IN THE COURT OF APPEALS

7/15/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01190 COA

PETER ANDREW NOROWSKI APPELLANT

v.

SANDRA NOROWSKI 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 H. MYERS

COURT FROM WHICH APPEALED: JACKSON COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT: DEMPSEY LEVI

SARAH E. BERRY

ATTORNEYS FOR APPELLEE: R. CONNER MCALLISTER

DAVID EARL ROZIER, JR.

NATURE OF THE CASE: DOMESTIC RELATIONS

TRIAL COURT DISPOSITION: DIVORCE DENIED TO BOTH PARTIES; APPELLANT TO PAY ALIMONY OF $1,000 PER MONTH; APPELLANT TO PAY CHILD SUPPORT OF $1,000 PER MONTH; CUSTODY OF MINOR CHILD GIVEN TO APPELLEE; APPELLANT TO PROVIDE MEDICAL INSURANCE AND PAY ALL MEDICAL EXPENSES NOT COVERED BY INSURANCE

MANDATE ISSUED: 8/5/97

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

The chancellor of Jackson County denied a divorce to Dr. and Mrs. Norowski that was being sought on the grounds of habitual cruel and inhuman treatment and adultery. In addition to ordering Dr. Norowski to pay Mrs. Norowski support in the amount of $1,000 per month, the chancellor awarded Mrs. Norowski custody of the couple's child, ordered Dr. Norowski to pay $1,000 per month in child support, and to pay medical expenses and provide insurance for the child. Dr. Norowski appeals, arguing the chancellor erred in each of the just-described awards. Mrs. Norowski cross appeals, alleging that the chancellor's awards of child support and insurance were inadequate, and the terms of visitation are unreasonable.

The chancellor erred in awarding Mrs. Norowski support, which was in effect alimony, after denying the divorce. We reverse and render judgment on alimony/spousal support. The record is silent on whether the chancellor applied the relevant factors before determining child custody. Consequently, we reverse and remand for these findings. Because we reverse on custody, we make no final determination regarding child support and visitation.

FACTS

Dr. and Mrs. Norowski were married in 1988. Dr. Norowski is a dentist. Mrs. Norowski had her own real estate business before the marriage. After the marriage, she worked in her husband's dentist office until she had their only child, Nathan. Nathan was diagnosed with cystic fibrosis five months after being born. Since Nathan's birth, Mrs. Norowski has taken care of him full time.

Mrs. Norowski filed for a divorce in June of 1993 on the ground of irreconcilable differences. During the pendency of the action, the court awarded temporary custody of Nathan to Mrs. Norowski and visitation to Dr. Norowski. In August of 1993, Dr. Norowski filed his answer and counter-complaint for divorce on the ground of cruel and inhuman treatment and filed a separate answer to Mrs. Norowski's motion for temporary support and other relief. Following a hearing, a second temporary order was entered, where the court again gave custody of the child to Mrs. Norowski, granted visitation to Dr. Norowski, ordered Dr. Norowski to pay $1,000 per month as child support and $1,

000 per month as temporary alimony. Mrs. Norowski filed her answer to Dr. Norowski's counter-complaint and amended her complaint for divorce alleging grounds of habitual cruel and inhuman treatment and/or adultery.

Trial began in April of 1994 and was continued in November of 1994 and January of 1995. The court filed its opinion in July of 1995 denying a divorce to both parties, ordering Dr. Norowski to continue to pay $1,000 per month in spousal support and $1,000 per month in child support. Both parties filed motions for the court to reconsider its ruling, which were denied.

DISCUSSION

I. Spousal Support

The chancellor's temporary order awarded alimony until the trial. After hearing all the evidence at trial and denying the parties a divorce, the chancellor awarded the same amount as previously awarded for alimony, but called it "support." Dr. Norowski argues that Mrs. Norowski was not entitled to spousal support, whether in the form of alimony or separate maintenance. Where a divorce is denied, there can be no award of alimony. See *Massingill v. Massingill*, 594 So. 2d 1173, 1179 (Miss. 1992); *Thompson v. Thompson*, 527 So. 2d 617, 623 (Miss. 1988). Mrs. Norowski responds that the award was a continuation of the earlier award of temporary alimony. In that she is correct, but it was an improper continuation. A chancellor's authority to award alimony until the suit on the merits can be heard, necessarily ends once the merits have been ruled upon.

