IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00266 COA

CHARLIE LAFAYETTE EPPERSON, JR.

APPELLANT

v.

MARY SUZANNE CHATHAM EPPERSON

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

ATTORNEYS FOR APPELLANT: WINN DAVIS BROWN, JR.

H. R. GARNER

ATTORNEYS FOR APPELLEE:

GRADY F. TOLLISON, JR.

BARBARA M. TUTOR

NATURE OF THE CASE: DOMESTIC RELATIONS AND CHILD CUSTODY

TRIAL COURT DISPOSITION: DIVORCE GRANTED IN FAVOR OF SUZANNE EPPERSON; CUSTODY OF MINOR CHILD AND CHILD SUPPORT TO SUZANNE EPPERSON; ATTORNEYS' FEES TO SUZANNE EPPERSON.

MANDATE ISSUED: 6/19/97

BEFORE BRIDGES, P.J., BARBER, AND MCMILLIN, JJ.

MCMILLIN, J., FOR THE COURT

This domestic relations case comes before the Court from the Chancery Court of Desoto County on the appeal of Charlie Lafayette Epperson, Jr. Mr. Epperson, dissatisfied with the relief granted by the chancellor in a contested divorce, urges this Court to consider a number of matters. In his brief, Mr. Epperson has alleged five issues; however, our review indicates that, in certain instances, separate issues have been combined into one. Because this makes consideration of the issue cumbersome and potentially confusing, we have, for purposes of our discussion, elected to recast the issues raised by Mr. Epperson as follows:

> (a) Whether the chancellor was so evidently biased and prejudiced against Mr. Epperson that the judgment must be set aside.
>
> (b) Whether the chancellor erred in granting a divorce to Mary Suzanne Chatham Epperson on the ground of habitual cruel and inhuman treatment.
>
> (c) Whether the chancellor should have, instead, granted a divorce to Mr. Epperson on the ground of habitual cruel and inhuman treatment.
>
> (d) Whether the award of lump-sum alimony to Mrs. Epperson was so excessive as to constitute an abuse of discretion.
>
> (e) Whether the chancellor committed an abuse of discretion in awarding $600.00 per month child support.
>
> (f) Whether the chancellor was manifestly in error in awarding sole custody of the parties' minor child to Mrs. Epperson.
>
> (g) Whether the chancellor erred in awarding attorney's fees to Mrs. Epperson in any amount; or alternatively, whether the amount awarded was excessive.

We conclude that there is no basis in the established law of this State to disturb the decision of the chancellor in this case, and we, therefore, affirm.

I.

Facts

This proceeding resulted in the dissolution of a marriage of some seventeen months duration. During the course of the marriage, one child, Emily Chatham Epperson, was born to the parties. Mr. Epperson is a successful business executive who was earning a gross salary of approximately $96, 000.00 annually at the time of the divorce. Prior to the marriage, Mrs. Epperson had worked as a lighting consultant. She abandoned her career at the birth and infancy of the child until the parties separated, but the proof showed she had since returned to her career earning a gross income of approximately $23,280.00 per year. At the time of the divorce proceeding, Mr. Epperson was fifty-two years of age, and Mrs. Epperson was thirty-five years of age. Mrs. Epperson had a teenage daughter from a previous marriage who lived with the parties during their brief marriage. Mr. Epperson, though previously married, had no other children.

The record paints two versions of this short and apparently stormy marriage. According to Mr. Epperson's version, Mrs. Epperson entered the marriage with a preconceived plan to become pregnant and use the child as leverage to obtain unreasonable financial benefits from Mr. Epperson, including coercing him into abrogating an antenuptial agreement entered into by the parties prior to their marriage. He claims that she repeatedly and constantly threatened him with financial catastrophe and loss of all but minimal contact with his child if he did not accede to her demands. In addition, he claims she wilfully refused him the normal sexual relations associated with marriage as a weapon in pursuing her financial agenda. It was his position at trial that her constant efforts in this regard caused him such emotional distress that he required professional counseling.

