IN THE COURT OF APPEALS

7/15/97

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00197 COA

WARRENE (PAYNE) BROWN APPELLANT

v.

PAUL CHRISTMAN BROWN, JR. APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. DENNIS M. BAKER

COURT FROM WHICH APPEALED: DESOTO COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT: DRUE D. BIRMINGHAM, JR.

ATTORNEY FOR APPELLEE: ELIZABETH BRENT TREADWAY

NATURE OF THE CASE: DIVORCE

TRIAL COURT DISPOSITION: APPELLEE AWARDED PRIMARY PHYSICAL CUSTODY OF MINOR CHILD AND APPELLANT WAS ORDERED TO PAY CHILD SUPPORT

MANDATE ISSUED: 8/5/97

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

McMILLIN, P.J., FOR THE COURT:

The Chancery Court of DeSoto County granted Warrene Brown a divorce upon finding that she had been subjected to cruel and inhuman treatment at the hands of her husband, Paul Brown. Mrs. Brown has appealed, claiming error in the chancellor's rulings concerning child custody and support, and in the equitable division of marital assets.

I.

Facts

Paul and Warrene Brown were married in 1976. At the time that they were married, Mrs. Brown was twenty-four years old and Mr. Brown was fifty-one. Their marriage produced three daughters; seventeen year old Heather, fifteen year old Rebecca, and eight year old Mary Ellen.

During most of the marriage, Mrs. Brown devoted her efforts to being a mother and a homemaker. A few years before their separation, however, she returned to school and received her nursing degree. She had been working for three months prior to the divorce and was earning a gross monthly salary of $2,332.

Mr. Brown is a professional engineer. At the time of trial, he was retired from a position with the United States Internal Revenue Service and was receiving federal retirement benefits in excess of $2, 000 per month. He was drawing, in addition, approximately $696 a month in Social Security benefits. Mr. Brown also was working part-time as a consultant, earning in the range of $1,000 a month.

Mrs. Brown was awarded custody of the two oldest daughters; however, the chancellor awarded custody of the youngest daughter to Mr. Brown. The chancellor granted Mrs. Brown exclusive use and possession of the family residence until the middle daughter attains the age of eighteen. At that time, either party may force a sale of the house with the proceeds to be divided between the parties. The court imposed a support obligation on Mr. Brown for the two older children, and Mrs. Brown

was ordered to pay $350 per month in child support for the youngest daughter. Mrs. Brown did not receive any interest in Mr. Brown's pension or certain investments acquired during the marriage, including a certificate of deposit of about $4,800, and stock having an estimated value in the range of $2,200. The proof also showed that Mr. Brown had bought a separate residence for himself after the parties separated, having a value of approximately $58,000, but subject to a mortgage debt of $52, 500. The chancellor left title to that property undisturbed in Mr. Brown, and Mrs. Brown claims on appeal that she should have been given some interest in that property.

II.

Scope of Review

This court has a limited scope of review of the chancellor's decision in matters concerning the dissolution of a marriage. We are without authority to disturb the chancellor's determinations unless we find that he has committed a manifest abuse of discretion or has erroneously applied the relevant law. *Ethridge v. Ethridge,* 648 So. 2d 1143, 1145-46 (Miss. 1995). We are not called upon or permitted to substitute our collective judgment for that of the chancellor. *Richardson v. Riley,* 355 So. 2d 667, 668-69 (Miss. 1978). A conclusion that we might have decided the case differently, standing alone, is not a basis to disturb the judgment. *Id.*

With that limited scope of review in mind, we proceed to consider the issues presented in this appeal.

III.

Child Custody

Mrs. Brown asserts that the chancellor erred in awarding physical custody of their eight year old daughter, Mary Ellen, to Mr. Brown. She points to Mr. Brown's age -- seventy years old at the time of trial, and offered evidence that he has a bad relationship with the two oldest children. She also claims that Mr. Brown's consulting job requires him frequently to travel out of town. Lastly, she submits that it is against Mary Ellen's best interest to be separated from her sisters.

In reviewing an award of child custody there are a number of factors which the chancellor should properly consider:

1. Age, health and sex of the child; 2. Which parent has had the continuity of care prior to the separation; 3. Which parent has the best parenting skills and willingness and capacity to provide primary child care; 4. The employment of the parent and responsibilities of that employment; 5. The physical and mental health and age of the parents; 6. Emotional ties of parent and child; 7. Moral fitness of parents; 8. The home, school, and community record of the child; 9. The preference of the child at the age sufficient to express a preference by law; 10. Stability of home environment and employment of each parent; 11. Other factors relevant to the parent child relationship.

Albright v. Albright, 437 So. 2d 1003, 105 (Miss. 1983).

As is often the case, the proof on these various factors did not all line up in favor of one parent over the other. It, therefore, became the difficult but necessary task of the chancellor to weigh the evidence and attempt to arrive at a conclusion that, on balance, appeared the most likely to advance the best interest of the affected child.

The disparity in the ages of the parties would seem to weigh in Mrs. Brown's favor under *Albright.* However, her job as a nurse requires her to work the night-shift; and as a result, she is away from home five nights a week, during which time she proposed to leave this eight-year-old child in the care of her older sisters. The chancellor found that, in the past, Mrs. Brown had been an overly-permissive parent, frequently allowing her daughters to have male visitors with no adult supervision. The proof showed that both the older daughters were teenaged unwed mothers. The chancellor concluded that Mrs. Brown's permissiveness may have contributed to that situation, and expressed concern about leaving the younger daughter to be subjected to the same influences as she matured. That would appear to be a legitimate concern, and we do not find such reasoning to be an abuse of the chancellor's discretion.

