that because the Union County Youth Court found the Smiths' allegations of child abuse to be without foundation, the chancellor erred by failing to award him his attorney's fee pursuant to this statute. He also argues that Betty Smith "abused the legal process of this Court in obtaining ex parte Emergency Temporary Child Custody Orders when there were no urgent or necessitous circumstances and no notice given to him." To support this assertion, he relies on *Robinson v. Robinson*, 481 So. 2d 855 (Miss. 1986) and *Morrow v. Morrow*, 591 So. 2d 829 (Miss. 1991). He argues that "The provisions of Section 93-5-23 are mandatory and the trial court erred in its failure to award the Appellee attorney's fees."

Our problem with the first facet of this issue is that at no time before, during, or after the hearing of this case did Robert Allen Jones request or move the Youth Court to award him an attorney's fee. The opinion and judgment of the court which the chancellor rendered on May 6, 1994, neither allows nor denies Robert Allen Jones an attorney's fee. It is silent on this matter. The chancellor only provided that "All other relief requested by either party is denied."

Jones did not move that the chancellor find the facts and state separately the conclusions of law to support an award of an attorney's fee to him as provided by Rule 52 of the Mississippi Rules Civil Procedure. After the court entered its Opinion and Judgment on May 6, 1994, Robert Allen Jones did nothing pursuant to Rule 59(e) of the Mississippi Rules Civil Procedure to move the chancellor to amend his Opinion and Judgment to award an attorney's fee to him. Now he asks this Court to rule on an issue which he did not first present to the chancellor for his decision.

In *Allgood v. Allgood*, 473 So. 2d 416 (Miss. 1985), the Mississippi Supreme Court dealt with a similar omission by an appellant, who claimed that the chancellor erred by denying her defense of laches. *Id.* at 423. The supreme court wrote:

The problem with Aletha's laches claim is that though pled it was never litigated nor decided. There is nothing in the record suggesting that the trial judge was requested to make findings of fact or enter conclusions of law regarding the laches plea, see Rule 52(a), Miss. R. Civ. P., and, not surprisingly, the point is mentioned neither in the trial judge's memorandum opinion of October 26, 1983, nor his final judgment entered November 7,

1983.

As a prerequisite to obtaining review in this Court, it is incumbent upon a litigant that he not only plead but press his point in the trial court. *See Nationwide Mut. Ins. Co. v. Tillman*, 249 Miss. 141, 156-57, 161 So. 2d 604, 609 (Miss. 1964) and particularly *Stubblefield v. Jesco, Inc.*, 464 So. 2d 47 (Miss. 1984) where we recently refused on appeal to consider whether defendant was entitled to a new trial where it had filed a formal motion for a new trial but had not obtained from the trial judge a ruling on that motion. Aletha having failed in this regard, we deny her assignment of error predicated upon a plea of laches.

Id. This Court rejects Robert Allen Jones's contention that the chancellor's failure to award him an attorney's fee was error because Jones did not plead and he did not press the award of an attorney's fee in the trial court.

The second aspect of this issue deals with Jones's claim that Betty Smith's claim is frivolous within the meaning of Mississippi Supreme Court Rule 38. In *Tricon Metals & Services, Inc. v. Topp*, 537 So. 2d 1331, 1335 (Miss. 1989), a case in which the Mississippi Supreme Court considered the application of Rule 11 of the Mississippi Rules of Civil Procedure, that court held that an action is frivolous "only when, objectively speaking, the pleader or movant has no hope of success." Later in *Hurst v. Southwest Mississippi Legal Services Corp.*, 610 So. 2d 374, 378 (Miss. 1992), the supreme court established this same standard for determining whether an appeal was frivolous within the ambit of Mississippi Supreme Court Rule 38, which is now Rule 38 of the Mississippi Rules of Appellate Procedure. In *Hurst*, the supreme court declined to award damages because it found that the appeal was not frivolous.

In the case *sub judice* this Court has decided that the chancellor erred when he ordered Betty Smith to pay the guardian ad litem's commission and expense. Thus, her appeal is not frivolous because she has partially succeeded in her appeal. We therefore reject Jones's contention that this Court should award him an attorney's fee for his having to defend a frivolous appeal pursuant to Rule 38 of the Mississippi Rules of Appellate Procedure.

IV. Summary

Our affirming the chancellor's award of M. M. M.'s custody to her father and our holding that he committed no error when he received the Guardian Ad Litem's report and opinion for his consideration were straightforward under relevant Mississippi Supreme Court decisions. The matter of the chancellor's assessment of the Guardian Ad Litem's fee and expense to the Smiths for their payment was problematical, as the chancellor perhaps recognized when he entered an order which suspended that payment "until this case is decided by the Mississippi Supreme Court." The resolution of this issue rests at the convergence of Section 42-21-121(e) of the Mississippi Code of 1972, which requires that the youth court judge appoint a guardian ad litem for M. M. M., Section 43-21-121(5), which makes the county's payment of the guardian ad litem's fee permissible, and Section 43-21-205,

which forbids the payment of court costs by any party to a youth court petition.