Mrs. Epperson's proof, on the other hand, portrayed Mr. Epperson as a manipulative individual obsessed with the control of family finances to the extent that, once she stopped working, she was totally dependent upon his whims for even the basic necessities. She claims that he once abandoned her, pregnant and alone, on a street in San Francisco after a dispute over a money matter. She alleged that Mr. Epperson began leaving the home for extended periods of time without telling her where he was going. She said that he began to make demands that she vacate the marital domicile and moved her older daughter's furniture out of her bedroom, physically shoving Mrs. Epperson when she confronted him about it. Mrs. Epperson also testified that he repeatedly, and without foundation, accused her of marital infidelity, including claiming she was involved in a homosexual relationship with an associate. According to her, Mr. Epperson constantly threatened her with divorce litigation, claiming that he, as a Mississippi resident, would be able to obtain results disastrous to her, and that, in any event, he had the financial resources to pursue such litigation far enough to ensure her financial ruin. Shortly before Mr. Epperson filed for divorce, she testified that, against her will, he took their small daughter from the marital domicile and kept her for three days during which time she did not know the child's whereabouts.

Mrs. Epperson, at trial, asked for exclusive custody of the child of the marriage. Through the testimony of several experts, Mr. Epperson appeared at first to be advocating an award of joint legal custody with an essentially evenly-divided physical custody arrangement. In the latter stages of the trial, however, Mr. Epperson seemed to abandon to some degree this position and, instead, sought

paramount custody of the child for himself.

II.

Trial Court Decision

On this conflicting proof, the chancellor made detailed findings of fact, essentially accepting as true the bulk of Mrs. Epperson's proof and rejecting Mr. Epperson's contrary assertions. Based upon these findings, the chancellor awarded Mrs. Epperson primary custody of the child, granting Mr. Epperson what would appear to be the normal visitation rights customarily given to the noncustodial parent. He ordered Mr. Epperson to be responsible for one-half of all schooling expenses for the child, and to maintain then-existing levels of health insurance and life insurance for the child's benefit. In addition, he ordered Mr. Epperson to pay the sum of $600.00 per month in periodic child support.

The chancellor also awarded Mrs. Epperson lump-sum alimony in the amount of $20,000.00; however, he mentioned in his opinion that this award was based in part on the finding that Mrs. Epperson would need this amount in order to provide a suitable residence for the child of the parties, thus bringing to some degree considerations of child support into the award. Mr. Epperson was offered an election to pay this sum in deferred installments with interest.

Mrs. Epperson was awarded $30,935.19 to help defray the costs of her representation in the proceeding.

III.

Allegations of Bias and Prejudice on the Part of the Chancellor

Mr. Epperson claims that the chancellor who tried this case evidenced such bias or prejudice against him personally during the course of the trial that he was, in effect, denied a fair hearing. Counsel for Mr. Epperson goes so far as to suggest that the chancellor violated two separate canons regulating judicial conduct in his handling of this case. Such allegations, if shown to be true, would indeed raise serious questions regarding the fairness of this proceeding.

Yet, in support of these allegations, Mr. Epperson offers only the flimsiest arguments. He claims, for example, that the chancellor's directive that, during visitation periods, Mr. Epperson should continue to take the child to the same church as that used by the mother is evidence of bias or prejudice. He alleges that the order that Mr. Epperson pay one-half of any school tuition for the child, when considered with the $600 monthly child support award, is evidence of improper bias or prejudice. He states that the "tone and content" of the chancellor's findings of fact show bias or prejudice in that they indicate that the chancellor was "offended by the manner in which [Mr. Epperson] participated in his own case" and the "manner in which [Mr. Epperson's counsel] presented his case." He further claims that the chancellor was "impatient and discourteous" to one of his expert witnesses, and that the chancellor was "personally offended by the presence and testimony of [this witness]."

