IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00282 COA

JEFF ANTHONY

APPELLANT

v.

JUDY LYNN DONALD ANTHONY

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 LEE GRIFFIN, JR

COURT FROM WHICH APPEALED: SUNFLOWER COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT:

LINDSEY C. MEADOR, JAMES WESLEY OUZTS, JR.

ATTORNEYS FOR APPELLEE:

RABUN JONES, HOWARD DYER, III

NATURE OF THE CASE: CIVIL: DIVORCE, CHILD CUSTODY, SUPPORT

TRIAL COURT DISPOSITION: DIVORCE GRANTED, CUSTODY GRANTED TO MOTHER, FATHER ORDERED TO PAY $400/MONTH SUPPORT

BEFORE BRIDGES, P.J., KING, AND PAYNE, JJ.

BRIDGES, P.J., FOR THE COURT:

Judy Donald Anthony was granted a divorce on the ground of habitual cruel and inhuman treatment from her husband, Jeff Anthony, by the Sunflower County Chancery Court. The lower court awarded

Mrs. Anthony custody of their daughter and $400 per month for child support. Mr. Anthony appeals this decision, arguing that Mrs. Anthony was not entitled to a divorce, custody of the daughter, nor $400 per month in child support payments.

STATEMENT OF FACTS

Jeff Anthony and Judy Donald Anthony were married in 1992. The couple had one daughter who was born before the marriage. Mr. Anthony refused to sign her birth certificate, but at the hearing it was stipulated that the child was in fact his biological daughter. The Anthonys separated in June of 1994, for the third and final time.

At trial, Mrs. Anthony testified that Mr. Anthony verbally, physically, and sexually abused her. There was also testimony that on several occasions Mr. Anthony had threatened to kill Mrs. Anthony. He also accused Mrs. Anthony many times during the marriage of committing adultery. It was shown that Mrs. Anthony was the primary care giver to the child. All parties agreed that Mrs. Anthony was a good mother who had a strong relationship with her daughter. There was also testimony concerning each of the parties' ability to support the child.

ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER THE TRIAL COURT ERRED BY GRANTING MRS. ANTHONY A DIVORCE ON THE GROUND OF CRUEL AND INHUMAN TREATMENT

On appeal from the grant of divorce, this Court will not reverse unless it finds that the findings of the chancellor were manifestly wrong. *Steen v. Steen*, 641 So. 2d 1167, 1169 (Miss. 1994); *Daigle v. Daigle*, 626 So. 2d 140, 144 (Miss. 1993). Where there is substantial evidence supporting the chancellor's ruling, the decision will be upheld. *Brooks v. Brooks*, 652 So. 2d 1113, 1124 (Miss. 1995). Further, we must review these findings in the light most favorable to the Appellee. *Rawson v. Buta*, 609 So. 2d 426, 429 (Miss. 1992). Where the chancellor's findings of fact are supported by credible evidence, this Court is not at liberty to disturb those findings. In *Polk v. Polk*, 559 So. 2d 1048, 1049 (Miss. 1990), the Mississippi Supreme Court held that the credibility of witnesses and the weight of their testimony, as well as the interpretation of the evidence where it is capable of more than one reasonable interpretation, are primarily for the chancellor as the trier of facts. Where the matters on appeal concern divorce and child support, this Court must give even greater deference to the chancellor's decisions in factual matters. *Steen*, 641 So. 2d at 1169-70.

In order for a divorce to be granted on the grounds of habitual cruel and inhuman treatment, the supreme court has stated:

> In years gone by, this Court consistently held that habitual cruel and inhuman treatment could be established only by a continuing course of conduct on the part of the offending spouse which was so unkind, unfeeling or brutal as to endanger, or put one in reasonable

> apprehension of danger to life, limb or health, and further, that such course of conduct must be habitual, that is, done so often, or continued so long that it may reasonably be said a permanent condition.

