IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00789 COA

TABITHA DIANE BERNIER

APPELLANT

v.

DANIEL J. BERNIER

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. WILLIAM ROBERT TAYLOR JR.

COURT FROM WHICH APPEALED: MARION COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

GARLAND D. UPTON

ATTORNEY FOR APPELLEE:

MARTHA RENEE MCBRIDE PORTER

NATURE OF THE CASE: DOMESTIC RELATIONS

TRIAL COURT DISPOSITION: DIVORCE GRANTED, CUSTODY OF CHILDREN GIVEN TO APPELLEE AND PROPERTY DIVIDED

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

BARBER, J., FOR THE COURT:

In May of 1995, the Chancery Court of Marion County heard Tabitha Bernier's complaint for divorce against Daniel Bernier. The parties subsequently entered into an "Agreement to Proceed Pursuant to Mississippi Code Annotated Section 93-5-2," in order to obtain a "no fault" divorce. The chancellor granted the parties a divorce on the ground of irreconcilable differences and awarded custody of the couple's two minor children to Daniel. The chancellor granted Tabitha visitation rights, and ordered her to pay child support in the amount of one hundred dollars per month. In

addition to addressing the issues of child custody and support, the divorce decree also effected a division of the real and personal property held by the parties. Tabitha appeals on the following grounds:

> I. WHETHER THE CHANCELLOR ERRED IN HIS FAILURE TO MAKE SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW USING THE *ALBRIGHT* ANALYSIS IN AWARDING CUSTODY TO THE FATHER.
>
> II. WHETHER THE COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF SECTION 93-5-2 OF THE MISSISSIPPI CODE.

FACTS

Daniel and Tabitha Bernier were married in November of 1984 with the marriage resulting in two children. Tabitha left the Bernier home in April of 1991 after Daniel discovered that she had committed adultery. Daniel was granted a divorce from Tabitha in May of 1991 on the ground of adultery. Daniel remained in the former marital home where he cared and provided for the couple's two children over the next three years. Tabitha subsequently moved to Louisiana where she remarried and gave birth to a child of that marriage.

In May of 1994, Tabitha filed a motion to set aside the divorce decree of May 1991. The Chancery Court of Marion County granted Tabitha's motion on the ground that the May 1991 divorce was void due to Daniel's failure to comply with Rule 40 of the Mississippi Rules of Civil Procedure. Tabitha then filed her own complaint for divorce which was heard in May of 1995. The parties subsequently entered into an agreement to proceed with the divorce action on the ground of irreconcilable differences under section 93-5-2 of the Mississippi Code. After hearing testimony from numerous witnesses for both parties, the chancellor granted the parties a divorce and ordered that custody of the children remain in Daniel with Tabitha having reasonable visitation rights. Additionally, the chancellor's order approved a stipulation of the parties with regard to real property jointly owned by them, established a visitation schedule, and disposed of other personal property matters.

ANALYSIS

> I. WHETHER THE CHANCELLOR ERRED IN HIS FAILURE TO MAKE SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW USING THE *ALBRIGHT* ANALYSIS IN AWARDING CUSTODY TO THE FATHER.

Tabitha Bernier asserts on appeal that the chancellor failed to make specific findings of fact pertaining to the considerations for child custody set forth in *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). In *Albright*, the Mississippi Supreme Court affirmed that the "polestar consideration" in child custody cases is the best interests and welfare of the child and also delineated some "other factors" to be considered in making custody determinations. *Albright*, 437 So. 2d at 1005. The "other factors" listed in *Albright* include:

> [H]ealth, and sex of the child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at that age sufficient to express a preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship.

Id. at 1005.