This Court has conducted a close review of the record, and we find these allegations of bias and prejudice on the part of the chancellor to be singularly without merit. The chancellor commented on some of the unusual aspects of the presentation of this case, but in no instance were these remarks disparaging of any party or any attorney. There is certainly nothing in either the "tone" or the "content" of the chancellor's writing on the case that even suggests any improper bias or prejudice. If the chancellor found some aspect of a case presented to him unusual or worthy of comment, then certainly it was his prerogative to so indicate. We find that the language, both of the chancellor's writing and his oral pronouncements from the bench throughout this lengthy trial, was courteous to all participants and exemplary of how a trial should be conducted. Certainly, upon occasion, firmness in the handling of attorneys, litigants, and witnesses is necessary, and the record reveals instances where the chancellor, in no uncertain terms, indicated his intention to remain in control of the conduct of his courtroom. But, at no time is there any indication that this firmness was accompanied to any degree by any mean-spiritedness or discourtesy to anyone.

We have given particular scrutiny to the matter of the chancellor's treatment of Dr. Jerry McCant, Mr. Epperson's expert witness claimed to have been mistreated by the chancellor. We find the chancellor's treatment of this witness to be painstakingly proper in every respect. The fact that the chancellor was unable to accommodate a late afternoon attempt to complete this witness's testimony in one day, preventing his immediate return to California, does absolutely nothing to indicate any disdain for this witness or any wilful mistreatment of him. In point of fact, a close review of this witness's testimony indicates that he testified almost exclusively in support of a joint custody arrangement, a proposition that even Mr. Epperson appeared to have abandoned by the end of the trial. His only reason offered for giving Mr. Epperson sole custody as a fall-back position was that, based upon his observation of the parties during the course of the trial, he felt that Mr. Epperson would be more open in allowing liberal visitation to Mrs. Epperson than she would be were the roles reversed. With this limited input, it is difficult to envision how claims that this witness was treated rudely, even if proved, would warrant disturbing the decision in this case. More to the point, we find these allegations totally baseless.

This Court summarily rejects this issue and admonishes counsel for Mr. Epperson, in the future, to consider seriously the provisions of Mississippi Rule of Appellate Procedure 28(k) when making accusations of ethical violations of the canons of judicial conduct against a trial judge.

IV.

Granting a Divorce to Mrs. Epperson

In his brief, Mr. Epperson has combined as a single issue the claim that the trial court erred in granting the divorce to Mrs. Epperson, but should have, instead, granted Mr. Epperson a divorce on the ground of habitual cruel and inhuman treatment. This is, in fact, two separate issues, admitting of the possibility that the first issue may have merit and the second may not, the result of which would be to leave the parties still married.

In defining the level of proof necessary to establish a ground for divorce on the basis of habitual cruel and inhuman treatment, our supreme court has said:

> In years gone by, this Court consistently held that habitual cruel and inhuman treatment could be established only by a continuing course of conduct on the part of the offending spouse which was so unkind, unfeeling or brutal as to endanger, or put one in reasonable apprehension of danger to life, limb or health, and further, that such course of conduct must be habitual, that is, done so often, or continued so long that it may reasonably be said a permanent condition.

Wilson v. Wilson, 547 So. 2d 803, 805 (Miss. 1989).

The chancellor, in this case, on controverted proof, found as a matter of fact that Mr. Epperson's conduct, including constant acts of financial oppression, threats and actions concerning depriving Mrs. Epperson of contact with her child, an act of physical aggression during an argument, and repeated and baseless accusations of marital infidelity, including claims of homosexual activity by Mrs. Epperson, all over a period protracted enough to meet the definition of habitual conduct, rose to the level necessary under such cases as *Wilson,* and *Smith v. Smith*, 614 So. 2d 394 (Miss. 1993), to constitute "habitual cruel and inhuman treatment" within the meaning of the statute. *See* Miss. Code Ann. § 93-5-1 (1972). Our established precedent permits the chancellor, as the trier of fact, to evaluate the sufficiency of the proof based upon his assessment of the credibility of the witnesses and the weight he thinks properly ascribed to their testimony. *Rainey v. Rainey*, 205 So. 2d 514, 515 (Miss. 1967). This Court, on appeal, is not permitted to disturb such findings absent a conclusion that the chancellor was manifestly wrong. *Id.*