Mrs. Norowski argues that, even if she was not entitled to alimony, she was entitled to separate maintenance -- even though she admits that she did not plead it -- until the parties could obtain a divorce. A decree for separate maintenance is a judicial command to the husband to resume cohabitation with his wife, or in default thereof, to provide suitable maintenance for her until such time as they may be reconciled to each other. *Thompson*, 527 So.2d at 621. Where the wife contributes equally or more to the separation of the parties, she is not entitled to any award of separate maintenance. *Rodgers v. Rodgers*, 349 So. 2d 540, 541 (Miss. 1977). During the temporary hearing, the court asked the parties whether there was any chance to save the marriage. Dr. Norowski's answer to this question was that he did not know, but that he wanted the marriage to work and he did not think the couple's problems were insurmountable. Mrs. Norowski's answer to the chancellor's question was an adamant "no." She testified that she wanted a divorce and there was no chance for a reconciliation. Because she was not willing to resume cohabitation with Dr. Norowski, Mrs. Norowski would not have been entitled to an award of separate maintenance had she pled it.

Once the divorce was denied, Mrs. Norowski was not entitled to support under any label.

II. Child Custody

When determining the best interest and welfare of a child in a custody proceeding, the supreme court requires that certain factors be weighed and that the record permit an appellate court to make a meaningful review of the process. *Bredemeier v. Jackson*, 689 So. 2d 770, 774 (Miss. 1997), citing

Albright v. Albright, 437 So. 2d 1003 (Miss. 1983). Where the chancellor properly considers and applies the factors enumerated in *Albright,* and the decision is supported by substantial, credible evidence, the decision will be upheld. *Jerome v. Stroud*, 689 So. 2d 755, 757 (Miss. 1997); *Bredemeier*, 689 So. 2d at 774.

The denial of a divorce does not necessarily end the need to address custody. A chancellor "has the power to determine matters relating to the custody or support of children apart from its jurisdiction of the divorce suit, so that custody or maintenance of the children of the marriage is more than a mere incident to the divorce proceedings, the court, although it denies a divorce, may make such provision as it deems necessary for the custody and maintenance of the children, and may, pursuant to such power, retain the cause on the docket for future action with respect to their custody and support." *Rasch v. Rasch*, 168 So. 2d 738, 742 (Miss. 1964).

The chancellor's first temporary order entered on July 13, 1993, stated simply that Mrs. Norowski was awarded temporary care, custody and control of Nathan for the month of July 1993. At the close of the temporary hearing on August 13, 1993, the chancellor stated:

I would find that temporary custody of this young man would be placed with his mother, and the father's request for visitation is certainly not unreasonable. It is in the best interest of the child, in the opinion of the court, for the father to have a rapport with him under the proper circumstances, and there has been no evidence here to show otherwise.

In the written order of the court which followed on August 19, 1993, the chancellor stated that temporary custody was granted to Mrs. Norowski, and he specified the dates that Dr. Norowski would have visitation with the child. After the trial, the chancellor issued a formal opinion denying the divorce. Custody of Nathan "shall remain in the custody of his mother, with father granted visitation rights." In his final judgment, the chancellor stated that the temporary order for custody shall remain in effect with some modifications in the visitation.

The transcript makes it clear that the evidence was presented in the framework of the *Albright* factor. However, we must also be able to tell from the record that the chancellor applied these factors, and did so properly. *Hayes v. Rounds*, 658 So. 2d 863, 864 (Miss. 1995). After a review of the transcripts, opinions, and judgments of the chancellor, we find no record of the chancellor's application of the factors.

Each party on appeal argues that the evidence overwhelmingly favored his or her being awarded custody of the child. It is not the appellate court's function to examine the contested evidence and apply the *Albright* factors. We are to measure the chancellor's performance of that function on the highly deferential standard of manifest error. On the state of this record, we can not do so. We reverse and remand for the chancellor to provide specific findings of fact and conclusions of law using the *Albright* analysis.

III. Child Support, Medical Expenses, and Insurance

V. Cross Appeal - Terms of Visitation

The award of child support is a matter within the discretion of the chancellor and will not be reversed unless the chancellor was manifestly in error in his fact findings and abused his judicial discretion. *Ferguson v. Ferguson*, 639 So. 2d 921, 932 (Miss. 1994). Dr. Norowski argues that the award of child support and the order that he pay all the medical expenses and insurance of the child was excessive. Mrs. Norowski cross appeals, arguing that the amount of the award of child support was inadequate in light of the child's health.

Child support in Mississippi is governed by Section 43-19-101 of the Mississippi Code which provides guidelines for awarding support. The statutory guideline for one child is for the noncustodial parent to pay fourteen percent of adjusted gross income. If the chancellor chooses not to follow the guidelines, then he must make a finding on the record that application of the guideline would be unjust or inappropriate in a particular case. One of the reasons given in the statute for not following the guideline is "extraordinary medical, psychological, educational, or dental expense." MCA § 43-19-103(a). It has been held that while the statutory guidelines are to be an aid in determining child support awards, the specific need or support required is to be determined by a chancellor "at a time real, on a scene certain, and with a knowledge special to the actual circumstances and to the individual child or children." *Smith v. Smith*, 614 So.2d 394, 397 (Miss. 1993), quoting *Thurman v. Thurman*, 559 So.2d 1014, 1018 (Miss. 1990).