Id. at 1170 (citations omitted); *see also Ferguson v. Ferguson*, 639 So. 2d 921, 931 (Miss. 1994); *Chamblee v. Chamblee*, 637 So. 2d 850, 859 (Miss. 1994); *Smith v. Smith*, 614 So. 2d 394, 396-97 (Miss. 1993). "While habitual cruel and inhuman treatment may be established by a preponderance of the credible evidence, as opposed to clear and convincing evidence, the charge 'means something more than unkindness or rudeness or mere incompatibility or want of affection.'" *Steen*, 641 So. 2d at 1170 (quoting *Wires v. Wires*, 297 So. 2d 900, 902 (Miss. 1974)). The complaining spouse must show systematic and continuous behavior beyond simple incompatibility on the part of the offending spouse. *Id.* (citing *Parker v. Parker*, 519 So. 2d 1232, 1234 (Miss. 1988)). However, "one incident of personal violence may be of such a violent nature as to endanger the life of the complaintant spouse and be of sufficient gravity to establish the charge of habitual cruel and inhuman treatment." *McKee v. Flynt*, 630 So. 2d 44, 48 (Miss. 1993) (citing *Ellzey v. Ellzey*, 253 So. 2d 249, 250 (Miss. 1971)). The risk of life, limb, or health must be real rather than imaginary and must be clearly established by proof. *Id.* (citation omitted). Finally, the court has held:

> Evidence sufficient to establish habitual, cruel and inhuman treatment should prove conduct that:
>
> > [E]ither endanger[s] life, limb or health, or create[s] a reasonable apprehension of such danger, rendering the relationship unsafe for the party seeking relief or, in the alternative, be so unnatural and infamous as to make the marriage revolting to the offending spouse and render it impossible for that spouse to discharge the duties of the marriage, thus destroying the basis for its continuance.

Gardner v. Gardner, 618 So. 2d 108, 113-14 (Miss. 1993) (alterations in original). However, the supreme court has also held that habitual threats and accusations, insults, and verbal abuse may cause such a high degree of mental suffering that the health and life of the innocent spouse may be endangered. *Chamblee*, 637 So. 2d at 859. The party alleging habitual cruel and inhuman treatment must generally corroborate the testimony. *Id.* However, a divorce may be granted on uncorroborated testimony of the plaintiff if the nature of the situation or isolation of the parties results in no corroborating proof being reasonably possible. *Peterson v. Peterson*, 648 So. 2d 54, 57 (Miss. 1994). We believe the charges against Mr. Anthony were sufficiently corroborated.

Mrs. Anthony testified that Mr. Anthony had choked her on one occasion causing her to fear for her life. There was uncontradicted testimony that Mr. Anthony had sexually abused her with a champagne bottle and a toothpaste bottle. Mr. Anthony constantly verbally abused her and accused her of imaginary adulterous relationships. He made lewd comments to other women in front of her causing her to become extremely embarrassed. And finally, he threatened to kill her on numerous occasions. These threats were communicated not only to Mrs. Anthony, but to her sister, mother, and

others as well. The threats coupled with the fact that Mr. Anthony attempted to choke her and routinely carried a pistol in his boot, put Mrs. Anthony in very real fear for her life.

All things considered, this Court believes that the chancellor did not err in granting Mrs. Anthony a divorce for habitual cruel and inhuman treatment.

II. WHETHER THE LOWER COURT ERRED IN GRANTING CUSTODY OF THE MINOR CHILD TO MRS. ANTHONY

In *Ellis v. Ellis*, 651 So. 2d 1068, 1073 (Miss. 1995), the Mississippi Supreme Court held that an assignment of error unsupported by any legal authority need not be considered by the court. Mr. Anthony has failed to cite authority for this argument; therefore, this issue is procedurally barred from our review. Further, all of the evidence in the record shows that Mrs. Anthony had been a good mother and primary caregiver to their daughter.

