

**IN THE COURT OF APPEALS 08/20/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CA-00182 COA**

**ANGELA ANDERSON SIMPSON**

**APPELLANT**

**v.**

**ROBERT BRADLEY SIMPSON**

**APPELLEE**

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

TRIAL JUDGE: HON. DON GRIST

COURT FROM WHICH APPEALED: CALHOUN COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT:

GRADY F. TOLLISON

BARBARA MILLER TUTOR

TRENT L. HOWELL

ATTORNEYS FOR APPELLEE:

EDWIN H. ROBERTS, JR.

PAUL MOORE, JR.

NATURE OF THE CASE: CIVIL - CHILD CUSTODY, CHILD SUPPORT, DIVORCE,  
SEPARATE MAINTENANCE.

TRIAL COURT DISPOSITION: AWARD OF CUSTODY TO FATHER, SUPPORT ORDERED  
FROM MOTHER, DIVORCE DENIED, SEPARATE MAINTENANCE DENIED.

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

BARBER, J., FOR THE COURT:

This case involves an action for separate maintenance, custody of the minor daughter, and child support brought by Angela Anderson Simpson in the Chancery Court of Calhoun County. Angela's husband, Robert Bradley Simpson, filed a counterclaim for divorce, custody, and child support. The final decree denied Angela's request for separate maintenance, denied Bradley's counterclaim for divorce, granted primary physical and legal custody of the minor child to Bradley, with restricted visitation rights to Angela. Angela was ordered to pay child support, and both parties' requests for attorneys' fees were denied. Angela appeals from the final decree and the order denying Angela's motion for reconsideration or, in the alternative a new trial.

On April 4-5, 1994, the Honorable Don Grist presided over this trial. On November 17, 1994, Angela Simpson filed a writ of mandamus in the Mississippi Supreme Court, Cause No. 94-M-1166. On November 23, 1994, the chancellor's opinion was filed with the Calhoun County Chancery Court. Thereafter, on December 28, 1994, the supreme court, pursuant to a motion by Angela, entered its order in Cause No. 94-M-1166, dismissing her writ of mandamus as moot. The Chancery Court of Calhoun County rendered its final decree on January 6, 1995.

Angela argues that the chancellor erred in awarding custody of the parties' minor daughter to Bradley instead of to her, or in the alternative, that the court erred in placing restrictions upon her visitation with the child. Angela further argues that the trial chancellor erred in denying separate maintenance to her, and in declining to award attorney's fees to her.

## FACTS

Angela and Bradley were married on November 19, 1990. At the time of their marriage, both Angela and Bradley were nineteen years old, and Angela was two months pregnant. Angela had graduated from high school and had taken one computer course. Bradley had a high school diploma and attended community college for one year. Bradley's parents were opposed to the marriage.

After the wedding, the couple moved to Senatobia. Angela had stopped working about a month prior to the wedding and the move to Senatobia. Although she considered returning to work after the wedding, Bradley wanted her to stay at home until after the baby was born.

In May 1991, the couple moved to Yalobusha County. The next month, Bradley began working at Kellwood in Calhoun City, and the child was born on June 12, 1991. At trial, Angela testified that Bradley wanted her to stay at home with the baby rather than return to work. Bradley denied this testimony. Angela, however, did remain at home with the full responsibility of caring for the child.

In July 1993, Angela began to experience digestive problems and chronic diarrhea. At the time, she was also taking medication for a thyroid condition. Her physical condition, possibly aggravated by the medication, culminated in an unfortunate incident at a local ballpark where Angela soiled her clothing. Angela's mother-in-law, Kathy Simpson, informed her that she (the mother-in-law) had

experienced similar problems a few years prior and that these problems were determined to be caused by depression. At Bradley and his mother's urging, Angela sought treatment from the same physician who had treated Bradley's mother. She voluntarily committed herself to a hospital for treatment of depression. This move came as quite a shock to Angela's family. Angela's mother, Delores Anderson, who saw Angela almost every day, testified that she did not observe Angela being depressed prior to this incident. Angela's grandmother also testified that she was not aware that Angela was depressed despite the fact that she spoke to her almost every day on the telephone.

Bradley stated that the incident at the ballpark had embarrassed and humiliated him and his family. He admitted that he based his complaint for divorce on the ground of cruel and inhuman treatment by Angela upon this one embarrassing incident. Bradley testified during the trial that he too had experienced stomach problems for which he had to take Pepto-Bismol, but he had never "s\_\_\_t all over" himself.