This Court recognizes that this case began in the chancery court as a contest between private litigants; but pursuant to *DeLee v. Wilkinson County*, the chancellor of his own motion transferred it to the Youth Court of Union County. The Youth Court of Union County is but a division of the Chancery Court of Union County pursuant to Section 43-21-107(3) of the Mississippi Code of 1972. Once the case came to rest in the Youth Court, it became subject to Mississippi's laws which create that court and regulate its function. Those laws forbid "any party to a petition" to pay any costs of the Youth Court. Rule 17(d) of the Mississippi Rules of Civil Procedure provides that the payment of the guardian ad litem's fee is a part of the court costs. Thus to require Sam Albert Smith and Betty Smith to pay the Guardian Ad Litem's fee and expense would simply violate the law of this State.

The chancellor's understandable suspension of the Guardian Ad Litem's fee and expense "until this case is decided by the Mississippi Supreme Court" necessitates a remand of this case on that issue. On remand, the chancellor and the parties may pursue further action which is not inconsistent with our holding, first, that the Smiths as petitioners cannot be ordered to pay the Guardian Ad Litem's fee and expense and, secondly, that it is permissible for Union County to pay that fee and expense.

We affirm the chancellor's resolution of all other issues except for the payment of the fee and expense of the Guardian Ad Litem. We assess one-half of the costs of this appeal to the appellant, Betty Smith, and the remaining one-half of the costs of this appeal to the appellee, Robert Allen Jones.

THE JUDGMENT OF THE UNION COUNTY YOUTH COURT IS AFFIRMED IN PART AND REVERSED AND REMANDED IN PART FOR FURTHER PROCEEDINGS WHICH ARE CONSISTENT WITH THIS OPINION. ONE HALF OF THE COSTS ARE ASSESSED TO APPELLANT AND ONE-HALF OF THE COSTS ARE ASSESSED TO THE APPELLEE.

DIAZ, KING AND SOUTHWICK, JJ., CONCUR. BRIDGES, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY FRAISER, C.J., THOMAS, P.J, AND BARBER, J. MCMILLIN AND PAYNE, JJ., NOT PARTICIPATING.

IN THE COURT OF APPEALS 01/16/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00657 COA

S.G.

APPELLANT

v.

T.W.M.

APPELLEE

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

BRIDGES, P.J., CONCURRING IN PART, DISSENTING IN PART:

Because I disagree with my colleagues in their majority opinion in part, I hereby concur in part and dissent in part with their opinion.

I agree with the majority opinion as to all matters except that issue which fails to award attorney's fees to the appellee.

In support of its refusal to award attorney's fees, the majority relies apparently on *Allgood v. Allgood*, 473 So. 2d 416 (Miss. 1985). The majority clearly points out that the issue involved in the *Allgood* case was one of laches, though pled was never litigated nor decided. In the case sub judice, the matter of attorney's fees was pled, prayed for and litigated. In fact, appellee testified "that he had incurred expenses in the amount of \$6,469.00 and that he had paid \$1,359.00 thereof." The attorney's bill as testified about was entered as an exhibit to appellee's testimony. Appellee was never cross-examined on the attorney's fees.

Attorney's fees are not specifically enumerated as part of the costs and expenses forbidden to be paid by either of the parties or witnesses pursuant to section 43-21-205 of the Mississippi Code of 1972, as supplemented and amended. Conversely, pursuant to section 93-5-23 of the Mississippi Code of 1972, as supplemented and amended, "If after final disposition by the youth court or family court, allegations of child abuse are found to be without foundation, the chancery court *shall* (emphasis added) order the alleging party to pay reasonable attorney's fees incurred by the defending party in responding to such allegation."

This cause of action originated in the Chancery Court of Union County, and although it was transferred to the Youth Court of that County, and was eventually disposed of finally by that court, attorney's fees, as such, are not a part of the court costs, or any other costs, which might be excluded from payment by appellants as provided by law.

Furthermore, this writer believes that the matter pertaining to attorney's fees was sufficiently preserved in the record from the trial court for this Court's consideration.

I believe the Chancellor was manifestly in error in failing to apply the law requiring him to order

attorney's fees to appellee, and I would reverse and render as to that issue, ordering the payment of attorney's fees by appellant to appellee in the amount of \$6,469.00, as properly alleged, testified about and sufficiently litigated.

FRAISER, C.J., THOMAS, P.J., AND BARBER, J., JOIN THIS SEPARATE WRITTEN OPINION.