PAYNE, J., FOR THE COURT:

III. WHETHER THE LOWER COURT ERRED IN AWARDING MRS. ANTHONY $400 PER MONTH IN CHILD SUPPORT

Mr. Anthony asks this court to reverse the chancellor's ruling setting the amount of child support because it is far in excess of the statutory guidelines. The award of child support is within the sound discretion of the chancellor. *Grogan v. Grogan*, 641 So. 2d 734, 741 (Miss. 1994). This Court will not disturb that award unless the chancellor was manifestly in error in his finding of fact or has manifestly abused his discretion. *Id.* Further, the process of "weighing evidence and arriving at an award of child support is essentially an exercise in fact-finding, which customarily significantly restrains this Court's review." *Id*.

The rebuttable presumption of the appropriateness of an award pursuant to these guidelines may be overcome by an award that does not comply with the guidelines or by making a written finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case. *Dunn v. Dunn*, 609 So. 2d 1277, 1285 (Miss. 1992). In the present case, the chancellor explicitly examined the guidelines and explained why equity and the best interests of the

child would require a departure therefrom. His order reads:

> I decline to follow the statutory guidelines with regard to child support and order Mr. Anthony to pay $400.00 per month as and for child support. Specifically, my reasons for not following the statutory guidelines are:
>
> (1) Mr. Anthony's monthly budget provides for $465.00 per month in child expenses

which he says he can pay if he has the child.

(2) Mr. Anthony, in addition to his monthly income, has approximately $2,400.00 due to him from the bankruptcy court.

(3) A significant portion of Mr. Anthony's farming expenses is rent due and payable to his mother. She testified that he would have to pay that. In light of Mr. Anthony's prior history of not having to pay the rental value of certain equipment he borrowed from his mother, I believe that it is unlikely that he will pay all of the rent, if any of the rent, due to her. This could result in an increase of approximately $1,500.00 per month in income.

Further, it should be noted that when the father was requesting custody of the child, he included in his monthly expenses the sum of $215 for day care for the child so that the father could work. If the chancellor had rigidly followed the percentage of the guidelines, the father would pay would be less support than the cost of day care. That would leave the entire support of the child as the responsibility for the mother, who has less take-home pay than the father's income on his farm operations where he receives room and board at no cost. The chancellor was manifestly *right* in his ruling, and we affirm his ruling in all particulars.

THE JUDGMENT OF THE SUNFLOWER COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

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

III: PAYNE, J., FRAISER, C.J., BARBER, DIAZ, KING, AND McMILLIN, JJ., CONCUR.

BRIDGES, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION TO III JOINED BY THOMAS, P.J., COLEMAN AND SOUTHWICK, JJ.

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BRIDGES, P.J., DISSENTING TO ISSUE III:

The Mississippi Supreme Court has ruled that an award of child support is within the chancellor's discretion and will not be disturbed by this Court unless the chancellor was manifestly in error in his finding of fact and manifestly abused his discretion. *McEachern v. McEachern*, 605 So. 2d 809, 814 (Miss. 1992). I believe the chancellor was manifestly in error when he awarded Mrs. Anthony more than 40% of Mr. Anthony's anticipated income. I, therefore, must respectfully dissent.

In making an award apart from the guidelines the chancellor must consider the best interest of the child, the reasonable needs of the child, the health of all the parties, the entire sources of income of both parties, the necessary living expenses of the husband, and such other factors bearing on the subject that might be shown by the evidence. *Draper v. Draper,* 658 So. 2d 866, 870 (Miss. 1995). The chancery court must consider both the child's necessity and the *father's ability to pay*. *McEachern*, 605 So. 2d at 813; *Cupit v. Brooks*, 79 So. 2d 478, 479 (Miss. 1955).

Mr. Anthony testified that he earned no income for the year 1994, and other than an FHA loan he had applied for following his bankruptcy, he had no expectations of income for the ensuing year. The loan proceeds had not been received at the time of the divorce hearing, nor were any other amounts received by him at that time which the chancellor included in Mr. Anthony's assets, estate, or available sources of money. Mr. Anthony had no salary, wages, or other income to support or substantiate a "present ability to pay child support" on January 18, 1995. Therefore, any amounts testified about during the hearing as to his income and such amounts that were stated in the chancellor's bench opinion, were speculative at most.