In this case, the chancellor in his written opinion stated that "this amount of child support is set due to the fact that this child has an extremely serious medical condition and requires special treatment, which creates an additional expense."

Mrs. Norowski on cross-appeal complains that the visitation set by the chancellor is not in Nathan's best interest. Dr. Norowski argues that Mrs. Norowski is simply trying to impede Nathan's access to his father. On visitation issues, as with other issues concerning children, the chancery court enjoys a large amount of discretion in making its determination of what is in the best interest of the child. *Clark v. Myrick*, 523 So. 2d 79, 83 (Miss. 1988). The specification of times for visitations rights is committed to the broad discretion of the chancellor. *Id.* The chancellor heard the arguments of the parties relating to Nathan's health needs, and devised a specific schedule of visitation based on the evidence.

The process followed by the chancellor on these questions was correct, and the determinations were reasonable and not manifest error or an abuse of discretion. We affirm the chancellor's determination of child support, medical expenses, insurance, and terms of visitation, subject to the chancellor's authority to reconsider any of these matters if after remand the chancellor alters the previous determination regarding child custody.

THE JUDGMENT OF THE JACKSON COUNTY CHANCERY COURT OF SUPPORT TO MRS. NOROWSKI IN THE AMOUNT OF $1,000 PER MONTH IS REVERSED AND RENDERED DENYING SUPPORT. THE JUDGMENT AWARDING CHILD CUSTODY TO MRS. NOROWSKI IS REVERSED AND REMANDED FOR SPECIFIC FINDINGS. THE REMAINDER OF THE JUDGMENT ADDRESSING CHILD SUPPORT, MEDICAL

EXPENSES, INSURANCE, AND TERMS OF VISITATION, IS AFFIRMED. COSTS ARE EQUALLY ASSESSED TO APPELLANT AND APPELLEE.

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

PAYNE, J., SPECIALLY CONCURRING WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, P.J.

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PAYNE, J., SPECIALLY CONCURRING:

Though I cannot say that the majority does not have valid citations to back up its opinion in this case, I believe we should examine the untoward results of the rigid adherence to the present state of the law. I write to point out that statutes and cases that developed domestic relations law were established with a worthy intention, namely to foster marriage and give every inducement to the restoration of the marriage by allowing for separate maintenance for the spouse who is waiting for her mate to return.

Therefore, in order to get a divorce one was required to establish that the actions of the offending (or separating) partner were so egregious as to constitute one of the thirteen grounds for divorce. Miss. Code Ann. § § 93-5-1 and 93-5-2 (Rev. 1994). One could not establish such grounds without a corroborating witness who had actually seen the cruel acts or had seen the results within a reasonable time after the offending spouse's actions. *See Gardner v. Gardner*, 618 So. 2d 108, 113 (Miss. 1993) (holding that the testimony of plaintiff must be substantially corroborated). Mere bickering or indignities would not suffice even if there were a continuing pattern. *Id.* at 114. Furthermore, without a divorce, there could be no alimony. *See Massingill v. Massingill*, 594 So. 2d 1173, 1179 (Miss. 1992); *Thompson v. Thompson*, 527 So. 2d 617, 623 (Miss. 1988).

However, the law evolved so that the courts came to recognize "constructive desertion," for example, so that even the separating spouse could be granted a divorce if the actions of the other spouse were such that it was dangerous or unbearable to stay in the matrimonial domicile. *Benson v. Benson*, 608 So. 2d 709, 711 (Miss. 1992); *Griffin v. Griffin*, 42 So. 2d 720, 722 (Miss. 1949).

The law in regard to "habitual, cruel, and inhuman treatment" provides that the offending conduct must be such that it endangers one's person or creates a reasonable apprehension of such danger. *Daigle v. Daigle*, 626 So. 2d 140, 144 (Miss. 1993). "Although cruel and inhuman treatment usually must be shown to have been 'systematic and continuous,' *see Robinson v. Robinson*, 554 So. 2d 300, 303 (Miss. 1989), a single incident may provide grounds for divorce. *Ellzey v. Ellzey*, 253 So. 2d 249, 250 (Miss. 1971) . . . ." *Id.*

For a while the law prohibited granting a divorce to either spouse if each had statutory grounds for divorce. In the 1960's the legislature stepped in and passed a law that made recrimination no longer an absolute defense, Miss. Code Ann. § 93-5-3, recognizing, perhaps, that seldom are marital difficulties entirely one-sided. However, the law prohibited divorce where there was collusion as to the grounds. *Crosby v. Hatten*, 56 So. 2d 705, 706 (Miss. 1952).