Angela was discharged from the hospital after seven days. During her stay, her doctors decided that she should be taken off the thyroid medication. There was doubt that this medication was ever needed. Angela testified that she felt much better after this hospitalization.

After Angela had been home approximately thirty-seven days, Bradley told her he thought she needed to go back to the psychiatric hospital. Thereafter, he took her back to Memphis on August 23, 1993. It is uncontroverted that Bradley told Angela that if she did not go back to the hospital, he would leave her. Even though her doctor told her she could return home shortly after being admitted to the hospital the second time, Angela remained hospitalized because Bradley told her he would leave her if she did not stay. She remained hospitalized the second time for approximately eleven days.

On the Sunday after he took Angela back to the hospital for the second time, Bradley packed up his and his daughter's belongings and moved out of the marital home and in with his parents. During the interim between Angela's first and second hospitalization, Bradley had sought legal advice about divorcing Angela and had also discussed this possibility with his mother. Upon being released from the hospital, Angela discovered that Bradley had moved out and had taken their daughter with him. Bradley testified that he left because Angela did not appear to be any better. He based his conclusion on the fact that she had "gained a lot more weight" and she just did not "look happy." Bradley also testified that because he was so concerned about Angela's depression, he had experienced some difficulty concentrating at work and was demoted as a result.

Although Bradley testified that Angela suffered from "major" depression, Angela testified that her doctor advised her that she only suffered from "minor" depression and had placed her on the mildest and most commonly prescribed drug for minor depression, Prozac. At the time of trial, she was taking this medication once a day. Angela further testified that the medication she was taking did not make her drowsy nor appear to produce any side effects. Members of Angela's family also testified that they could discern no apparent side effects from the medication Angela was taking. Additionally, at the time of trial, Angela was returning to see her psychiatrist once every three months; by January 1995, this had been reduced to once every six months. Angela further testified that she would have been released altogether from her doctor's care except for the fact that she was now involved in a custody battle over her young daughter.

Phillip G. Cooker, Ph.D., a psychologist, testified as an expert during the trial. Dr. Cooker was aware

that Angela was being treated for depression by Dr. Lathram and indicated that he obtained a release from Angela in order to obtain information from Dr. Lathram in order to make his evaluation. Based upon his examination of Angela, it was Dr. Cooker's opinion that Angela was not emotionally unstable and not unfit to have custody of her child. He also found that Angela exhibited traits which are considered to be traditional "female" or "family" characteristics. Dr. Cooker concluded that Angela was emotionally stable. It was his opinion that there was no reason why Angela could not care for her child or for herself and that she posed no danger to her child. He ascertained no evidence which would lead him to believe that Angela had done anything which was harmful to the child or not in the child's best interest. He had no doubt that Angela could cope with the day to day stress of taking care of and raising her child. He further testified that Angela had demonstrated, in positive and responsible ways, her abilities to perform these duties.

The affidavit of Dr. Marvin Lathram, Jr., Angela's treating psychiatrist, was submitted to the lower court with Angela's motion for reconsideration. Dr. Lathram's sworn statement was that Angela had been his patient since July 9, 1993. He stated that Angela only suffered from chronic depression which had not escalated to major or severe depression and it was not a debilitating depression. He further stated that Angela is not mentally ill and that her condition has continued to improve since she was discharged from the hospital in September of 1993. He stated that it was his opinion, within a reasonable degree of medical certainty, that Angela Simpson is mentally and emotionally stable, and poses no threat to the safety and well being of her child if awarded custody. Moreover, he stated that he detected nothing in Angela's mental or emotional condition which would prevent her from providing primary care for her daughter.

It was uncontroverted that after the couple married, Bradley provided the sole support for Angela until their separation in August 1993. He provided some support for her from then until December 1993, when he discontinued all support. He does not intend to provide any further support for Angela. Furthermore, the chancellor did not grant his counterclaim for divorce.

It was also uncontroverted that after the child was removed from Angela's care, she was put into a day care environment during the day. This resulted in the child becoming ill more often. Since the couple's separation, the child has begun using some obscene words when she becomes upset. Angela, Bradley, and both grandmothers testified that the child is also experiencing separation anxiety when she is returned to her father after the weekend visits with her mother.

## ANALYSIS

### STANDARD OF REVIEW

If substantial evidence in the record supports a chancellor's judgment, his findings will not be disturbed upon appeal. *Morreale v. Morreale*, 646 So. 2d 1264, 1266 (Miss. 1994). Stated another way, on appeal we are required to respect the findings of fact made by a chancellor if those findings of fact are supported by credible evidence and are not manifestly wrong. *Brennan v. Brennan*, 638 So. 2d 1320, 1323 (Miss. 1994). In divorce or domestic cases, this is particularly true. *Id.* The word "manifest," as used in this context, requires that a chancellor's findings of fact must be unmistakably, clearly, plainly, or indisputably wrong before being disturbed upon appeal. *Brennan*, 638 So. 2d at 1323.

