IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00132 COA

BEN R. SAMEL **APPELLANT**

v.

PATRICIA A. GOLDIN SAMEL **APPELLEE**

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

DATE OF JUDGMENT:	11/27/95
TRIAL JUDGE:	HON. SEBE DALE, JR.
COURT FROM WHICH APPEALED:	FORREST COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	JACK B. WELDY
ATTORNEY FOR APPELLEE:	NANCY STEEN
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	DIVORCE GRANTED TO APPELLEE ON GROUND OF HABITUAL CRUEL AND INHUMAN TREATMENT.
DISPOSITION:	AFFIRMED IN PART; REVERSED IN PART - 10/7/97
MOTION FOR REHEARING FILED:	7/2/97
CERTIORARI FILED:	
MANDATE ISSUED:	10/28/97

ON MOTION FOR REHEARING

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

The original opinion is withdrawn on motion for rehearing and this modified opinion is substituted therefor. The motion for rehearing is granted.

This is a divorce case appealed from the Chancery Court of Forrest County wherein Patricia A.

Goldin Samel was granted a divorce on the ground of habitual, cruel and inhuman treatment from Ben R. Samel. Patricia was also awarded custody of the parties' minor son. Ben was ordered to pay monthly child support in the amount of $525. Feeling aggrieved, Ben appeals arguing: (1) that Patricia failed to meet her burden of proof in establishing the ground of habitual, cruel and inhuman treatment; and (2) that $525 is an excessive amount of child support and that the child support award should not exceed $318. Finding error, we reverse in part and affirm in part.

STATEMENT OF THE FACTS

Patricia and Ben Samel were married on May 25, 1989, in Forrest County, Mississippi and they had one child, Michael. The parties separated on or about December 14, 1994.

Patricia testified that Ben had a problem controlling his temper and that he would scream, holler and curse her. She stated that Ben would be "set-off" and go into a rage. According to Patricia, Ben's yelling would be daily and their fights were not the normal disagreements of a married couple. In April and May of 1994, Patricia discovered that Ben had incurred approximately $25,000 in gambling debts. Upon this discovery, Patricia insisted on taking over the couple's finances which previously had been handled exclusively by Ben. Patricia testified that Ben's behavior worsened and that he continued screaming, hollering, cursing, and criticizing her. Patricia was so adversely affected by these outbursts that she had to seek the help of a psychiatrist. Patricia stated that Ben's treatment of her "degraded me to the point that I did not know how to think for myself sometimes." Patricia asked Ben to go with her to therapy, and he refused. Patricia testified that the incident which instigated the divorce occurred in mid-December 1994 when she refused to withdraw money on one of her credit cards to provide Christmas money for Ben's children of a previous marriage, and Ben became angry. This confrontation ended with Ben shaking his hands in front of Patricia as if to choke her and saying he could just kill her. Patricia testified that Ben told her on three occasions that the only way she was going to leave the marriage was in a pine box. She stated that she feared for her physical safety. After the couple's separation, Patricia obtained several restraining orders against Ben. She testified that he broke those restraining orders and continued to harass and threaten her.

Jerry Goldin, Patricia's father, testified as to incidents in which he observed Ben's behavior. He characterized Ben's behavior as more than rudeness stating that Ben "treated her like a slave," was "out of control" and "would just embarrass her like she was nothing." Beth Henthorne also testified on Patricia's behalf. Henthorne and her husband frequently socialized with the Samels. She testified that she observed constant verbal abuse by Ben of Patricia. Henthorne stated that Ben's behavior was to the extent that it made both her and her husband very uncomfortable. She and her husband initially socialized with the Samels regularly, but because of Ben's behavior their visits became infrequent.

Ben Samel testified that he did have a problem with his temper. Ben admitted to threatening Patricia and that his behavior was possibly intimidating. Ben stated that he had a gambling problem and was receiving treatment for his problem.

I. DID THE TRIAL COURT ERR IN AWARDING PATRICIA A DIVORCE ON THE GROUND OF HABITUAL CRUEL AND INHUMAN TREATMENT?

Ben argues that Patricia failed to meet her burden in establishing the ground of habitual cruel and

inhuman treatment. The Mississippi Supreme Court has stated that, on appellate review, a chancellor's findings of fact will not be disturbed if substantial evidence supports those factual findings. *Brooks v. Brooks*, 652 So. 2d 1113, 1124 (Miss. 1995) (citations omitted). The appellate scope of review is limited since this Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong or clearly erroneous, or if an erroneous legal standard was applied. *Steen v. Steen*, 641 So. 2d 1167, 1169 (Miss. 1994) (citation omitted). This Court is required to respect a chancellor's findings of fact that are supported by credible evidence, particularly in the areas of divorce and child support. *Id.* at 1169-70 (citations omitted).

