IN THE COURT OF APPEALS 06/04/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00491 COA

MILLARD HOWELL AND ARMA RUTH HOWELL

APPELLANTS

v.

DOUGLAS DEE SMITH AND PAUL THORNHILL

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. GEORGE D. WARNER, JR.

COURT FROM WHICH APPEALED: CLARKE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANTS:

GREGORY L. HARPER

ATTORNEYS FOR APPELLEES:

WILLIAM B. JACOB (THORNHILL)

EDWARD N. KRAMER, III (SMITH)

NATURE OF THE CASE: CUSTODY--MATERNAL GRANDPARENTS SEEKING CUSTODY OF THREE MINOR CHILDREN OF DECEASED DAUGHTER

TRIAL COURT DISPOSITION: CASE DISMISSED UNDER RULE 41(B) FOR FAILURE OF GRANDPARENTS TO PROVE CASE TO TAKE CUSTODY AWAY FROM RESPECTIVE FATHERS OF THE CHILDREN.

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

McMILLIN, J., FOR THE COURT:

Millard and Arma Ruth Howell (hereafter "the Howells") filed suit in the Clarke County Chancery Court for custody of their daughter's three minor children following her death. The Howells requested permanent custody and support from the children's fathers, Douglas Dee Smith and Paul Thornhill. At the close of the Howell's case in chief, both Smith and Thornhill filed a motion to dismiss under Rule 41(b) of the Mississippi Rules of Civil Procedure. The chancellor granted both motions to dismiss on the basis that the Howells had failed to prove that either Douglas Smith or Paul Thornhill should not be allowed legal custody of their respective children. The Howells filed this appeal, alleging (1) that the guardian ad litem failed to adequately represent the best interests of the children, and (2) that the court's decision to return the children to their respective natural fathers was against the overwhelming weight of the evidence.

I.

FACTS

Phyllis Diane Howell Smith (Diane), the natural child of Millard and Arma Ruth Howell, married Douglas Dee Smith (Smith) in 1978. Of this union, one child, Stephanie Diane Smith (Stephanie), was born. Diane and Smith separated in 1988 but were never legally divorced.

Shortly after her separation from Smith, Diane began living with Paul Thornhill (Thornhill), and the couple had two children, April Marie Thornhill (April) and Tiffany Nicole Thornhill (Tiffany). Diane lived with Thornhill next door to her parents until July 5, 1992, when Diane's mother, Arma Ruth Howell, ordered Thornhill to leave their property on allegations of his physically abusing her daughter. Diane and her children continued to live next to the Howells until Diane's tragic death on December 7, 1992. Thornhill and Smith both lived and worked in Texas at the time of Diane's death.

On December 10, 1992, the Howells filed a complaint for custody and support of the three children. Billy Mitts was appointed as guardian ad litem by the court to represent the interests of the minor children. The case proceeded to trial, and following the Howells' case in chief, both Smith and Thornhill filed a motion to dismiss pursuant to Mississippi Rule of Civil Procedure 41(b). The chancellor granted both motions on the basis that the Howells had failed to make out a *prima facie* case for removal of the children from their natural parents and awarded custody of the children to their respective natural fathers, subject to the rights of liberal visitation of the Howells. From that dismissal, the Howells bring this appeal.

II.

GUARDIAN AD LITEM

The Howells assert that the court appointed guardian, Billy Mitts, failed to adequately represent the

best interests of the children. In this assertion, the Howells direct this Court's attention to certain alleged action or inaction by Mitt, including (1) his failure to cross-examine or question certain parties during the Howells' case in chief, (2) his failure to request that the court order drug screens for Smith and Thornhill, (3) his failure to make a recommendation to the court as to who should have custody of the children, (4) his failure to subpoena the adoption papers of Smith in an unrelated matter in Texas, (5) his failure to subpoena Jackie L. Davis, social worker from Clarke County, for a recommendation of custody in light of her Home Study Report, and (6) his failure to request a continuance and obtain Home Study Reports from Texas on Smith and Thornhill. The Howells argue that, based on this failure to fully and adequately represent the interests of the children, this case should be remanded to the lower court.

Smith and Thornhill, however, argue that the Howells' assertions concerning Mitts' conduct are slightly misconceived. First, although Mitts did not cross-examine either Smith or Thornhill, he reserved the right, along with both of their counsel, to examine them at a later time; however, Mitts was not given that opportunity because the case was dismissed at the close of the Howells' case. Further, Mitts presented questions, although limited in number, to several witnesses concerning whether the alleged conduct on the part of Smith or Thornhill elicited during direct examination of the witnesses took place in the presence of the children. As to the Howells' assertions that Mitts failed to request a continuance, drug screening, or subpoena Davis, Smith, and Thornhill point out that the Howells did not take such action themselves and therefore, cannot now, on appeal, claim that Mitts was negligent in failing to act. Finally, Smith and Thornhill note that because the case was dismissed based on lack of proof under Rule 41(b), Mitts did not have the opportunity to present his case, which would have possibly included presentation of evidence of which the Howells complain.

