IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00257 COA

ROGER TRUMAN SAVELL **APPELLANT**

v.

BRENDA CAROL SAVELL **APPELLEE**

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

DATE OF JUDGMENT:	02/27/96
TRIAL JUDGE:	HON. DENISE OWENS
COURT FROM WHICH APPEALED:	HINDS COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	ANTHONY SAKALARIOS
ATTORNEY FOR APPELLEE:	J. PEYTON RANDOLPH
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	DIVORCE GRANTED
DISPOSITION:	AFFIRMED - 11/18/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/9/97

BEFORE THOMAS, P.J., COLEMAN, AND KING, JJ.

THOMAS, P.J., FOR THE COURT:

Roger T. Savell and Brenda Carol Savell were married on March 18, 1977. During the term of the marriage, the couple had one child, Roger Truman Savell, II. The child was seventeen years old at the time of the trial. He had attended public schools most of his life, but was now being home schooled by the Hinds County Public School System.

In 1983, the minor child received a kidney transplant from Mrs. Savell and has been under constant medical supervision ever since. Dr. Marcello Ruvinsky, the treating nephrologist, testified that the child does not require round the clock supervision, but his condition was delicate and he should not engage in activity requiring strenuous physical activity. At the time of the trial, the child was found to be totally disabled and received $420 per month from Social Security.

Over the course of the marriage, the wife worked sporadically, managing a chicken farm, working as

secretary for several companies, and taking in cleaning for extra income. At the time of trial, she no longer worked and devoted her time to caring for her son.

There was some dispute over the gross income of Mr. Savell, but it appears he made between $61, 000 and $68,000 in 1995. After taxes, Mr. Savell's income was around $44,000 including overtime pay. This was reduced in 1996 because he will no longer receive a marital deduction.

The parties entered into a consent decree of divorce on the grounds of irreconcilable differences. In the consent decree, the parties stipulated to certain issues and then set out issues for the chancellor to decide.

Contested issues to be decided by the chancellor were as follows: whether the wife should be responsible for one-half the unpaid medical expenses above the Medicaid amount when she becomes employed; whether installment notes paid by the husband should be deducted from the $3,618.93 insurance payment to the wife for the loss of her car and whether the money should be paid in a lump sum or in installments; whether the husband should receive credit for the minor child's earning capacity to reduce his child support payments; the amount of adjusted gross income to be attributed in calculating the amount of periodic alimony to be paid to the wife; and whether the husband should receive an equitable lien on the marital home.

DISPOSITION AT TRIAL

The chancellor held Mr. Savell responsible for child support in the amount of $400 per month based on the Uniform Child Support Guidelines at fourteen percent of his gross income, periodic alimony in the amount of $800 per month, attorney's fees in the amount of $2500 to be paid from any income tax refund he receives for 1995, one-half of the medical expenses incurred by the former Mrs. Savell which are not covered by the COBRA insurance plan which he has agreed to pay for thirty-six months, and the amount of the child's medical expenses which are not paid by Medicaid up to $1,000. Mr. Savell was allowed to claim the minor child as a dependent on his income tax returns as long as the I.R.S. allowed and he was awarded joint legal custody of the child. He also received personal property acquired during the marriage. Mrs. Savell was awarded primary physical custody of the child, ownership of the marital home and all of the abovementioned items to be paid by Mr. Savell.

From this order, Mr. Savell appeals to this Court asserting as error the following issues:

I. WHETHER THE TRIAL COURT ERRED IN FAILING TO GIVE THE DEFENDANT CREDIT FOR THE DISABLED CHILD'S EARNING CAPACITY, AND IN FAILING TO GIVE THE DEFENDANT CREDIT FOR THE CHILD'S SOCIAL SECURITY BENEFITS TOWARD CHILD SUPPORT PAYMENTS.