The chancellor found that Mr. Brown, though seventy years old, appeared to be young beyond his years both physically and mentally. Mr. Brown testified that he had recently passed a thorough physical examination as a part of pursuing a license to pilot airplanes. Though admitting to be a strict disciplinarian, Mr. Brown claimed to have a good and loving relationship with Mary Ellen. The less-than-ideal relations Mr. Brown has with the older daughters appeared, to the chancellor's satisfaction, to be based on his attempts to restrain the behavior that ultimately led to their present predicament, rather than from any fault or character failing on Mr. Brown's part. Mr. Brown's job, unlike Mrs. Brown's, allows him to be home every night, and he testified that he would, if given custody of the youngest child, forego any consulting assignments that would require frequent overnight travel.

The best interest of the child remains the polestar consideration of the court. *Riley v. Doerner,* 677 So. 2d 740, 744 (Miss. 1996). Though Mr. Brown is seventy, it appears that his job and lifestyle provide him with the opportunity to devote sufficient time to the care of the youngest daughter. Mrs. Brown lives nearby, has liberal visitation, and will be able to play an important role in her daughter's life. The chancellor appears to have given due consideration to the various factors that should properly guide him in making this difficult decision. His analysis and conclusions seem well-reasoned and the result of mature consideration. We cannot say that the chancellor manifestly erred in awarding custody of Mary Ellen to Mr. Brown, and we, therefore, affirm his decision on this issue.

IV.

Child Support

Mrs. Brown's next assignment of error is that the court erred in ordering her to pay $350 per month in child support.

The child support guidelines found in section 43-19-101 of the Mississippi Code suggest that, when one child is involved, fourteen percent of the non-custodial parent's adjusted gross income is a presumptively proper amount of support. *See* Miss. Code Ann. § 43-19-101(1)(1972). The statute

further states that the guidelines ought to apply unless the court makes findings, either in writing or on the record, that applying the percentages would be unjust or inappropriate because of considerations special to that case. Miss. Code Ann. § 43-19-101(2) (1972). The Mississippi Supreme Court has held that, when the percentage guidelines are ignored, the failure to make appropriate findings regarding the reason for the departure from the guidelines is reversible error. *See Johnson v. Johnson,* 650 So. 2d 1281, 1288 (Miss. 1994).

In this case, Mrs. Brown's adjusted gross income is about $21,600. Applying the guidelines, Mrs. Brown would owe $252 per month in child support for the child. The chancellor did not make any findings in the record as to why he ordered Mrs. Brown to pay nearly $100 per month over the statutorily-indicated amount. His reasoning appeared to be based on the fact that Mrs. Brown, in requesting custody of all three daughters, had asked for $350 per month per child for support. We do not think that such a request, in all likelihood based upon considerations of Mr. Brown's superior earning ability, amounts to a stipulation by Mrs. Brown that $350 would be a proper amount for her to pay for one child in the event that she lost the custody adjudication. This analysis by the chancellor, supported by nothing more, is not adequate to justify such a significant deviation from the percentage guidelines. *See* Miss. Code Ann. § 43-19-103 (1972). As a result, we find that the chancellor committed an abuse of discretion, and we remand this issue for a redetermination of Mrs. Brown's support obligations taking into account the statutory guidelines as well as those factors established by case law. *See, e.g., Brabham v. Brabham,* 226 Miss. 165, 84 So. 2d 147, 153 (1955).

V.

Equitable Distribution

As her final assignment of error, Mrs. Brown asserts that the chancellor erred in permitting Mr. Brown to retain an ownership interest in the marital home and in denying her any interest in Mr. Brown's pension, new home, and other investment assets.

At trial, Mrs. Brown stipulated that she was willing to waive any claim to Mr. Brown's federal pension and new residence if the chancellor would award her outright title to the marital home. In his findings of fact, the chancellor seemed to indicate that Mrs. Brown had testified, without condition, that she did not want any portion of Mr. Brown's pension benefits and that she would quitclaim any interest she had in Mr. Brown's new home. As a result, the chancellor concluded that there was no issue before the court with respect to these assets, and refused to award Mrs. Brown any interest in them.

We find the evidence to be uncontradicted that Mrs. Brown's willingness to waive claims to these assets was strictly conditional -- the condition being that she receive exclusive title to the marital home. Since the chancellor only awarded Mrs. Brown use of the home for approximately three years, we conclude that the chancellor committed a manifest abuse of discretion by holding Mrs. Brown to the terms of her conditional waiver while, at the same time, ignoring the conditions of the waiver. We, therefore, find it necessary to remand this issue for further proceedings. On remand, the issue of the equitable division of all of the marital assets should be made under the now-familiar standards set out in *Ferguson v. Ferguson,* 639 So. 2d 921 (Miss. 1994).

THE JUDGMENT OF THE CHANCERY COURT OF DESOTO COUNTY IS AFFIRMED AS TO THE AWARD OF CUSTODY OF THE MINOR DAUGHTER, MARY ELLEN BROWN, TO THE APPELLEE. THE JUDGMENT IS REVERSED AND REMANDED FOR A REDETERMINATION OF THE APPELLANT'S PERIODIC CHILD SUPPORT OBLIGATION AND FOR RECONSIDERATION OF THE EQUITABLE DISTRIBUTION OF MARITAL ASSETS. COSTS OF THE APPEAL ARE DIVIDED EQUALLY BETWEEN THE APPELLANT AND THE APPELLEE.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.