A guardian ad litem is "the one primarily charged with and looked to for protection of the children's interest when judicial proceedings arise." *Copiah County Dep't of Human Servs. v. Linda D.,* 658 So. 2d 1378, 1382 (Miss. 1995). The guardian ad litem is responsible for investigating the situation, completing any necessary reports, and making recommendations to the court. *Id.* at 1383. The guardian ad litem, however, is "not in the true sense an adversary party and the court has a duty to insure that guardians ad litem perform their duties properly and in the best interest of their wards." *Id. quoting Shainwald v. Shainwald,* 395 S.E.2d 441, 444 (S.C. Ct. App. 1990). There are three minimum requirements which must be adhered to by the trial judge in appointing a guardian ad litem to represent a minor or minors in the courts of this State: (1) the person selected by the trial judge must be a competent person to serve as the guardian ad litem, (2) the person selected by the trial judge must have no interest that is adverse to that of the minor which he represents, and (3) the person selected by the trial judge must be adequately instructed on the duties which are required of him and proper performance of such duties. *Id.* at 1383.

In this case, the chancellor appointed Billy Mitts to represent the three minor children in the proceedings to determine their custody. Mitts was present throughout the pretrial process and at the trial and questioned witnesses appropriately in conjunction with his duty, which was to serve the best interests of the children. Mitts signed an order agreeing with the home studies to be conducted on each of the parties. However, because the case was dismissed due to lack of evidence to shift custody from the natural fathers, Mitts' recommendation as to custody was never requested, nor was Mitts allowed to present any other evidence which the Howells complain of on appeal.

The Howells' assertions that Mitts was derelict in his duties involve evidentiary matters which are the responsibility of the party bearing the burden of proof. These are all matters which the Howells failed to pursue, including the failure to request a continuance to obtain a home study from Texas, the failure to request drug screening, and the failure to introduce a home study (or the witness who prepared the study) into evidence. The Howells bore the burden of making out their *prima facie* case that the natural fathers were unfit, including the evidentiary matters which they now complain that Mitts failed to complete. Mitts' duty, on the other hand, was not to carry the plaintiffs' burden in proving their case but was to safeguard the best interests and welfare of the children. *Cf. Loggans v. Hall*, 652 So. 2d 184, 190 (Miss. 1995) (where the Mississippi Supreme Court held that the Department of Human Services was not required to carry the parties' prosecution of their case in a child custody matter but should be responsible for safeguarding the best interests of the children). Therefore, we decline to reach the issue of whether Mitts failed to adequately represent the interests of the children because there is no evidence to the contrary.

III.

CUSTODY AWARD BASED ON THE OVERWHELMING WEIGHT OF EVIDENCE

The Howells further take issue with the lower court's award of custody to the respective natural fathers, claiming that the award is against the overwhelming weight of the evidence. The Howells argue that the chancellor failed to consider the best interests of the children and the fact that the siblings were being separated in the current custody award. Therefore, the Howells contend that the custody of the children should be returned to them, or alternatively, the case remanded to the lower court to consider the best interests of the children, including the impact of the separation from their siblings.

Smith and Thornhill, on the other hand, argue that awarding custody to the natural fathers is in the best interests of the children, and separation of siblings, though often tragic, does not change that general principle.

When the trial judge is presented with a Rule 41(b) motion, as in this case, he must determine the question of whether the evidence presented by the plaintiff would entitle the plaintiff to a judgment; and, "[i]f, considering the evidence fairly, as distinguished from in the light most favorable to the plaintiff, the trial judge would find for the defendant . . . because the quality of the proof offered is insufficient to sustain the burden of proof cast upon the plaintiff," final judgment should be entered in the defendant's favor. *Smith v. Smith*, 574 So. 2d 644, 649 (Miss. 1990). After hearing the evidence presented by the Howells, the chancellor, sitting as the fact finder in this case, granted a motion to dismiss as to both Thornhill and Smith, stating that the Howells had failed to overcome their burden necessary to take the children from their natural parents. This Court adheres to the substantial evidence/manifest error standard of review to appeals from a grant or denial of a Rule 41(b) motion to dismiss and any findings of fact made therein. *Century 21 Deep S. Properties, Ltd. v. Corson*, 612 So. 2d 359, 369 (Miss. 1992); *Smith*, 574 So. 2d at 649. Therefore, we must affirm the chancellor's grant of a motion to dismiss if that decision is supported by substantial evidence and not in manifest error, despite the fact that we may or may not have made the same decision on the facts presented at trial. *Murphy v. Murphy*, 631 So. 2d 812, 815 (Miss. 1994) (citations omitted).

It is settled jurisprudence in this state that "the natural parents of a child have the right to nurture and care for their child." *McKee v. Flynt*, 630 So. 2d 44, 46 (Miss. 1993) (citations omitted). The denial of custody to a natural parent is a serious matter, and one that is not to be treated lightly. *Id.* (citing *Ethredge v. Yawn*, 605 So. 2d 761, 764 (Miss. 1992)). In the case of a custody dispute between the parent or parents of that child and that child's grandparents, "there is a [legal] presumption that it is in the best interest of that child to remain with the natural parents." *Id.* at 47. For the grandparents (or third party) to overcome this presumption, there must be a clear showing that the parent has abandoned the child or is mentally or morally unfit to have the custody of the child or a that the parent is guilty of conduct so immoral as to cause detriment to the child. *Id.* at 47 (quoting *White v. Thompson*, 569 So. 2d 1181, 1183-84 (Miss. 1990); *Rodgers v. Rodgers*, 274 So. 2d 671, 673 (Miss. 1973)).