## I. DID THE CHANCELLOR ERR IN AWARDING CUSTODY OF THE PARTIES' MINOR FEMALE CHILD TO THE FATHER INSTEAD OF TO THE MOTHER?

In *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983), the court listed several factors chancellors should consider when making custody decisions, reminding parties and chancellors that the "best interest and welfare of the child" remains the "polestar" consideration. The factors announced by the court in that case are: age, health and sex of the child; continuity of care of child prior to parents' separation; which parent has the best parenting skills and the willingness and capacity to provide primary child care; parents' employment and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; home, school and community record of the child; preference of the child (if applicable); stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship. *Id.*

In his opinion, the chancellor specifically found two of the factors which must be considered in child custody cases weighed equally between Angela and Bradley, i.e., that their daughter has attachments to both parents, and that both parents were approximately the same age (early twenties). The chancellor noted these "critical" differences between the parties: parenting skills and ability to provide primary care and stability of home environment.

The best interests and welfare of the child must be the primary consideration in this matter. A re-analysis of the *Albright* factors would indicate that the scales are tipped in favor of granting Angela custody of their child.

The trial judge makes no mention that the age and gender of their daughter favors Angela having custody of her. The chancellor also ignored the fact that Angela had the primary continuity of care for the child from the time of her birth until the parties' separation. He failed to take note of the fact that in Bradley's counterclaim for divorce he admitted that he had moved in with his parents so that his mother could help take care of his daughter, in essence admitting he lacked the ability to provide the primary care for her. The judge discounted Bradley's employment and how the fact that he had to be at work at 6:00 a.m. affected the child. He failed to note that the primary source of help for Bradley with the child was Bradley's mother, Kathy, *who admittedly had suffered previously from the very same ailment which formed the basis of the chancellor's denial of custody to Angela, depression*. He makes no mention of the very strong emotional ties between Angela and her daughter, which were acknowledged by every witness including Bradley and his mother.

The substantial weight of the credible evidence presented does not support the trial judge's finding that Angela "admittedly suffers from severe mental illness which has many physical manifestations," and from "severe debilitating depression." Angela repeatedly denied that she suffered from "major" depression. She testified that her doctor never told her that she suffered from major depression, that he considered her depression to be "minor". Searching the record, one cannot find sufficient credible evidence adduced at trial which indicated that Angela suffered from "severe mental illness" or "severe

debilitating depression." Psychologist Phillip G. Cooker, testified at the trial that his opinion, which was based upon a reasonable degree of professional certainty after thoroughly examining and testing Angela, was that Angela does not suffer from mental illness, and that she is emotionally and mentally stable. Dr. Cooker found nothing, mentally or emotionally, which would prevent Angela from providing primary custodial care for her child.

The trial judge does not mention in his findings of fact and conclusions of law the testimony by Dr. Cooker, which was the only medical opinion testimony submitted and which ought to be given great deference by the court. Even in the face of additional sworn medical testimony presented to the court in support of Angela's post-trial motion, the chancellor neither granted her a hearing on the motion nor a favorable disposition on the merits.

Granted, expert's opinions are ordinarily advisory and not binding upon courts in this State. *Dickey v. Parham*, 295 So. 2d 284, 286 (Miss. 1974); *Davidson v. Rogers*, 431 So. 2d 483, 485 (Miss. 1983). However, when testimony is presented "which is not improbable or unreasonable the trial court should accept such evidence unless it is contradicted." *Davidson*, 431 So. 2d at 485. In this case, the only evidence at trial controverting the medical opinion presented by Dr. Cooker was lay testimony by Bradley. Bradley testified that Angela would allow her hair to become oily between washings, would sometimes wear the same clothes two days in a row, and would not maintain their mobile home in an orderly fashion. Bradley's testimony, which is subject to bias, significantly, was not corroborated by his mother. Moreover, it was directly contradicted by Angela's mother and grandmother.

The chancellor placed great emphasis on Angela's "admittance" that she does not know if she might lapse into depression again. However, the circumstances under which Angela admitted this must be considered. During cross-examination, she admitted that she did not know if and when she might lapse into depression again. For Angela to have testified that she would never lapse into depression again would, at the very least, test her credibility.