Scrutiny of the record before this Court indicates that the chancellor's ruling on child custody made at the May 12, 1995 trial did not include on-the-record factual findings regarding each specific *Albright* factor as Tabitha apparently contends is required. The chancellor, however, made it abundantly clear that he understood the custody issue to be governed by *Albright* and that he had "carefully reviewed each factor of that case as it relates to the facts of this matter." The chancellor then found that, although both parties were suitable parents, Daniel would be the most suitable. Despite the chancellor's omission at trial of specific findings of fact for each *Albright* factor, at a subsequent hearing on Tabitha's motion to alter or amend the judgment, the chancellor did make specific findings regarding the *Albright* factors. At the motion hearing, the chancellor stated that in making his original order he had "thoroughly covered and considered all the [*Albright*] factors that are required to be considered by this Court, each and every one." However, in an apparent effort to eliminate any confusion in the matter, the chancellor went on to make specific on-the-record findings regarding each *Albright* factor that resulted in his decision that Daniel was best suited to have custody of the children.

Contrary to Tabitha's assertion, specific findings *were* in fact made, albeit not at trial but at the hearing on her motion to alter or amend the divorce judgment that was conducted prior to the filing of the instant appeal. The specific findings the chancellor dictated into the record at the motion hearing weighed heavily in favor of Daniel retaining custody of the children. Tabitha's assertions notwithstanding, the record makes it clear that the chancellor followed *Albright* in making his decision, and Tabitha has presented no persuasive evidence to demonstrate that the chancellor's findings were manifestly wrong or not supported by credible evidence. *See Brennan v. Brennan*, 638 So. 2d 1320, 1323 (Miss. 1994) (holding appellate court must respect findings of fact made by chancellor if such findings are supported by credible evidence and are not manifestly wrong). When reviewing a chancellor's findings for "manifest" error, appellate courts require "that a chancellor's

findings of fact must be unmistakably, clearly, plainly, or indisputably wrong before being disturbed on appeal." *Brennan*, 638 So. 2d at 1323. Since the chancellor's findings in the case at bar are supported by credible evidence and are not erroneous, his findings must be affirmed. *See Morreale v. Morreale*, 646 So. 2d 1264, 1266 (Miss. 1994) (holding that where substantial evidence in record supports chancellor's judgment, his findings will not be disturbed on appeal). Accordingly, this issue is without merit.

II. WHETHER THE COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF SECTION 93-5-2 OF THE MISSISSIPPI CODE.

Tabitha's final assignment of error is rather vague, apparently being an assertion that the chancellor erred in allowing the divorce to proceed under section 93-5-2 of the Mississippi Code, while at the same time allowing the parties to reach an out-of-court agreement to resolve a dispute over the division of the couple's real property. In their "Agreement to Proceed Pursuant to Mississippi Code Annotated Section 93-5-2," Daniel and Tabitha struck out the line reading "division of the real property of the parties" from the listing of issues being submitted to the chancellor for resolution. This change was initialed by both parties. However, in her brief, Tabitha complains that she "understood that she was submitting the question of division of real property . . ." to the chancellor and that she was acting "under the advice of counsel . . . ." Tabitha further asserts that she was "forced" into this agreement.

In analyzing this assignment of error, this Court has closely scrutinized Tabitha's argument. However, at no point does Tabitha provide any evidence to support her claim that she was "forced" into the property agreement or that she was misled as to the effect of her initials beside the line striking out the "division of the real property of the parties" text from the "Agreement to Proceed Pursuant to Mississippi Code Annotated Section 93-5-2." Furthermore, the statute clearly states that a prerequisite to a divorce decree under section 93-5-2 is that "marriage and property rights between the parties raised by the pleadings have been *either* adjudicated by the court *or agreed upon by the parties* . . . ." Miss. Code Ann. § 93-5-2(3) (emphasis added). There is nothing in this section of the code to preclude parties from voluntarily settling a disputed issue and thereby saving the court from having to expend judicial resources to rule on the matter. On the contrary, section 93-5-2 is designed to promote the settlement of issues in dispute between parties, in keeping with the principles behind an "irreconcilable differences" divorce. Because Tabitha has presented no evidence to suggest that the changes made to the "Agreement to Proceed Pursuant to Mississippi Code Annotated Section 93-5-2" were not voluntary and of her own volition, this issue is totally without merit.

THE JUDGMENT OF THE MARION COUNTY CHANCERY COURT IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

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