II. WHETHER THE TRIAL COURT EXCEEDED THE STATUTORY GUIDELINES FOR THE PAYMENT OF SUPPORT.

III. WHETHER THE TRIAL COURT ERRED IN AWARDING THE PLAINTIFF PERIODIC ALIMONY.

IV. WHETHER THE TRIAL COURT ERRED IN THE PROPERTY DIVISION AND

IN DENYING THE DEFENDANT AN EQUITABLE LIEN ON THE MARITAL HOME.

ANALYSIS

The standard of review of findings of fact made by a chancellor is extremely deferential. This Court always reviews a chancellor's findings of fact, but they will not be disturbed unless they are manifestly wrong or clearly erroneous. *Denson v. George*, 642 So. 2d 909, 913 (Miss. 1994) (citing *Bowers Window and Door Co., Inc. v. Dearman*, 549 So. 2d 1309 (Miss. 1989); *Love v. Barnett*, 611 So. 2d 205, 207 (Miss. 1992)). It is against this backdrop that Mr. Savell appeals.

I. WHETHER THE TRIAL COURT ERRED IN FAILING TO GIVE THE DEFENDANT CREDIT FOR THE DISABLED CHILD'S EARNING CAPACITY, AND IN FAILING TO GIVE THE DEFENDANT CREDIT FOR THE CHILD'S SOCIAL SECURITY BENEFITS TOWARD CHILD SUPPORT PAYMENTS.

Mr. Savell argues that he is entitled to a credit for the earning capacity of the minor child and also for the amount received by the child for his total disability from Social Security. He cites ***Mooneyham v. Mooneyham*, 420 So. 2d 1072 (Miss. 1982),** as support for his proposition. In *Mooneyham*, the father was receiving Social Security payments as a result of his total disability, a portion of which was designated for the support of the minor child. The mother filed for and began receiving these payments rather than having them mailed to the father and later remailed to the minor child. The *Mooneyham* court held: "[W]here the father who has been ordered to make child support payments becomes . . . disabled, and unconditional Social Security payments for the benefit of minor children are paid to the divorced mother, the father is entitled to credit for such payments by the government against his liability for child support under the divorce decree." ***Id.* at 1073** (citing *Andler v. Andler*, 538 P.2d 649, 654 (Kan. 1975)).

Mr. Savell's reliance upon *Mooneyham* is misplaced. The father in that case was the disabled party, and it was the payments to which he was entitled that were set aside for the benefit of the minor child. In the case *sub judice*, the payments are not for the benefit of the father and rerouted to the son. The son himself is the disabled party. The payments are to compensate him for his disability, and therefore, Mr. Savell is not entitled to them. If Mr. Savell has no claim of right to the money in the first place, he should not be allowed to use them to reduce his support payments.

In a 1992 decision, the Mississippi Supreme Court held that receipt of Social Security benefits does not reduce parental support obligations. ***Hammett v. Woods*, 602 So. 2d 825, 828-29 (Miss. 1992).** The Court reasoned that the public should not be burdened with payment when the parents are more than able to provide for the child's support. ***Id.*** (citing *Anderson v. Powell*, 221 S.E.2d 565, 566 (Ga. 1975)).

Mr. Savell next claims that he is entitled to a credit for the sums earned by his son under ***Wray v. Langston*, 380 So. 2d 1262 (Miss. 1980).** The *Wray* court merely upheld a ruling by the chancellor

that the husband be allowed a credit for the money earned by the child. As counsel for Mrs. Savell correctly points out, the Court did not hold that the husband was *entitled* to the credit, but rather, the Court reemphasized the broad deference given to decrees of the chancery court. ***Id.* at 1264**.

The Mississippi Supreme Court set out nine factors to be considered in determining an award of child support. ***Hemsley v. Hemsley,* 639 So. 2d 909, 912-13 (Miss. 1994)** (citing *Brabham v.Brabham,* 226 Miss. 165, 176, 84 So. 2d 147, 153 (1955)). The factors to which Mr. Savell refers include: "(2) The health of the wife and her earning capacity . . . (9) Such other factors and circumstances bearing on the subject that might be shown by the evidence." ***Id.***

Specifically, Mr. Savell argues that the chancellor did not consider evidence tending to show that Mrs. Savell intended to stay home, care for their son, and be a housewife. Mrs. Savell had the present ability to work and conflicting testimony showed that the child was able to at least perform some of the activities required to maintain his health. There is evidence in the record, however, that tended to show that Mrs. Savell was required to assist the minor child in performing many daily functions such as working cramps from his legs, transporting him to and from his frequent doctor appointments, and often helping him out of bed in the mornings.