There is substantial evidence in the record to support the findings of fact made by the chancellor. The fact that there was substantial evidence of a diametrically opposite character does nothing to alter that fact. The chancellor was in the best position to view the witnesses, their testimony and demeanor and make the difficult decisions necessary to resolve the contested factual matters placed before him. There is nothing beyond the previously-rejected protestations of bias and prejudice on the part of the chancellor to suggest that he was manifestly in error in accepting the truth of the evidence upon which he based his findings of fact, and, by implication, rejecting the remainder of the proof as unworthy of belief. *Crow v. Crow*, 622 So. 2d 1226, 1228 (Miss. 1993).

The chancellor further found, as a matter of fact, that, from a subjective standpoint, the proof was sufficient to show that the conduct of Mr. Epperson had the necessary adverse impact on Mrs. Epperson's physical and emotional well-being to justify severing the marital relationship. This was the correct standard to apply. *See Faries v. Faries,* 607 So. 2d 1204, 1209 (Miss. 1992) (citations omitted) (The court held that in granting a divorce on the ground of habitual cruel and inhuman treatment, the impact of the conduct on the plaintiff is critical; therefore, a subjective standard is employed.). There is enough evidence in the record in support of the chancellor's finding on this point, and there is, therefore, no basis to disturb the judgment.

V.

Mr. Epperson's Grounds for Divorce

The ruling of the chancellor granting a divorce to Mrs. Epperson carried with it, by necessary implication, a finding that Mr. Epperson's proof did not entitle him to a divorce. Insofar as we can determine from our review of the record and Mr. Epperson's brief, his claim of habitual cruel and inhuman treatment was based upon establishing some scheme on the part of Mrs. Epperson, conceived prior to the marriage, and pursued with relentless zeal throughout the marriage, to obtain excessive financial benefits from the marriage at the expense of Mr. Epperson. Much of the information cited in Mr. Epperson's lengthy brief on this issue, such as his claim that Mrs. Epperson concealed a previous marriage from Mr. Epperson, while perhaps distressful to Mr. Epperson, is largely irrelevant. Whether her conduct rose to the level of severity to meet the requirements of the statutory grounds is a matter vested in the sound discretion of the chancellor. *Chamblee v. Chamblee*, 637 So. 2d 850, 859 (Miss. 1994). Our review limits us to considerations of whether the chancellor substantially abused the discretion given him. *Rainey*, 205 So. 2d at 515. We conclude that the chancellor was not manifestly in error in denying Mr. Epperson's claim for divorce on this proof.

VI.

Lump-Sum Alimony

Mr. Epperson claims that, due to the short duration of this marriage and Mrs. Epperson's established ability to support herself as a lighting consultant, the chancellor abused his discretion when he awarded Mrs. Epperson lump-sum alimony in the amount of $20,000.00. The chancellor was, under our established case law, obligated to consider a number of factors when addressing the issue of lump sum alimony, the duration of the marriage being only one. *See Creekmore v. Creekmore*, 651 So. 2d 513, 517 (Miss. 1995); *Crow*, 641 So. 2d at 1103. Considering Mr. Epperson's demonstrated earning capacity and the fact that Mrs. Epperson interrupted her professional career to enter into this marriage, and in view of the fact that she was the one forced to establish a new domicile upon the breakup of the marriage, we cannot conclude that this lump-sum award constituted an abuse of the chancellor's discretion. This is especially true upon consideration of the chancellor's specific finding that the award was for the purpose of permitting Mrs. Epperson to re-establish a suitable residence for her and the child of the parties.

VII.