The chancellor, therefore, was correct in dismissing the Howells' motion for custody of the three minor children against the natural fathers, Thornhill and Smith, absent a clear showing by the Howells that Thornhill and Smith were mentally or morally unfit or were guilty of conduct detrimental to the children, or had abandoned the children. Pursuant to our standard of review, we must affirm that decision if it is supported by substantial evidence and is not manifestly in error.

In support of their case, the Howells called both Smith and Thornhill to testify as adverse witnesses. Smith testified that he had received two DUIs in the past, with the most recent being in 1992. He also noted that he had continued to support his child, Stephanie, throughout the separation and had visited her as often as possible. In addition, Smith agreed to liberal visitation for the grandparents, the Howells. Thornhill, the father of Tiffany and April, admitted that he had not given Diane any support for the five months prior to her death but testified that he had supported the family during the time when he and Diane were living together. Thornhill also admitted to past drug use, but stated that he had been "clean" since 1990. Finally, Thornhill admitted to striking Diane on two occasions, one in which he alleged that he had found Diane using drugs with her sister-in-law in front of the children and the other time which he alleged that Diane had returned the children's Christmas presents and had used the cash to support a drug habit. Thornhill also agreed that the Howells should be allowed visitation with his children.

The chancellor was also presented with the testimony of three of the Howells' relatives concerning past actions of Smith and Thornhill. Denise Howell, the Howells' ex daughter-in-law, who lives in a trailer on the Howells' land with her children, testified that she had done drugs with Thornhill in 1992 and had purchased drugs from him in 1990. She further implicated Thornhill for participating with her in a cocaine "spree" in 1989, prior to his moving in with Diane and prior to the time the children were born. David Miles, nephew of the Howells, testified that he had gotten marijuana from Smith several times over the years when traveling through Texas on his job, with the last time being in 1992. He also noted that the children were never present when he, Diane, and Smith smoked marijuana. J.D. Howell, the Howells' son, testified that he had used cocaine, Valium, and other drugs with Smith and had purchased drugs from Smith about five years ago. He further stated that he and Smith had smoked marijuana together over the years, and that this continued after Stephanie was born. However, Howell noted that Stephanie was a baby at the time and was never present in the room when they smoked.

Finally, the chancellor heard the testimony of both the Howells, who alleged both drug and alcohol abuse by both Smith and Thornhill, but who admitted that Mr. Howell, himself, was a recovering alcoholic. The Howells further admitted that all of their children had used drugs over their lifetime, including Diane, the mother of the three children.

From that testimony, the chancellor concluded that Smith and Thornhill were entitled to custody of the three children, stating:

> I am simply saying that the proof, in no way, rises to the standard requirement for me to tell the fathers that they could not have custody of their children due to the tragic and untimely death of the children's mother. Who also, according to the proof, did the same things that the Howells would have the Court use to take the children away from their fathers.
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> There are two other criteria in these cases. I want to cover them. One of them is abandonment of the child. I find nothing that could be called abandonment on the part of Mr. Smith. I find that Mr. Thornhill didn't support his children for at least five months before the death of his children's mother and probably at some other periods. . . .And the law in this state, according to numerous cases, is mere non-support without more does not constitute abandonment of children. So I don't find any abandonment, just a cavalier I-don't-give-a-darn attitude whether they eat or not for some five months.
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> And the third criteria is that the parent is unfit mentally. There is absolutely no proof of anything like that. . . . There is not one single word of testimony, by anybody, that any person now alive, most notable the fathers, has ever, in any way, manner or form done anything to these children. . . .
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> So, Mr. Smith and Mr. Thornhill, I take your word for it. You are recovering drug abusers. . . . So this record will reflect that I accept your word that you are recovering from your problems in the use of drugs. . . And I accept your word that nothing like this will take place in the presence of these children.

The chancellor also noted, for the record, that if Smith or Thornhill engaged in any type of drug use, the children would not be left in their custody. Further, he granted the grandparents visitation, which was agreed upon by all parties.

From the record, and based on the opinion of the chancellor, which clearly addressed the three factors which must be established in order to overcome the presumption that the best interest of the children is served by remaining in the custody of the natural parent, we find that the chancellor's findings were supported by substantial evidence. Because the chancellor did not commit manifest error in granting the natural fathers custody of their respective children, we affirm his ruling.

THE DECISION OF THE CLARKE COUNTY CHANCERY COURT AWARDING CUSTODY OF APRIL MARIE THORNHILL AND TIFFANY NICOLE THORNHILL TO

THEIR NATURAL FATHER, PAUL THORNHILL AND CUSTODY OF STEPHANIE

DIANE SMITH TO HER NATURAL FATHER, DOUGLAS DEE SMITH IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

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