The chancellor also found that Angela had been hospitalized twice for "extended" periods of time due to her depression. The substantial weight of the evidence at the trial simply does not support this. Angela was hospitalized twice for depression, the first time for a period of approximately eight days from July 9, 1993 to July 17, 1993. She was hospitalized a second time from August 23, 1993 through September 3, 1993 for a period of approximately eleven days. Angela entered the hospital both times voluntarily, although Bradley threatened that he would leave her if she did not return to the hospital on August 23. Angela has not required further hospitalization since September 1993 and her condition continues to improve.

The chancellor's finding that Angela had failed to care for herself, the marital home, and the child, and that she exhibited "erratic" behavior upsetting to the minor child are not supported by credible evidence in the record. The only testimony adduced at trial that Angela had failed to care for herself and her home came from testimony offered by Bradley. Angela, her mother, and her grandmother all testified that she did care for herself and her home. Even Bradley's mother's testimony did not corroborate Bradley's testimony in this regard -- she never gave one statement during her entire trial testimony which indicated that she had any personal knowledge that Angela had failed to care for herself or her home. The record is devoid of any credible evidence that Angela failed to properly care

for her daughter. Even Bradley admitted that Angela loved, fed, bathed, and generally took care of their child. The evidence adduced at trial showed that it was Angela who had been the primary child care provider for their daughter from the time she was born until the separation. The chancellor completely failed to take this into account, not even mentioning it as one of the *Albright* factors weighing heavily in Angela's favor.

The chancellor made reference to what he termed "erratic behavior" by Angela in awarding custody to Bradley. One can assume that perhaps the court was referring in this context to the incident at the ballpark when Angela had the accident during a bout with her digestive system and quite naturally became distressed. This type of incident occurred one time and was the result of a medical condition. In addition, the incident occurred before Angela received medical treatment and began taking the medication Dr. Lathram prescribed. Possibly, the chancellor was referring to Bradley's allegations that Angela cried in front of their daughter when mentioning his finding that she exhibited "erratic behavior." Angela admitted that she had possibly cried in front of her daughter a few times but denied ever having "pitched a fit" in front of her. If our judicial system has reached the point where every mother who has allowed her child to see her cry a few times can be accused of exhibiting "erratic" behavior which might be used against her in a custody hearing, the system, has, indeed, reached a sad state.

Before the chancellor made his decision in this matter, a stipulation was filed with the lower court and an order entered allowing the evidence to be supplemented with the fact that Angela had obtained a full-time job at Kellwood. That fact was not noted by the chancellor in his findings of fact.

The substantial weight of the evidence in this case simply does not support the chancellor's findings regarding Angela's parenting skills and her ability to provide the necessary and proper primary child care.

Furthermore, the substantial credible evidence in this case does not support the chancellor's finding that Bradley's home environment is more "stable" than Angela's. In making this decision, the chancellor again noted that Angela admittedly "might lapse into depression at any time." The court's error in relying upon this as a factor in its analysis has been previously addressed. The court also noted that Angela remained under "substantial medication," but the evidence at trial does not support this finding. At the time of the trial and in January 1995, Angela was taking two BuSpars and one Prozac daily. Her medical dosage had been decreased by one-half since she was first hospitalized in July 1993.

In his analysis on home environment, the chancellor found that even though Angela had the support of her mother and grandmother, Bradley, with his family's broad support, could provide the more stable and desirable home environment. Ironically, Bradley's main family support is his mother, Kathy Simpson, who testified at length during the trial about how it was she who recommended Angela see Dr. Lathram because Dr. Lathram had been her treating doctor when she had to be hospitalized for twelve days for depression some eight years prior to the trial. In other words, the chancellor found that Angela, because of her depression, did not possess the requisite parenting skills and the ability to provide and care for the child, and did not have the necessary home stability to have primary custody of her, the daughter for whom she cared since birth. In so doing, he gave custody to Bradley, whose main source of support was his mother, who admittedly in the past suffered from the *very same*

*illness.*

Angela informed the chancellor in her motion for reconsideration that since the time of the trial Bradley had moved out of his parents' house and into an apartment. He has to be at work at 6:00 A.M., thus their daughter is forced to get up extremely early every morning in order to be driven to Bradley's parents' home so that they might later take her to a day care center. Angela has as much, if not more, "broad family support." She lives with her grandmother. Her mother sees her nearly every day. The substantial weight of the evidence simply does not support the chancellor's finding that Bradley has the most "stable" home environment. Finally, her medical condition, chronic depression, is one that is extremely commonplace in our society today, and is a medical condition for which many people receive treatment while living normal, productive lives.