The standard applicable to a divorce on the ground of habitual cruel and inhuman treatment is as follows:

Evidence sufficient to establish habitual, cruel and inhuman treatment should prove conduct that:

either 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) (quoting *Rawson v. Buta*, 609 So. 2d 426, 431 (Miss. 1992)). See also Hand, N. Shelton, Mississippi Divorce, Alimony and Child Custody, § 4-12 (4th ed. 1996). The party alleging habitual cruel and inhuman treatment must generally corroborate the testimony. *Id.* 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. *Id.*; *see also Peterson v. Peterson*, 648 So. 2d 54, 57 (Miss. 1994) (holding that even where a divorce on the ground of habitual cruel and inhuman treatment is uncontested, there must be corroboration of the plaintiff's testimony). "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)). Systematic and continuous behavior beyond simple incompatibility on the part of the offending spouse must be shown. *Id.* (citing *Parker v. Parker*, 519 So. 2d 1232, 1234 (Miss. 1988)). The court has stated that "[w]e have counseled against the awarding of a divorce on the grounds of habitual cruel and inhuman treatment where the lawsuit is based merely 'on petty indignities, frivolous quarrels, general incompatibility and the petulant temper of one or both parties.'" *Steen*, 641 So. 2d at 1170 (quoting *Howard v. Howard*, 138 So. 2d 292, 293 (Miss. 1962)). The risk of life, limb, or health must be real rather than imaginary and must be clearly established by proof. *Id.* (citation omitted). The court has "consistently insisted that parties seeking divorce on [these] grounds . . . prove that the conduct of the offending spouse really was cruel and inhuman . . . ." *Faries v. Faries*, 607 So. 2d 1204, 1208 (Miss. 1992) (quoting *Wilson*, 547 So. 2d at 805).

In the present case, Patricia testified *as* to a pattern of behavior by Ben in which he would regularly holler, yell and curse her. Any subject could induce Ben into a rage. This pattern of behavior

worsened after Patricia confronted Ben about the $25,000 debt which Patricia discovered was a result of Ben's gambling. Ben's behavior culminated into a heated argument in which Ben approached her, with hands clinched as if to choke her and threatened to kill her. Patricia's testimony of continued abuse by Ben was corroborated by both her father and Beth Henthorne. Patricia testified that Ben's behavior frightened her to the extent that she feared for her safety. We cannot say that the chancellor erred in determining that Patricia was entitled to a divorce on the ground of habitual cruel and inhuman treatment. We find no merit in this assignment of error.

II. DID THE TRIAL COURT ERR IN ORDERING BEN TO PAY $525 PER MONTH IN CHILD SUPPORT?

Ben argues that the trial court's order requiring him to pay $525 per month in child support was excessive. The Mississippi Supreme Court has stated that "in cases concerning support of children, the best interest of the child is the 'touchstone' which this Court must keep in mind." *Love v. Barnett*, 611 So. 2d 205, 208 (Miss. 1992) (citation omitted). "Child support is awarded to the custodial parent for the benefit and protection of the child." *Id.* (citations omitted). Mississippi statutory law provides for child support guidelines regarding an award or modification of child support. Miss. Code Ann. § 43-19-101(1) (1972). The statute specifies percentages of a non-custodial parent's adjusted gross income to be awarded for supporting his or her children. *Id.* These percentages depend upon the number of children that are to be supported. *Id.* Moreover, the statutory guidelines "apply unless the judicial or administrative body awarding or modifying the child support award makes 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 under the criteria specified in Section 43-19-103." Miss. Code Ann. § 43-19-101(2) (1972); *see also Grogan v. Grogan*, 641 So. 2d 734, 740 (Miss. 1994).

If a chancellor departs from the statutory guidelines and states his or her reasoning on the record, an appellate court must consider whether the chancellor erred in the amount itself. *Grogan*, 641 So. 2d at 740-41. The child support award is within the sound discretion of the chancellor. *Id.* at 741. This Court will not disturb a chancellor's determination of child support unless the chancellor was manifestly in error in a finding of fact or abused his or her discretion. *Id.* (citations omitted); *see also Love*, 611 So. 2d at 208 (stating that a chancellor has substantial discretion and must consider all relevant facts and equities in modifying child support so that best interests of the child prevail). An appellate court has a limited scope of review and will not arbitrarily substitute its judgment for that of the chancellor who is better situated to evaluate the factors related to the best interests of the child. *Ash v. Ash*, 622 So. 2d 1264, 1266 (Miss. 1993) (citation omitted); *Barber v. Barber*, 105 So. 2d 630, 632 (Miss. 1958) (finding that a court will not substitute its judgment for that of chancellor unless it clearly appears that chancellor abused his discretion or failed to exercise equity).

