

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**IN THE MATTER OF THE ESTATE OF
GEORGE H. KENDRICK, SR., DECEASED
GEORGE H. KENDRICK, JR., INDIVIDUALLY AS
ADMINISTRATOR OF THE ESTATE OF GEORGE
H. KENDRICK, SR., CHERYL K. RANKIN, AND
CYNTHIA COLEMAN**

PLAINTIFFS/APPELLANTS

VS.

CASE NO. 2009-CA-456

SONJA S. GORDEN

DEFENDANT/APPELLEE

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. George H. Kendrick, Jr., Plaintiff/Appellant
2. Cheryl K. Rankin, Plaintiff/Appellant
3. Cynthia Coleman, Plaintiff/Appellant
4. Anita Matthews Stamps, Esq., Attorney for Appellants
5. Sonja S. Gorden, Defendant/Appellee
6. Ottawa E. Carter, Jr., Esq., Attorney for Defendant/Appellee

Respectfully submitted,

SONJA S. GORDEN

BY:


**OTTAWA E. CARTER, JR.
ATTORNEY FOR APPELLEE**

TABLE OF CONTENTS

Certificate of Interested Persons	i
Table of Contents	ii, iii
Table of Authorities	iv
Statement of the Issues	1
A. The Chancellor applied the appropriate standard of law in determining that Sonja Gorden is a lawful heir of George Kendrick, Sr., Deceased	1
B. The Chancellor’s application of the clear and convincing standard is supported by substantial and credible evidence in the record and should be affirmed	1
C. The Chancellor’s findings were not manifestly wrong or clearly erroneous	1
Summary of the Argument	2
Argument	3
A. The Chancellor applied the appropriate standard of law in determining that Sonja Gorden is the daughter and lawful heir of George Kendricks, Sr., Deceased	3
B. The Chancellor’s application of the clear and convincing standard is supported by substantial and credible evidence in the record and should be affirmed	3
C. The Chancellor’s findings were not “manifestly wrong or clearly erroneous”and should be upheld	6
1. The fact that Sonja Gorden’s birth certificate does not list George Kendricks, Sr., as her father is a factual matter and its probative value, if any, was within the purview of the Chancellor	7

2.	The Chancellor found that George Kendrick Sr.'s other children, the appellants', were aware of their father's relationship with Ms. Gorden before commencement of the determination of heirs hearing	8
3.	The DNA Evidence	9
	Conclusion	11
	Certificate of Service	12

TABLE OF AUTHORITIES

Cases

<i>Blissard v. White</i> , 515 So.2d 1196, 1200 (Miss. 1987)	4
<i>Chisolm v. Eakes</i> , 573 So.2d 764 (Miss. 1990)	9
<i>Groves v. Slaton</i> , 733 So.2d 349 (Miss. App. 1999)	9
<i>Robinson v. Gusta</i> , 540 So.2d 30, 32 (Miss. 1989)	4, 7
<i>United States v. Natson</i> , 469 F.Supp.2d 1253 (M.D.Ga. 2007)	10

Statutes

Miss. Code. Ann. § 91-1-15 (2)(c)	3
Miss. Code. Ann. § 93-9-9 (as amended)	7

STATEMENT OF THE ISSUES

QUESTION PRESENTED:

In determining that Sonja Gorden is a lawful heir of George Kendrick, Sr., Deceased, did the Chancellor apply the appropriate standard of law, and were its findings supported by substantial and credible evidence which were not manifestly wrong or clearly erroneous?

- A. **The Chancellor applied the appropriate standard of law in determining that Sonja Gorden is a lawful heir of George Kendrick. Sr., Deceased.**
- B. **The Chancellor's application of the clear and convincing standard is supported by substantial and credible evidence in the record and should be affirmed.**
- C. **The Chancellor's findings were not manifestly wrong or clearly erroneous.**

SUMMARY OF THE ARGUMENT

Appellants argue that the Chancery court erred in finding that Sonja S. Gorden (Sonja) is the biological daughter and heir of George H. Kendricks, Sr., Deceased. To prevail on appeal, appellants must show either that the Chancellor failed to apply the appropriate standard to conclude Sonja is the daughter and lawful heir of George H. Kendricks, Sr., Deceased, or that his application of said standard was “manifestly wrong or clearly erroneous” such that this Court is left with the “firm and definite view that a mistake has been made.” The appellants fail with either approach. Appellants concede the Chancellor applied the appropriate standard. However, they take issue with the Chancellor’s application of that standard. Because appellants concede the appropriate standard was applied, they must establish that the Chancellor’s findings were manifestly wrong or clearly erroneous. This they cannot do because the Chancellor’s findings are supported by substantial and credible evidence in the record.