Child Support Award

Mr. Epperson complains that the award of $600.00 per month child support was excessive. More specifically, he urges reversible error in the chancellor's failure to follow the dictates of section 43-19-101(4) of the Mississippi Code, which requires the court, when setting child support, to make "a written finding in the record as to whether or not the application of the guidelines established in this section is reasonable." Miss. Code Ann. § 43-19-101(4) (1972). This is so, he claims, by virtue of the

uncontroverted fact that his adjusted gross income in the amount of $60,802.00 is more than the $50, 000.00 upper limit of subsection (4).

The statutory provision cited by Mr. Epperson defines two situations when the otherwise presumptively appropriate guidelines must be further scrutinized by the chancellor. One situation is when the adjusted gross income is less than $5,000.00. *See id.* § 43-19-101(4). It seems obvious that the legislative concern in this instance is that the guidelines result in a pitifully small sum for the support of the affected child or children. The other instance -- and the one with which we are concerned in this case -- just as clearly indicates a concern on the part of the legislature that the guidelines, blindly applied to ever-larger amounts of income, could result in child support that would be increasingly beyond the reasonable requirements of the child or children. *Id.* Thus, from Mr. Epperson's view, the statutory scheme seems designed for the purpose of protecting, to some degree, his income beyond $50,000.00 by preventing the chancellor from applying the percentage guidelines without specifically addressing the question of whether the resulting support award constitutes a reasonable sum. By way of example, had the chancellor set child support at $709.00 per month (that being 14% of his adjusted gross income) without the appropriate finding required by section 43-19-101(4), Mr. Epperson would appear to have an issue on appeal.

However, in this instance, the chancellor's award of $600.00 per month was substantially *below* that required by the statutory guidelines of section 43-19-101(1). In fact, the amount awarded is essentially the sum dictated by the percentage guidelines had Mr. Epperson's income been at the maximum amount mentioned in section 43-19-101(4), since fourteen percent of $50,000.00 equals $7,000.00 annually or $583.00 per month, the $17.00 per month difference between $583.00 and $600.00 being an insignificant sum. Thus, had Mr. Epperson's adjusted gross income been shown by the proof to be $50,000.00, the award would have been presumptively correct without any findings by the chancellor. The chancellor's ruling, in effect, gives Mr. Epperson the benefit of his extra earnings above $50,000.00, without a specific finding that ignoring his extra earnings was a reasonable course of action. The injury, if any, for the chancellor's failure to make a finding of reasonableness under section 43-19-101(4), therefore, lies with Mrs. Epperson, not Mr. Epperson. The chancellor deviated from the strict percentage guidelines of the statute in a manner that worked to Mr. Epperson's benefit, not to his detriment, and we, therefore, conclude that, under these facts, he is without standing to assert this statutory violation on appeal.

Mr. Epperson further engages in a statistical analysis of the time the child will be with him under the chancellor's visitation order, urging that, in view of that analysis, child support is excessive. Many costs and expenses associated with supporting and maintaining a child are fixed costs, payable no matter where the physical presence of the child happens to be. Housing, utilities, transportation facilities, clothing for the child, and such matters are not substantially affected by the number of weekends or holidays that a child spends with the noncustodial parent. The visitation schedule ordered by the chancellor appears to be the customary schedule used in that chancery district. No unusual extended periods of visitation with the father beyond the normal were ordered. Under those circumstances, it must be assumed that the factors urged for consideration by Mr. Epperson that might suggest a decrease in child support had already been factored into the chancellor's award. We do not find that the chancellor abused his discretion in refusing to lower child support based upon the percentage of time the child will spend with Mr. Epperson.

VIII.

The Award of Custody

Mr. Epperson urges this Court to conclude that the chancellor abused his discretion in awarding paramount custody of the child of the parties to Mrs. Epperson. At the first level, he argues that the chancellor abused his discretion in applying the factors traditionally used to determine issues of custody. *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). In the alternative, he urges that, in cases where both parents are presumptively fit, our courts should abandon the *Albright* considerations. He claims that, in many instances where both parties are fit, application of the *Albright* factors requires the chancellor to engage in hair-splitting analysis such that the result is often based upon insignificant shadings of difference between the competing parents' qualifications for custody. He urges, as an alternative, the adoption of a procedure to determine custody that he styles "The Full Family Environment Assurance Test." This procedure, attached as an exhibit to Mr. Epperson's brief, essentially encourages the parties to resolve the custody issues by agreement, then provides for an appointment of a guardian ad litem for the child if the parties are unable to agree. The guardian, in the first instance, essentially acts as a mediator between the parents. If the issues cannot be resolved, then the parents and the guardian ad litem submit competing proposed custody plans to the trial court, and the trial court then adopts one of the three plans or formulates its own plan.

