IN THE COURT OF APPEALS

8/26/97

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00551 COA

RODNEY JOE ROBINSON APPELLANT

v.

WENDY JOANN (TURNER) ROBINSON APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. PERCY LEE LYNCHARD JR.

COURT FROM WHICH APPEALED: DESOTO COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT: DAVID L. ROBINSON

ATTORNEY FOR APPELLEE: D. RUSSELL JONES JR.

NATURE OF THE CASE: CHILD CUSTODY

TRIAL COURT DISPOSITION: TRANSFER OF CUSTODY OF CHILD FROM APPELLANT TO APPELLEE

MANDATE ISSUED: 9/16/97

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

DIAZ, J., FOR THE COURT:

This appeal stems from a decree entered by the DeSoto County Chancery Court modifying child custody by transferring primary physical custody of the child from Rodney Joe Robinson, the father, to Wendy Joann Turner Robinson, the mother of the child. Aggrieved, Rodney appeals to this Court asserting that (1) the chancellor applied an erroneous legal standard in modifying the custody arrangement, (2) the chancellor erred in limiting testimony of the witnesses to thirty minutes, and (3) the chancellor erred in weighing the *Albright* factors. Finding no reversible error, we affirm.

FACTS

Rodney Joe Robinson and Wendy Joann Turner Robinson were granted a divorce on the ground of irreconcilable differences by the chancery court in February 1992. The divorce decree provided that both parties would have joint legal custody of the child, Zachary Joseph, and that Rodney would have primary physical custody, and Wendy would have reasonable visitation rights. The agreement went further to state that Wendy would have visitation with Zachary for four (4) months and Rodney would have Zachary for two (2) month intervals until he reaches the age of six (6) years old. Once Zachary reached school age, the parties would jointly decide where he would attend school. Since the decree, the parties have agreed to split the visitation evenly, each parent keeping the child for three months at a time.

After the divorce, Wendy moved to Pennsylvania to live with her mother, and Rodney remained in Mississippi and remarried. Rodney testified that his annual gross income is approximately $25,000, and his wife's is approximately the same, to make their combined household income of approximately $50,000. Rodney claims that Zachary has many friends and family in Mississippi, and that he becomes depressed when he knows he has to go to Pennsylvania to be with his mother. Wendy testified that her gross annual income is approximately $18,200. She lives with her mother and has no mode of transportation other than borrowing her mother's car, or relying on her brother, or other friends. She testified that Zachary gets depressed when he knows it is time to return to Mississippi.

The chancellor found that pursuant to the original divorce decree that Wendy actually had Zachary in her custody for greater periods of time than Rodney. After weighing several factors as specified in *Albright*,[(1)] the chancellor was not persuaded that the economic status of Wendy made her a less desirable parent and ultimately concluded that it would be in Zachary's best interest to live in Pennsylvania with his mother.

DISCUSSION

CUSTODY

Rodney argues that the lower court erred in awarding Wendy primary physical custody of Zachary. He argues that the chancellor applied an erroneous legal standard in finding a material change in circumstances to warrant a change in custody. The chancellor found that because Zachary had reached school age, and considering the distance between homes of each parent, a substantial material change in circumstance warranted a modification of the original divorce decree.

As stated in the original divorce decree, the issue of child custody was to be modified upon petition by one or both parties showing a material change in circumstances. Clearly, we have reached this point in this case now where Zachary has attained school age. As provided in the original decree, the parents were to decide jointly where Zachary would attend school. Because they could not decide between themselves, they each petitioned the court for physical custody of Zachary. Ordinarily, in a modification proceeding, the non-custodial party must prove: (1) that a substantial change in circumstances has transpired since issuance of the custody decree, (2) that this change adversely affects the child's welfare, and (3) that the child's best interests mandate a change in custody. *Bredemeier v. Jackson*, 689 So. 2d 770, 775 (Miss. 1997). A chancellor's finding of fact will not be disturbed on appeal unless the finding is manifestly wrong or is not supported by the substantial credible evidence. *Id.*