ARGUMENT

A. The Chancellor applied the appropriate standard of law in determining that Sonja Gorden is the daughter and lawful heir of George Kendricks, Sr., Deceased.

With respect to the ability of an illegitimate child to inherit from her father, the Mississippi legislature has provided that:

(2) An illegitimate shall inherit from and through the illegitimate's natural and his kindred, and the natural father of an illegitimate and his kindred shall inherit through the illegitimate according to the statutes of descent and distribution if:

(c) There has been an adjudication of paternity after the death of the intestate, based upon clear and convincing evidence, in an heirship proceeding under §§ 91-1-27 and 91-1-29. However, no claim of inheritance shall be recognized unless the action seeking an adjudication of paternity is filed within one (1) year after the first publication notice to creditors to present their claims, whichever is less....”

Miss. Code. Ann. § 91-1-15 (2)(c), as amended. In this case, the Chancellor found, and the appellants do not contest, that Sonja filed her petition to determine heirs at law within the statutorily required time frame. (Vol. I, p. 68)¹. Neither do they argue that the Chancellor failed to apply the “clear and convincing evidence” standard, as statutorily required. (See Vol I., p. 71) (finding “based on the clear and convincing evidence presented before [the Court], that Sonja is the natural daughter of George H. Kendrick, Sr., Deceased”).

B. The Chancellor’s application of the clear and convincing standard is supported by substantial and credible evidence in the record and should be affirmed.

The Mississippi Supreme Court has long held that a Chancellor’s findings of fact will be upheld on appeal if they are “supported by substantial, credible evidence in the record.” *Estate of*

¹Citations to the record will be in two forms: “R at ____” refers to the record with the corresponding page number filling in the blank; “Vol. I, p. ____” refers to the pleadings with the particular page number filling in the blank as well.

Robinson v. Gusta, 540 So.2d 30, 32 (Miss. 1989). A Chancellor's findings will not be reversed unless an appellate court believes those findings are "clearly erroneous." *Id.* In *Gusta*, ironically a case in which appellants' counsel participated, the court noted:

"[w]here, as here, the issue presented on appeal is one with respect to which at trial *the appellee bore the burden* of proof by clear and convincing evidence, we inquire whether the record contains evidence of sufficient quality and quantity that a rational trier of fact *could have concluded* that the fact had been proved by clear and convincing evidence."

Id. (citing *Blissard v. White*, 515 So.2d 1196, 1200 (Miss. 1987)) (Emphasis added).

The *Gusta* court found the clear and convincing standard was met based on evidence nearly identical to the evidence presented in this case. In that case, there was evidence of an intimate sexual relationship between the mother and the alleged father during and around the nine months prior to the child's birth. That evidence, along with the mother's uncontested testimony that she did not have a sexual relationship with anyone else during that period of time, and "any number of [the father's] implied acknowledgments" of paternity, was enough for the Chancellor to determine paternity by clear and convincing evidence. *See Id.*

The record in this case contains more than enough evidence for the Chancellor to conclude, by clear and convincing evidence, that George Kendrick, Sr., was Sonja's biological father. In fact, the Chancellor's opinion contained a veritable laundry list of such evidence.

Flossie Phungbun, Sonja's mother, testified that George Kendrick Sr., was Sonja's father and that there was no biological possibility that anyone else could be her father. (R. at 48). Ms. Phungbun also testified that she had been intimate with George Kendrick, Sr., during the time that Sonja was conceived and that she had not been intimate with any other man during that time. (R. at 48). As the Chancellor noted, Ms. Phungbun's testimony concerning her intimacy with

George Kendrick, Sr., was not refuted by the Estate of George Kendrick, Sr., Deceased.

Sonja testified that George Kendrick, Sr., was first introduced to her as her father at a young age. (R. at 6). He began helping her and giving Ms. Phungbun and her mother, Sonja's grandmother, money for her support when she was a young child. (R. at 8). When Sonja was a teenager, George Kendrick, Sr., began to act as her counselor, advising her not to get married. (R. at 9). When she failed to take that advice and ultimately found herself in an abusive marriage, he helped her leave the marriage and move to Chicago. (R. at 10-11). Later, after the death of Darrell Kendrick, George Kendrick Sr.'s son, Sonja moved in with George Kendrick Sr., and helped him deal with his depression over the death. She cooked for him, cleaned his home, and generally cared for him during his period of bereavement. (R. at 11-14). Sonja also lived with him and helped him during other difficult periods of his life. She also resided with him when she needed a place to live. (R. at 11-14).