It is beyond the authority of this intermediate appellate court to dictate such a change in the law of child custody of this State. Other than the injection of a guardian ad litem into the picture, the plan, based upon our review, does not appear to introduce anything substantially new to the mix. Informal settlement discussions prior to trial, where each party advances his or her own ideas of the proper resolution of the case, would appear to be the rule and not the exception. The fact that proposals made during these negotiations do not carry with them such high-flown titles as "Full Family Environment Assurance Plans" does nothing to diminish their importance in preventing litigation of the issues whenever possible. Neither are we convinced that formalizing such procedures and assigning important-sounding titles to settlement proposals would do anything to bring hopelessly deadlocked litigants to agreement. In fact, this case appears an excellent example of an instance where anything short of a judicially mandated resolution of the custody dispute appears, for practical purposes, unattainable. As to a guardian ad litem for the child, such authority would appear to be already vested in the chancellor should the chancellor, in his discretion, determine the need. *See* Miss. Code Ann. §§ 93-13-1, -13 (1972); *Union Chevrolet Co. v. Arrington,* 162 Miss. 816, 826, 138 So. 593, 595 (1932) (where court held that chancery court is "superior guardian" of minors).

The chancellor painstakingly analyzed this case under the *Albright* factors and reached a result that appears well reasoned and supported by the facts and the applicable law on the subject. We find nothing to indicate that there was any abuse of discretion that would warrant interference by this Court on appeal.

We note, parenthetically, that one of the *Albright* factors the judge was required under the law to consider, and which he did consider, was the respective age of the parents. Mr. Epperson suggests in

his brief that, by virtue of the fact that he is substantially older than Mrs. Epperson, he has been subjected to unlawful age discrimination in violation of applicable federal laws on the subject. This Court finds such an assertion to be frivolous in the extreme. The polestar consideration in any custody determination is the best interest of the child, and that is where the focus of the chancellor's well-reasoned opinion remained at all times. Arguments such as this clearly move the focus away from this polestar consideration and do nothing to advance the best interest of the child or the proper resolution of the vital issues being considered by the court.

IX.

Attorney's Fees

This was an extremely hard fought divorce case extending over a lengthy period of time. At the inception of the litigation, Mrs. Epperson was unemployed and forced to establish and maintain a separate household for herself and her daughter. There were extensive proceedings in the case, extensive discovery, and, for reasons not totally apparent, Mr. Epperson's counsel saw fit to bombard Mrs. Epperson's counsel with a virtual avalanche of correspondence. As a result, Mrs. Epperson incurred substantial legal fees that were in excess of $40,000 at the time of trial.

The chancellor, well aware of the course of the litigation, concluded that her fees were necessary and reasonable. He further found, based upon her situation in the time leading up to and ending with the trial of the case, that she did not have the resources to pay such substantial fees. On that basis, he awarded Mrs. Epperson attorney's fees and expenses of $30,935.19. The award of attorney's fees in divorce litigation is vested largely within the sound discretion of the chancellor, subject to the restriction that the chancellor must, in awarding fees, determine that the party is unable, from that party's own separate resources, to defray such costs. *Magee v. Magee,* 661 So. 2d 1117, 1126 (Miss. 1995); *Hubbard v. Hubbard,* 656 So. 2d 124, 130 (Miss. 1995).

The chancellor made the necessary determinations, and this Court is not of the opinion that he was manifestly in error in his findings.

THE JUDGMENT OF THE DESOTO COUNTY CHANCERY COURT IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.