If this Court considers, however, the loan proceeds from the FHA, which seem to be the only apparent certainty of monies to be received, Mr. Anthony will have only $975.00 monthly, less his federal and state tax obligation and expenses to meet this support obligation. These expenses include necessary living expenses of room and board of $200.00, truck expense of $250.00 for operating his farm business, and his own medical expenses of $250.00 to treat his asthmatic condition (totaling $700.00). This leaves Mr. Anthony approximately $275.00 (before taxes) to pay child support to his other child Austin and the $400.00 child support and medical expenses ordered by the chancellor. The simplest arithmetical calculations should tell us that Mr. Anthony's expected income from the FHA loan, together with any other amounts speculated upon by the chancellor, leaves Mr. Anthony with nothing, in fact a deficit, with which to pay expenses for which his loan was made. Furthermore,

such simple calculation tells us that Mr. Anthony is paying 41% of his gross income, not adjusted gross income (which would be even greater), a percentage which has been criticized by our supreme court as an unreasonable difference between the statutory percentage of 14% for one child (or 20% for two children divided by two (2)) and the amount awarded. *Dunn v. Dunn*, 609 So. 2d 1277, 1285-86 (Miss. 1992). Moreover, post divorce analysis will surely reveal that because the child will be in the custody of Mrs. Anthony, she will enjoy two tax exemptions, thus lowering her income tax liability and increasing her adjusted gross income, while Mr. Anthony will suffer a loss of a dependent tax exemption, thus increasing his tax liability and lowering his adjusted income. This will further increase Mr. Anthony's inability to pay his child support and other debts, and in my opinion, the chancellor should have considered this in his calculations and findings.

Additionally, I do not believe the chancellor satisfied sections 43-19-101 and 43-19-103 of the Mississippi Code. Section 43-19-103 provides as follows:

> The rebuttable presumption as to the justness or appropriateness of an award or modification of a child support award in this state, based upon the guidelines established by Section 43-19-101, may be overcome by a judicial or administrative body awarding or modifying the child support award *by making a written finding or specific finding on the record* that the application of the guidelines would be unjust or inappropriate in a particular case as determined according to the following criteria.

Miss. Code Ann. § 43-19-103 (1972). Nine criteria are then listed, including total available assets of the obligor and any other adjustments which are needed to achieve an equitable result which may include, but not be limited to, a reasonable and necessary existing expense or debt. The chancellor, in my opinion, did not plainly state the necessary language to rebut the statutory presumption.

Additionally, section 43-19-101 provides:

> The amount of "adjusted gross income" as that term is used in subsection (1) of this section shall be calculated as follows:
>
> > (a) Determine gross income from all potential sources that may reasonably be expected to be available to the absent parent including, but not limited to, the following: wages and salary income; income from self employment; income from commissions; income from investments, including dividends, interest income and income on any trust account or property; absent parent's portion of any joint income of both parents; workers' compensation, disability, unemployment, annuity and retirement benefits, including an individual retirement account (IRA); any other payments made by any person, private entity, federal or state government or any unit of local government; alimony; any income earned from an interest in or from inherited property; any other form of earned income; and gross income shall exclude any monetary benefits derived from a second household, such as income of the absent parent's current spouse;

(b) *Subtract the following legally mandated deductions:*

(i) Federal, state and local taxes . . . ;

(ii) Social security contributions;

(iii) Retirement and disability contribution except any voluntary retirement and disability contributions;

(c) If the absent parent is subject to an existing court order for another child or children, subtract the amount of that court-ordered support;

. . . .

(e) Compute the total annual amount of adjusted gross income based on paragraphs (a) through (d), then divide this amount by twelve (12) to obtain the monthly amount of adjusted gross income.