In addition, the Chancellor found that it was common knowledge in the community that George Kendrick, Sr. was Sonja's father and he held himself out as such in a number of ways. (Vol. I, p. 70). He took Ms. Gorden to parties and blues shows and always introduced her to others as his daughter. (R. at 13). When Sonja remarried in 2003, he was listed on the program as her father and he fulfilled the traditional role of the father by walking her down the aisle and giving her away. (R. at 14-15). Mr. Kendrick introduced himself to Sonja's new mother-in-law and her pastor as her father. (R. at 17). He also paid for half the cost of the wedding and helped Ms. Gorden and her new husband purchase George Kendrick Sr.'s mother's home by cosigning on the note and deed of trust. (R. at 26-27). Mr. Kendrick's other children, George Kendrick Jr., Cheryl Rankin, and Cynthia Coleman, all acknowledged that they had long heard that Sonja

might be their sister.

The evidence that Sonja presented was quantitatively and qualitatively sufficient for a rational trier of fact to conclude that she is the daughter and lawful heir of George Kendrick, Sr. Because the Chancellor's resolution was supported by substantial and credible evidence, his decision should not be disturbed.

C. The Chancellor's findings were not "manifestly wrong or clearly erroneous" and should be upheld.

Appellants contend that the Chancellor's determination that Sonja is George Kendrick, Sr.'s daughter and lawful heir to his Estate, was a "manifestly wrong or clearly erroneous" application of the clear and convincing evidence standard. (Appellant's Br. 11). The basis of this argument are several disagreements they have with the Chancellor's resolution of fact issues. They also disagree with the weight the Chancellor gave to evidence which was not in dispute. They point to the facts that Sonja's birth certificate did not list George Kendricks, Sr., and his other children's claim that they do not believe she is their sister. They emphasize that the deposition testimony of Dr. Elmer Otteson concerning blood test results that were conducted on Sonja, her mother, Flossie Phungbun, and Dayton Kendricks, the brother of George Kendricks, Sr. According to Dr. Elmer, the results indicated that it is unlikely that Sonja and Dayton Kendricks are related. As shown below, however, the Chancellor's resolution of these factual issues are rationally supported by substantial and credible evidence in the record. Consequently, they are not manifestly wrong or clearly erroneous.

1. **The fact that Sonja Gorden's birth certificate does not list George Kendricks, Sr., as her father is a factual matter and its probative value, if any, was within the purview of the Chancellor.**

Appellants argue that George Kendrick, Sr.'s name not appearing on Sonja Gorden's birth certificate is evidence that he is not her father. (Appellant Br., 11). Their argument, apparently, is that his failure to be the signatory on any document acknowledging paternity undermines the chancellor's paternity determination. Appellants, however, provide no authority which supports their contention that a failure to acknowledge paternity in writing is conclusive on the issue of paternity. The statute they cite merely provides a time frame in which a signatory to a written acknowledgment of paternity may rescind that acknowledgment. (*See* Miss. Code. Ann. § 93-9-9 (as amended)). Furthermore, although Mr. Kendrick did not sign a birth certificate or other written acknowledgment of paternity, he publicly acknowledged paternity in a number of other ways. Those public acknowledgments, along with other evidence of paternity were more than sufficient for the Chancellor to determine by clear and convincing evidence that Gorge Kendrick, Sr. is Sonja's biological father.

When the appellee bears the burden of proof at the trial by clear and convincing evidence, the appellate court only determines whether or not the record contains evidence of sufficient quality and quantity such that a rational trier of fact *could have* concluded that the fact had been proved by clear and convincing evidence. *Gusta*, at 32. The record is replete with evidence that supports the Chancellor's conclusions. As such, the appellants' recitation of evidence that was obviously of questionable value to the Chancellor, is of even less value to this Court.

2. **The Chancellor found that George Kendrick Sr.'s other children, the appellants', were aware of their father's relationship with Ms. Gorden before commencement of the determination of heirs hearing.**

Appellants claim George Kendrick Sr., did not introduce Sonja to his other children as their sister. The Chancellor found otherwise. In fact, the court noted that there was uncontradicted testimony that, until commencement of this action, the appellants referred to Sonja as their sister. Sonja testified that, until this suit was filed, she always had a good relationship with appellant George Kendrick, Jr., and he had always referred to her as his sister. (R. at 29). She also testified that Darrell Kendrick, George Kendrick Sr.'s deceased son, always referred to her as his sister before his demise. (R. at 29). Finally, she testified that when George Kendrick Sr., was in the hospital on his deathbed, appellants Cheryl Rankin and Cynthia Thomas introduced her to the doctors and nurses as their sister. (R. at 30).