In the present case, the chancellor ordered Ben to pay $525 a month in child support. The chancellor determined that this amount constituted 15% of Ben's monthly income as reflected in his sworn financial statement. However, the chancellor failed to deduct the amount of child support Ben pays for another child which was also reported on his financial statement. *See* M.C.A. §43-19-101(3)(c) (Rev. 1993) ("If the absent parent is subject to an existing court order for another child or children, subtract the amount of that court-ordered support.") Thus, the chancellor's failure to deduct the $300 Ben pays in child support for another child results in a miscalculation of the amount of child support

Ben is required to pay under the guidelines for the child of this marriage. According to our calculations, the amount of support Ben is required to pay under the guidelines is 14%[(1)]

of $3,208 which is $449.12, or $450 if we round to the next dollar amount. Therefore, we reverse on the issue of child support and render the cause so as to modify the amount of child support that Ben should pay to $450 a month.

THE JUDGMENT OF THE CHANCERY COURT OF FORREST COUNTY IS AFFIRMED AS TO THE ISSUE OF AWARDING PATRICIA SAMEL A DIVORCE ON THE GROUND OF CRUEL AND INHUMAN TREATMENT AND IS REVERSED ON THE ISSUE OF CHILD SUPPORT AND WE ORDER BEN SAMEL TO PAY MONTHLY CHILD SUPPORT IN THE AMOUNT OF $450. ALL COSTS OF THIS APPEAL ARE TAXED ONE-HALF TO THE APPELLANT AND ONE-HALF TO THE APPELLEE.

BRIDGES, C.J., THOMAS, P.J., DIAZ, HERRING, AND HINKEBEIN, JJ., CONCUR. SOUTHWICK, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY MCMILLIN, P.J., COLEMAN AND KING, JJ.

SOUTHWICK, J., DISSENTING:

The majority found that the chancellor miscalculated an adjustment to income, preliminarily to setting the amount of child support. The quintessentially trial court function of setting child support amounts is then assumed by the majority. It is from that decision that I dissent.

Section 49-19-101 sets out the guidelines for determining the amount of child support to be awarded. The statute provides only a "rebuttable presumption" as to the amount that should be awarded. The guidelines "apply unless the judicial or administrative body awarding or modifying the child support award makes a written finding or specific finding on the record hat the application of the guidelines would be unjust or inappropriate in a particular case as determined under the criteria specified in Section 43-19-103." *Dufour v. Dufour*, 631 So. 2d 192, 193 (Miss. 1994) quoting Miss. Code Ann. § 43-19-101(2). Thus, it is not necessary that the chancellor strictly apply the statutory guideline in calculating the amount of child support due. In this case he clearly did not. The supreme court has held that "[a]lthough we have child support award guidelines in our Code, they are mere guidelines and do not control the chancellor's award of child support." *McEachern v. McEachern*, 605 So. 2d 809, 814 (Miss. 1992). Thus the proper amount to be paid in child support is determined by a chancellor, weighing all the facts that focus on the needs of the child and ability of the non-custodial parent to pay.

The majority focuses on the chancellor's saying that $525 was 15% of the adjusted gross income. They then determine that the adjustments to income were in error, and award 15% of the correctly adjusted income. That means the majority is holding as a matter of law, not subject to chancellor's discretion, that 15% should be awarded in this case. The best interests of the child must always be the guiding principle, not a strict mathematical formulation. Here the chancellor quite clearly had already corrected one error in his calculation and still held that he would award $525. It is beyond question

that the chancellor was actually determining that this child required something over $500 per month for support and that the father could pay it. It is only the second part of the conclusion that has been successfully questioned on appeal.

It is not for us to set child support amounts, either by rigid application of the guidelines nor by rigid application of a different percentage stated by the chancellor. The majority would lower the amount of support paid by $75 per month, or by 14% of the total amount the chancellor stated should be awarded. That is far from a de minimis change that we should be making based on a cold appellate record.

Having found that the chancellor erred in computing adjusted gross income as defined in this statute, we should reverse and remand for the chancellor to determine what support amount is required to serve the best interests of this child, taking into account the father's ability to pay.

McMILLIN, P.J., COLEMAN AND KING, JJ., JOIN THIS SEPARATE OPINION.

1. The statutory child support guidelines indicate that 14% is the percentage of income that should be awarded for the support of one child. *See* M.C.A. §43-19-101(1).