As stated earlier, this Court always reviews a chancellor's findings of fact, but they will not be disturbed unless they are manifestly wrong or clearly erroneous. ***Denson,* 642 So. 2d at 913.** Even if the chancellor fails to make findings of fact, the Supreme Court assumes that the issues were resolved in favor of the appellee. ***Id.***

No evidence has been presented to show that the chancellor abused her discretion or was manifestly wrong in her weighing of the determining factors for an award of child support. Since the chancellor was in a better position to view the evidence and weigh the credibility of the witnesses, her findings should not be disturbed here. The appellant's first assignment of error is without merit.

II.WHETHER THE TRIAL COURT EXCEEDED THE STATUTORY GUIDELINES FOR THE PAYMENT OF SUPPORT.

In Mr. Savell's second assignment of error, he states that the chancellor was in error in finding that he should pay four hundred dollars a month in child support. He argues that this exceeds 14% of his adjusted gross income as mandated by Mississippi Code Annotated § 43-19-101(1) (Rev. 1993) (requiring that persons pay child support in the amount of 14% of adjusted gross income for support of one child). He asserts that he should be allowed credit for the car allowance paid to him by his employer, the fact that the parties agreed that Mrs. Savell would remain on his insurance policy at his expense for thirty-six months, his agreement to be responsible for all bills incurred by the parties prior to separation, and the change in his tax status as a result of the divorce.

None of these considerations are specifically listed as exemptions. The list of factors to be considered in determining income is very broad. The list includes a clause which states that this is not an exhaustive list of factors. **Miss. Code Ann. § 43-19-101(3)(a) (Rev. 1993).** The exemptions, on the contrary, are specifically listed. There is no clause in the listed exemptions which reads that the factors "include, but are not limited to" as in the previously mentioned subsection.

Mrs. Savell agrees with Mr. Savell that the award of child support was incorrect; however, she notes on appeal that $400 per month is not the proper figure under the statutory requirements, but rather it is too low. In her submitted brief she states:

Defendant fails to state what his calculation of the adjusted gross income is. The fact is, under the law as previously stated, fourteen percent (14%) of Mr. Savell's Adjusted Gross Income ($43, 265.66) would be Five Hundred Four Dollars and Seventy-Seven Cents ($504.77). This Figure is reached by taking the Defendant's Adjusted Gross Income of $43,265.66, and dividing this number by 12, then multiplying the resulting figure by 14%, pursuant to Miss. Code Ann. § 43-17-101 [sic] (1972). Since the Defendant has contested this issue on appeal, Plaintiff would assert that the proper calculation of Defendant's support obligation is $504.77, and *ask that if the award is modified at all (pursuant to Defendant's request), that it be increased to reflect the statutory guidelines*.

This is the first time Mrs. Savell has brought this to any court's attention. In the lower court neither party ever asserted to the chancellor that four hundred dollars was not 14% of Mr. Savell's adjusted gross income. Mrs. Savell's attorney did not argue this point in a motion for new trial, nor was a cross-appeal filed. "[A] trial judge cannot be put in error on a matter which w**as never presented to him for decision. . . . the rule applies in both criminal and civil cases. . . ." *Cooper v. Lawson*, 264 So. 2d 890, 891 (Miss. 1972)** (citing *Colson v. Sims*, 220 So. 2d 345 (Miss.1969)); ***Gilmer v. Gunter*, 46 So. 2d 447 (Miss. 1950)**; ***Hoke v. State*, 232 Miss. 329, 98 So. 2d 886 (1957)).** "Under this Court's standard of review, however, the Court retains the inherent authority to notice error, despite trial counsel's failure to preserve the error." ***Johnson v. Fargo*, 604 So. 2d 306, 311 (Miss. 1992).** ***See also* M.R.A.P. 28 (a)(3).**