Our state supreme court has held that "the advent of school age was a material change in circumstances that rendered the split custody of the child useless and even harmful to the child." *Id.* at 776 (citations omitted). The situation in this case is similar to that in the case *Torrance v. Moore*, 455 So. 2d 778 (Miss. 1984). In *Torrance*, the parties had a joint custody agreement where each parent had custody of their son for equal periods of time on a monthly basis. *Id.* at 778. Both parents sought modification of a joint custody agreement when their son approached school age. At trial, each party conceded the fitness of the other; therefore, it was before the chancellor to decide what was in the best interest of the child. *Id.* After weighing all the evidence presented to him, the chancellor in that case found that the best interest of the child would be served by placing him in custody of his father even though either parent would have been fit and suitable to have the care, custody, and control of the child. *Id.* at 780. Similarly in this case, because Zachary has attained school age, in addition to the fact that the parties live a great distance apart from each other, the chancellor was correct in finding a material change in circumstances. We find no merit to this issue.

LIMITING TESTIMONY

In the order setting the case, the parties originally agreed that the trial would be concluded in one day. As a result, the chancellor decided to limit the length of time allowed for the examination of each witness. Each side was limited to thirty minutes for direct examination and cross examination of each witness. Rodney made no objection at the time. Now on appeal, he argues that the chancellor erred by limiting each side's time to examine the witnesses. He claims that this curtailed his ability to present evidence and resulted in rushed and incomplete testimony. Because neither party raised an objection at the time of trial, this issue is procedurally barred. Nevertheless, in considering this issue on its merits, we find no error.

Rule 611 of the Mississippi Rules of Evidence provides the court with reasonable control over the mode and order of interrogating the witnesses and presenting evidence. M.R.E. 611(a). The mode and order of interrogation are matters left to the sound discretion of the trial judge. *Deshpande v.*

Ferguson Brothers Construction Co., 611 So. 2d 877, 878 (Miss. 1992). "The mode of examination of a witness allowed by the trial court will not be criticized or reviewed unless gross injustice resulted therefrom." *Id.* The trial judge has the duty of conducting an orderly trial. It is also his duty to see that the court's time is used economically. *Walker v. State*, 671 So. 2d 581, 609 (Miss. 1995). Moreover, the trial judge is allowed discretion in the conduct of a trial. *Id.* We find no manifest abuse of discretion by the chancellor in limiting the examinations of each witness in this instance.

APPLICATION OF *ALBRIGHT*

Finally, Rodney claims that the chancellor erred in his application of the *Albright* factors. Rodney argues that the lower court failed to consider the factors which favored him, namely the sex of the child, the parent having continuity of care prior to separation, employment, stability, financial situations of each parent, and differences in lifestyles.

In deciding an issue concerning child custody, the polestar consideration is the best interest of the child. *Albright v. Albright*, 437 So. 2d 1003,1005 (Miss. 1983). *Albright* suggests a number of factors to consider in determining custody:

The age of the child . . . is but one factor to be considered. Age should carry no greater weight than other factors to be considered, such as: health, 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 the parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express the preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship.

Hassett v. Hassett, 690 So. 2d 1140, 1148 (Miss. 1997), quoting *Albright v. Albright*, 437 So. 2d 1003,1005 (Miss. 1983). The relative financial situations are not controlling since the duty to support is independent of the right to custody. *Albright*, 437 So. 2d at 1005. In applying these factors, the lower court found that both parents were equally suitable; however, it vested physical custody of Zachary with his mother. The lower court found that the mother had the continuity of care in excess of the father; and therefore, the best interest of the child would be served by placing physical custody with his mother. A review of the record reveals that the chancellor properly considered the factors listed in *Albright*. We cannot say with reasonable certainty that the decision is manifestly wrong, nor that it is against the overwhelming weight of the evidence. Finding no abuse of discretion, we affirm the decision of the lower court.

THE JUDGMENT OF THE DESOTO COUNTY CHANCERY COURT MODIFYING CUSTODY IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

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

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