Given the above, we reverse the decision of the chancellor in granting custody to Bradley.

## II. DID THE CHANCELLOR ERR IN DENYING SEPARATE MAINTENANCE TO ANGELA A. SIMPSON?

In denying Angela's request for separate maintenance, the chancellor found that her depression, her "erratic behavior," and her failure to perform wifely duties contributed to the separation. Courts are given the power to award separate maintenance based on separation without fault on the part of the spouse making the claim and willful abandonment by the other spouse with refusal to support the abandoned spouse. *Thompson v. Thompson*, 527 So. 2d 617, 621 (Miss. 1988). A decree of separate maintenance orders that the husband resume cohabitating with his wife or provide for her until they are reconciled. *Id.*

Bradley admitted that he left Angela because of her depression. By its ruling, the lower court is placing blame or "fault" upon Angela for actions which were not of her own doing, but for actions produced by a medical condition. Angela did suffer from depression, an illness. This illness was not her fault. Moreover, Angela voluntarily sought medical treatment, with the encouragement of Bradley and his mother, for her condition in an effort to recover. According to her doctor, and the expert presented at trial, Angela was successful in her efforts.

Bradley testified that Angela had "embarrassed" and "humiliated" him when she soiled herself at the ballpark. This same incident was the source of embarrassment for his mother in the presence of her friends and acquaintances. Bradley admitted that he sought legal advice regarding a divorce in July 1993. Afterward, he told Angela that if she did not return to the hospital a second time, he would leave her. Then, he removed himself and their daughter from the marital home before Angela returned home from the hospital in September. We find that the facts clearly support the conclusion that Bradley willfully abandoned Angela. Additionally, Bradley announced to the court at trial that he had no intention of returning to her or of supporting her.

A wife does not have to be totally blameless in order to be awarded separate maintenance. *Daigle v. Daigle*, 626 So. 2d 140, 145 (Miss. 1993). The proof does have to show that "misconduct" on her



part materially led to the separation. *Id.* In such a finding, her fault would be equal to or greater than that of the husband or that her fault was not sufficient to justify the husband leaving the domicile. *Robinson v. Robinson*, 554 So. 2d 300, 304 (Miss. 1989). The proof showed that Bradley no longer wanted to live with Angela, who had become "repulsive" and "embarrassing" to him. Proof of any misconduct on the part of Angela was wholly lacking in this case. Bradley's testimony that she was a poor housekeeper, which was disputed by other witnesses, is certainly insufficient to justify Bradley leaving the domicile. The court's finding that Angela exhibited conduct which amounted to such fault so as to deny her request for separate maintenance is not supported by the substantial weight of the evidence. The denial of separated maintenance to Angela is reversed and remanded for determination.

### III. DID THE CHANCELLOR ERR IN DENYING AN AWARD OF ATTORNEY'S FEES TO ANGELA ANDERSON SIMPSON?

Chancellors are generally given the discretion as to whether or not attorney's fees should be awarded in domestic cases, assuming the "appropriate standards" are followed. *Daigle*, 626 So. 2d at 147. In *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982), the court announced factors to consider in determining if the amount of attorney's fees requested is appropriate. If it is proved that a party is unable to pay her attorney's fees, then an award of such is appropriate. *Daigle*, 626 So. 2d at 147.

The evidence at trial showed that Angela had no assets available to her at the time of trial from which to pay attorney's fees. She held no interest in any assets other than a one-half interest in the couple's mobile home and her automobile. She had no bank account. At the time of trial, Angela was not employed, and it was shown that her mother and grandmother provided the funds to pursue her lawsuit to obtain custody.

Because the chancellor failed to address these facts and further failed to apply the *McKee* factors in his determination to deny an award of attorney's fees to Angela, we remand for a finding on this issue as well.

**THE JUDGMENT OF THE CHANCERY COURT OF CALHOUN COUNTY IS REVERSED AS TO THE AWARD OF CUSTODY OF THE MINOR CHILD TO THE FATHER AND AS TO THE DENIAL OF AN AWARD OF SEPARATE MAINTENANCE TO ANGELA ANDERSON SIMPSON. WE REMAND THIS CASE FOR A FINDING ON THE ISSUE OF AN AWARD OF ATTORNEY'S FEES IN ACCORDANCE WITH THIS OPINION AND FOR A DETERMINATION OF THE AMOUNT OF SEPARATE MAINTENANCE AND CHILD SUPPORT TO BE AWARDED TO ANGELA. COSTS ARE TAXED AGAINST THE APPELLEE.**

**BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. FRAISER, C.J., CONCURS IN RESULT ONLY.**