The chancellor was correct in not allowing Mr. Savell any of the above argued credits. However, under our calculations we determined that error occurred in the determination that 14% of Mr. Savell's adjusted gross income was four hundred dollars a month. The record reflects that Mr. Savell's net pay of 1995 was approximately $46,308.66, with deductions for federal and state taxes, medicare, social security and an advance in salary. Mr. Savell's pay check stub also shows deductions for insurance and a credit union account, but these are not legally mandated deductions in accordance with Mississippi Code Annotated § 43-19-101(b). The only deductions that are allowed from gross pay are:

> (i) Federal, state and local taxes. Contributions to the payment of taxes over and beyond the actual liability for the taxable year shall not be considered a mandatory deduction:
>
> (ii) Social security contributions:
>
> (iii) Retirement and disability contributions except any voluntary retirement and disability contributions; . . . .

Miss. Code Ann. § 43-19-101(b)(i)-(iii) (Rev. 1993).

It would appear the support guidelines would prescribe approximately $540.27 per month in child support based upon Mississippi Code Annotated § 43-19-101(b). Since neither party asserted this issue to the chancery court or to this Court, we remanded this point to the chancellor to enumerate why she deviated from the standard set forth in Mississippi Code Annotated § 43-19-101(1) (Rev.

1993). Chancellor Owens first sent this Court a calculation of her finding and then held a hearing, with both parties represented, and set forth her reasons for deviation from this section.

Chancellor Owens's calculations were as follows:

Mr. Savell's income as reflected by his 1994 W-2 $ 55,247.00

Less Social Security 3,425.33

51,821.97

Less Medicare 801.11

51,020.86

Less Federal Taxes 8,534.00

42,486.86

Less State Taxes (Approximate) 2,000.00

40,486.86

Plus Adjustment for Income Tax Refund3,071.00

43,557.86

Less Periodic Alimony 9,600.00

$ 33,957.86

Adjusted Gross Income × 14% = $4,754.10

or $396.17 per month, rounded off to $400.00.

Chancellor Owens stated that since this was a special needs child, who was receiving Social Security benefits in the amount of $420 per month, she felt that the periodic alimony deduction from gross income, $9,600, was warranted, given the fact that the minor child had additional income. Her next deviation was the Medicare tax, which she felt should be considered with the federal, state, and local taxes. Last, Chancellor Owens noted that the big difference between our calculations and her calculations was that she used Mr. Savell's 1994 income instead of his 1995 income. She stated that she used the 1994 income because this income would be about the amount of his income once he became a single taxpayer.

It is at this point that we must again remember the standard of review this Court must make of a chancellor's finding. This Court always reviews a chancellor's findings of fact, but these findings will not be disturbed unless they are manifestly wrong or clearly erroneous. ***Denson v. George*, 642 So. 2d 909, 913 (Miss. 1994)** (citing *Bowers Window and Door Co., Inc. v. Dearman*, 549 So. 2d 1309 (Miss. 1989); ***Love v. Barnett*, 611 So. 2d 205, 207 (Miss. 1992))**. While troubled by the

chancellor's use of Mr. Savell's 1994 income, with the above standard in mind, we are constrained to affirm the chancery court. This does not preclude either party from petitioning the chancery court for a modification of such child support given any change in circumstances which has occurred subsequent to this appeal. Accordingly, this Court will affirm the chancellor's finding of child support.

III.WHETHER THE TRIAL COURT ERRED IN AWARDING THE PLAINTIFF PERIODIC ALIMONY.