Miss. Code Ann. § 43-19-101 (1972) (emphasis added). None of the deductions from Mr. Anthony's gross income such as: (1) federal, state and local taxes, (2) social security contributions, and (3) the amount of court-ordered support for another child, were apparently considered by the chancellor, and none of which was mentioned in his findings which would remove the award from the guidelines embraced within section 43-19-101.

The guidelines require the fact finder to subtract certain expenses from the gross income figure and divide it by twelve to determine the amount of monthly adjusted gross income. *Draper*, 658 So. 2d at 870. He may then make a specific finding on the record, after considering those matters contained in section 43-19-103, that the guidelines do not apply and make an appropriate award, but he must consider other additional factors when finally making that award. *Id.* The chancellor cannot make a carte blanche, vague finding on the record. He must make a *specific finding on the record that the application of the guidelines would be unjust or inappropriate* and make his findings according to the criteria set out in section 43-19-103. *Johnson v. Johnson*, 650 So. 2d 1281, 1288 (Miss. 1994).

The record in the case sub judice clearly shows that Mr. Anthony is not in good health, contrary to the chancellor's findings, and that he has necessary living expenses. A standard of living beyond the father's financial ability to provide cannot be imposed upon him. *McEachern*, 605 So. 2d at 813. This Court must consider that the father, not the grandmother, is required to pay child support. Any other assumption is not only impractical and unreasonable, but not the law.

In most divorce cases there is not enough money to sustain two households. That is obviously the situation in the case at bar. Mrs. Anthony needs all the income from both parties, but that is consciously not the law. Mr. Anthony needs all of the income from both parties, but the same law applies to him. Borrowing the words from the supreme court of our state when it opined in the *Tilley* case concerning the award of alimony to the wife, the court held:

'[T]he [C]hancellor should consider the reasonable needs of the wife and the right of the

> husband to lead as normal a life as possible with a decent standard of living.' Considering that admonishment, this judgment seems unsettling. Certainly Joyce and the children deserve to enjoy a nice standard of living with many amenities of life. But the blunt truth is that now two families will have to live on the same salaries that once supported one family. There is no way the standard of living can remain as high as it once might have been. The other problem is Richard Tilley's debt burden.

Tilley v. Tilley, 610 So. 2d 348, 353-54 (Miss. 1992) (citations omitted).

Mr. Anthony depends on farming for his living. His testimony was that he had farmed all his life, that this was all he knew and that this is what he was doing when he married Mrs. Anthony. Mrs. Anthony obviously knew all about Mr. Anthony's income and ability to earn when she married him.

Based upon this writer's calculations, it is wholly unreasonable to expect Mr. Anthony to survive after he has paid the amounts ordered by the chancellor. Prior to the divorce, the parties lived under one roof as a family with a total spendable income of $1,942.00 (Mr. Anthony's income of $975.00 including his taxes plus $967.00 from Mrs. Anthony's income per month). This would allocate $647.33 for each person in the household. Following the divorce, Mrs. Anthony and the child will have a total of $1,367.00, including the $400.00 child support, or $683.50 each, and Mr. Anthony will have only $575.00 as spendable income from which to pay all of his debts. For this Court to affirm such an award would not only be a gross injustice, but would condone divorces. Moreover, affirmance will allow one spouse to fare better financially after divorce than during the marriage. I believe the result of this holding is contrary to the intent of this Court and the chancery courts of Mississippi. Indeed, to allow this support award to stand will immediately place Mr. Anthony in a contempt of court posture knowing that he has no financial ability with which to purge himself therefrom, and no funds with which to endure litigation.

I question whether the chancellor utilized the correct numerical figures in calculating Mr. Anthony's income. I further believe that the chancellor's findings were unjust and constituted an abuse of discretion and manifest error. I would reverse the judgment in this case as to the award of child support, and remand the same to the chancery court for a determination of Mr. Anthony's present ability to pay, allowing the chancellor to consider, on rehearing, any relevant circumstances that have taken place since the judgment appealed from was entered.

THOMAS, P.J., COLEMAN, AND SOUTHWICK, JJ., JOIN THIS SEPARATE WRITTEN OPINION.