Then in 1976, again responding to the unworkability of the divorce laws, the legislature passed what became known as the "no fault divorce" law, Miss. Code Ann. § 93-5-2 (Rev. 1994). Opponents of the bill felt that it would greatly increase the number of divorces because of the ease in getting a divorce. Proponents of the act said it was needed to allow relief to hurting couples who would never think of raising a hand to each other, but who had irreconcilable differences. Proponents said that couples were lying on the stand in order to fit within the statutory grounds claiming, therefore, that the present laws were out of sync with the realities of marriage in modern times. In the initial law, the parties had to agree on all points to be eligible to fall within the no fault category: that there were irreconcilable differences in the marriage and that there was a property settlement, as well as a child custody and support agreement. *See* N. Shelton Hand, Jr., *Mississippi Divorce, Alimony, and Child*

Custody § 4-14.1 (3rd ed. 1992 and Supp. 1995). As chancellors found the unworkability of requiring couples who had irreconcilable differences to agree on every facet of the results of that union, the legislature allowed irreconcilable divorces where parties agreed to let the chancery court determine support and custody. Miss. Code Ann. § 95-5-2(3) (Rev. 1994).

All of these changes were accommodations to realities which no longer fit the law of divorce. However, all the laws are still aimed at the working goal of preserving marriages that are salvageable. Therefore, the statutory mandates must be followed with little deviation.

Coinciding with the development of the divorce laws, another form of relief was granted that did not result in the severing of the marriage contract. That remedy was separate maintenance. *Garland v. Garland*, 50 Miss. 694 (1874). Its purpose is well-established: "'[a] decree for separate maintenance is a judicial command to the husband to resume cohabitation with his wife, or in default thereof, to provide suitable maintenance of her until such time as they may be reconciled to each other.'" *Daigle*, 626 So. 2d at 144 (quoting *Lynch v. Lynch*, 616 So. 2d 294, 296 (Miss. 1993)). Clearly, the theory behind separate maintenance was to make it cost a person who initiates the separation. The rules in regard to receiving separate maintenance were such as would encourage a restoration of the marriage: (1) the remaining spouse must not be at fault in causing the separation, and (2) the remaining spouse must be willing to take back the leaving spouse should he genuinely want to resume the marriage within a year of the separation. *Id.* at 144-45.

As can be seen from the development of our domestic relations laws, both divorce and separation laws have fostered and made more desirable the restoration of the marriage by requiring unpleasant costs if one refused to return. However, in neither divorce nor separation does the law seek to leave a spouse destitute, particularly where the leaving party has means to provide for his family. In fact, *Hammond v. Hammond*, 597 So. 2d 653, 655 (Miss. 1992) says that, even if the wife is guilty of adultery, a chancellor is not prohibited from granting alimony if the wife would be destitute without it. The law also states, in regard to an award of separate maintenance, that a spouse is not required to be totally blameless as long as her conduct did not materially contribute to the separation. *Daigle*, 626 So. 2d at 145.

In a case of divorce, the court seeks to equitably distribute the marital assets. *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994). The contributions of each spouse are recognized and valued whether monetary or non-monetary. *Id.* All of these provisions are to eliminate the uneven balance of power held by the income producing spouse to the end that neither will be financially victimized by the breakup of the marriage.

In the present case, the chancellor found that the parties had not proved grounds for divorce, and therefore a divorce was denied. It is at this point that separate maintenance comes into play as alimony is not a possibility in the absence of a divorce. *Massingill*, 594 So. 2d at 1179. While my colleagues correctly follow the law in denying Mrs. Norowski's request for separate maintenance on the ground that she refused to take the husband back, it seems to me that never did the law anticipate leaving a stay-at-home spouse with a cystic fibrosis disabled child with no financial provision at all except child support from her dentist husband in an amount $1,000 per month. There must be some place between getting alimony to keep from being destitute, though guilty of adultery (which strikes

at the very heart of the exclusivity of marriage) to being deprived of separate maintenance (or any spousal support by whatever name) because she was not faultless in a marriage that seems not to be redeemable. Our opinion today leaves destitute this woman who gave up any hopes of a career to stay home with her dentist husband's child and who, though not faultless, is less guilty than the adulterous wife in the *Hammond* case.

We are bound by clear supreme court precedent. However we would be remiss in our duties if we fail to point out a need for change in laws which began with a worthy purpose, but which are now being used to aid a wealthy man to walk away from a marriage with no incentive to return. Surely, the law needs to address this problem. Separate maintenance is a creation of the supreme court; therefore, the supreme court has the authority to modify the law in regard to separate maintenance should a case be presented.

THOMAS, P.J., JOINS THIS SEPARATE WRITTEN OPINION.