The Mississippi Supreme Court set out nine factors to be considered in determining an award of periodic alimony. ***Hemsley*, 639 So. 2d at 912-13.** The factors to which Mr. Savell refers include:

> (1) The health of the husband and his earning capacity;
>
> (2) the health of the wife and her earning capacity; . . .
>
> (4) the reasonable needs of the wife;
>
> (5) the reasonable needs of the child;
>
> (6) the necessary living expenses of the husband . . . .

Id.

The record indicates that Mr. Savell is in reasonably good health and, despite his testimony that his income fluctuates, his earning capacity has increased over the past few years as his level of experience increased.

Mrs. Savell is likewise in reasonably good health, but the record indicates that her earning capacity is impaired somewhat by the fact that she must care for the minor child and that she has had frequent medical problems of her own due to the donation of her kidney to the child. The reasonable needs of Mrs. Savell must include her need to keep a roof over her head and provide for her immediate needs such as food and utilities.

The child's needs are certainly an overarching factor in this consideration. There was testimony from both sides that he required frequent care. The only argument was over the degree of care he requires. Mrs. Savell testified that he needed near constant supervision. Some mornings, he needs help merely to get out of bed. Although Dr. Ruvinsky testified that the child should be allowed some degree of autonomy, he did not recommend that the child work in any job that would require "excessive or strenuous physical activity." Dr. Ruvinsky included in this category bagging groceries at the Jitney Jungle and any job were he would be required to merely stand for long periods of time. Under any set of circumstances, the child requires a certain amount of supervision and will never be as independent as other children his age.

As to Mr. Savell's reasonable living expenses, Mr. Savell testified that he must pay $500 per month to live in a room in his sister's home. He must also pay for the stipulated expenses in the final decree of divorce such as the thirty-six months insurance premiums for Mrs. Savell to remain on his plan. Certainly his living expenses were high, but in light of the deferential standard of review, this Court

will not re-weigh the evidence and re-determine the credibility of the witnesses.No evidence has been presented to show that the chancellor abused her discretion or was manifestly wrong in her weighing of the determining factors for an award of periodic alimony. The appellant's third assignment of error is without merit.

IV.WHETHER THE TRIAL COURT ERRED IN THE PROPERTY DIVISION AND IN DENYING THE DEFENDANT AN EQUITABLE LIEN ON THE MARITAL HOME.

Mr. Savell does not contest the division of the personal property and merely seeks the reversal of the chancellor's decision not to allow an equitable lien to be placed on the marital home.

The marital home was acquired in 1993 when Mrs. Savell borrowed money from a friend to make a $1500 down payment. Mr. Savell testified that he did not even know of the purchase until some time afterward. Since that time, Mr. Savell made several payments on the mortgage, but fell behind. In August 1995, Mr. Savell was ordered to temporarily make the house payments by the chancery court.

A spouse who has made a material contribution to the acquisition of an asset "may claim an equitable interest in the jointly accumulated property" even if the asset is titled in the name of the other spouse. ***Hemsley*, 639 So. 2d at 913.** Marital property is defined as "any and all property acquired or accumulated during the marriage." ***Id.* at 915.** Under this definition, the marital home was certainly marital property and as such, was subject to the equitable division sought by Mr. Savell. This would necessarily include an equitable lien to reimburse Mr. Savell for the money he invested in the monthly mortgage payments upon its sale.

This remedy is an equitable one and is entirely at the chancellor's discretion. The chancellor may be reversed only upon a showing that she "abused [her] discretion, was manifestly wrong or clearly erroneous, or an erroneous legal standard was applied." ***Denson*, 642 So. 2d at 913.** There is no evidence that the decision of the chancellor fits into any of these categories. Mr. Savell simply asserts that he made certain payments on the mortgage and should be entitled to an equitable lien on the property. The record indicates that his payments were sporadic at best.

Since the chancellor was in a much better position to weigh the credibility of the witnesses and evidence presented and had a large amount of discretion in crafting a remedy, the decision of the chancellor should not be reversed here without a much greater showing. The appellant's final assignment of error is without merit.

THE JUDGMENT OF THE HINDS COUNTY CHANCERY COURT IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED ON $3618.90. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

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