Daniel Lee Hawthorne was a long time friend of the Kendrick family, and in particular to George Kendrick, Sr., and George Kendrick Jr. Mr. Hawthorne testified that he knew George Kendrick Jr., from about the age of five and that George Kendrick Jr., always recognized and identified Sonja as his sister. (R. at 70). He also testified that Darrell Kendrick, deceased, always recognized and identified Sonja as his sister (R. at 70). Finally, and most importantly, he testified that George Kendrick Sr. always identified Sonja as his daughter and treated her as such. (R. at 70).

According to their own testimony, the appellants had heard that Sonja might be their sister. They also knew she lived with their father for a time after Darrell's death and that their father gave her away at her wedding. Yet amazingly, they each testified that they never so much as asked their father whether or not Sonja was their sister; about the nature of their relationship;

why she had moved in with him after their brother's death; why he had given her away at her wedding; or why he was listed on the wedding program as her father. Obviously, this testimony was so incredible that the Chancellor found it unworthy of belief.

3. **The DNA Evidence**

Aside from the appellants' discredited testimony about having never been introduced to Sonja as their sister and having addressed her as such, the appellants' only other evidence on the issue of paternity was the deposition testimony of Dr. Elmer Otteson, a research scientist with Gen Quest DNA Laboratory. Dr. Otteson's deposition described the results of a DNA "kinship test" conducted on Sonja, her mother Flossie Phungbun, and Dayton Kendrick, the brother of George Kendrick, Sr. The appellants argue that the kinship test conclusively proves that Sonja is not George Kendrick, Sr.'s daughter.

The Chancellor, citing *Groves v. Slaton*, 733 So.2d 349 (Miss. App. 1999), pointed out that a trial court does not have to "recognize the blood test as infallible or accept this blood test as conclusive proof of paternity." (Vol. I, p. 69). *See also, Chisolm v. Eakes*, 573 So.2d 764 (Miss. 1990) (finding that blood tests should be considered as one factor along with the other evidence before the court and should not be viewed as absolutely determinative on the issue of paternity). In his deposition, Dr. Otterson acknowledged that while most states have established minimum standards for paternity tests at 99.5 to 99.7% to be considered scientifically reliable, no such standards or requirements for "kinship tests" exist. (Deposition of Dr. Elmer Otterson, Exhibit 5, at 29). Despite this acknowledgment, the Chancellor admitted the deposition testimony into evidence "to be considered like any other testimony offered." (R. at 197). In his opinion, however, the Chancellor took judicial notice of the fact that this kinship test, according

to Dr. Otterson, had only “a 95% accuracy rate while other paternity tests have a 100% accuracy rate.” Consequently, he concluded that the test was not conclusive on the issue of paternity.

(Vol. I, p. 69).

Like this case, the kinship test’s reliability was at issue in *United States v. Natson*, 469 F.Supp.2d 1253 (M.D.Ga. 2007). In *Natson*, the government attempted to establish paternity via a paternity test that provided only a 96.3% probability the defendant was the father. *Id.* at 1255. The court found the evidence was not relevant and therefore inadmissible because the 96.3% probability of paternity was significantly lower than the 99.9% the scientific community requires to consider the test conclusive on the issue. *Id.* at 1255, 1258. Here, the kinship test was admitted into evidence despite having a lower probability than in *Natson* and despite there being no established minimum standards for kinship tests. (See Deposition Testimony, Exhibit 5, at 29). Therefore, the Chancellor then considered this evidence “for what its worth,” along with the other evidence presented at trial. His conclusion that the kinship test was not conclusive of paternity was supported by the substantial evidence and was not manifestly wrong or clearly erroneous.

CONCLUSION

To prevail on appeal, appellants must establish either that the Chancellor failed to apply the appropriate standard or that his application of that standard was manifestly wrong, clearly erroneous, and unsupported by the evidence in the record. Because the Chancellor applied the correct legal standard and his resolution of the factual issues was supported by substantial and credible evidence in the record, the appellants' motion to reverse his decision and render judgment in their favor should be **denied**.

Respectfully submitted this 21st day of December, 2009.

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CERTIFICATE OF SERVICE

I, Ottawa E. Carter, Jr., Counsel for Defendant/Appellee, do hereby certify that I have this day served a true and correct copy of the above and foregoing document via fax and by United States Mail, postage prepaid, to:

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P. O. Box 2916
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Honorable Dewayne Thomas, Presiding Chancellor
Hinds County Chancery Court Judge
P. O. Box 686
Jackson, MS 39205-0686

SO CERTIFIED, this 21st day of December, 2009.


OTTAWA E. CARTER, JR.