IN THE COURT OF APPEALS 04/08/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01043 COA

MARC BOUTWELL

APPELLANT

v.

SHANNON W. BOUTWELL PASSMORE

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. NATHAN P. ADAMS JR.

COURT FROM WHICH APPEALED: HOLMES COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT:

BRIAN K. HERRINGTON

SALLY BARRETT

ATTORNEY FOR APPELLEE:

WALTER E. WOOD

NATURE OF THE CASE: DOMESTIC RELATIONS

TRIAL COURT DISPOSITION: PHYSICAL CUSTODY OF MINOR CHILD GIVEN TO MOTHER

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

PAYNE, J., FOR THE COURT:

STATEMENT OF THE FACTS

This is a change of custody case involving the minor child of Marc Boutwell and Shannon Passmore. Boutwell and Passmore were divorced in October 1993. The chancellor in that proceeding found both parents to be fit and proper persons to have joint legal and physical custody of the minor child with each party to have physical custody on an alternating weekly basis. This arrangement proved satisfactory until the minor child, Laken Boutwell, reached kindergarten age at which time the father, Marc Boutwell, filed a petition for modification of custody. The trial court

found that the advent of school age for Laken was a material change in circumstances that rendered split custody harmful to Laken, and that continued application of the alternating custody provision of the divorce decree would be detrimental to the child during her school years. The trial court found that it would be in the best interest of Laken to be in the *physical* custody of only one of the parents, and that permanent *legal* care, custody and control should be awarded jointly to Mrs. Passmore and Mr. Boutwell. Physical custody of Laken was awarded to Mrs. Passmore. Feeling aggrieved, claiming that the chancellor failed to make specific findings of the *Albright* factors and that Mrs. Passmore's smoking adversely affects the child, the Appellant, Marc Boutwell, appeals.

The court further increased child support to Mrs. Passmore from $175.00 a month to $400.00 per month. On cross-appeal, Mrs. Passmore asserts error in the calculation of the child support award on the ground that the trial court erroneously excluded bonuses from Mr. Boutwell's total income.

ANALYSIS

I. DID THE TRIAL COURT ERR BY FAILING TO MAKE SPECIFIC FINDINGS ON THE *ALBRIGHT* FACTORS AND BY ASSERTING THE TENDER YEARS DOCTRINE?

Boutwell contends that the trial court committed reversible error by failing to make specific findings on each of the *Albright* factors. Boutwell argues that it is impossible to determine what is in the best interest of the child without making specific findings of fact regarding each factor.

Boutwell argues that he introduced favorable testimony on each factor while Mrs. Passmore offered little proof as to the *Albright* factors. Boutwell contends that the evidence clearly favored his being awarded custody of Laken.

Boutwell argues further that the trial court erroneously relied on the Tender Years Doctrine in making its decision. Boutwell contends that the Tender Years Doctrine is nothing more than a presumption in Mississippi which he clearly overcame.

The Mississippi Supreme Court has held 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). In child custody cases, the best interests of the child remains paramount. *Ash v. Ash*, 622 So. 2d 1264, 1266 (Miss. 1993). An appellate court's limited scope of review requires that it not arbitrarily substitute its own judgment for that of the chancellor, who is in the best position to evaluate the factors related to the child's best interest. *Id.* (citation omitted).

In the present case, a reading of the chancellor's findings indicates that he did consider all of the *Albright* factors before reaching a decision. The chancellor found that the parents were equal on all but three factors. He found the child's age and sex to favor placement of custody with the mother while the child's health favored the father. Boutwell takes issue with the chancellor's giving more weight to age and sex than health. He argues that the chancellor erred by not giving a reason why the child's age and sex favored placement with the mother other than the fact that the child is

five years of age and of the female gender. Boutwell contends that the chancellor's failure to give further reasons for his decision on the age and sex factors indicates that he relied entirely on the Tender Years Doctrine in reaching his decision which Boutwell alleges is contrary to the law of this state.

We disagree. First of all, Boutwell erroneously lumps age and sex together under the Tender Years Doctrine. The Tender Years Doctrine pertains primarily to the age of the child. *Pellegrin v. Pellegrin*, 478 So. 2d 306, 307 (Miss. 1985) (citation omitted). Secondly, while our case law disavows use of age as the sole determining factor in a child custody case, it says clearly that age is just as much a factor in determining what is in the best interest of the child as any other factor. *Id.* (quoting *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983)). Therefore, we cannot find the chancellor to have erred in his consideration of age as a factor in determining what was in the best interest of the child.

Boutwell also argues that Mrs. Passmore's smoking habit is dangerous to the health of the minor child in that Laken has suffered from various respiratory ailments. We note that the chancellor did indeed determine the health factor to favor the Appellant; however, we find that neither Laken's physician, Dr. Downer, nor Boutwell's expert, Dr. Burns, could say conclusively that Mrs. Passmore's smoking is the cause of Laken's respiratory problems.

In his brief, Boutwell does nothing more than rehash the evidence that he presented to the chancellor during the hearing. In addition to health, age, and sex, Boutwell presses the issue of Mrs. Passmore's frequent changes in employment and residences since the divorce. Boutwell argues that he has maintained one residence and one job since the divorce while Mrs. Passmore has moved four times and had numerous jobs. While we do not dispute the facts as presented by Mr. Boutwell, we must reiterate this Court's function. As a reviewing court, we cannot reevaluate the evidence and substitute our judgment for that of the chancellor. We have reviewed the record and are satisfied that the chancellor's finding of fact was supported by substantial, credible evidence. The court made a finding of fact, based on all the facts, evidence, and testimony presented, that a material change in circumstances existed, and that Laken's interests were best served by granting custody to the mother.

The bottom line, in this case, is that the chancellor had a very difficult job in choosing between two good parents. Unfortunately, as is the case in all child custody decisions, there is a losing party. Here, much to his disappointment, Mr. Boutwell is that losing party. Boutwell would have this Court go

back and reevaluate the evidence and hopefully reach a different conclusion. This we cannot do. We find no manifest error on the part of the chancellor and therefore affirm his award of custody to the Appellee, Shannon Passmore.

II. DID THE CHANCERY COURT ERR IN EXCLUDING BONUSES FROM MR. BOUTWELL'S TOTAL INCOME WHEN CALCULATING THE AMOUNT OF CHILD SUPPORT TO BE AWARDED?

Passmore takes issue with the computation of the child support award in the amount of $400.00. Passmore contends that the chancellor erroneously excluded bonuses from Boutwell's adjusted gross income when he computed the amount of child support. Boutwell is an attorney whose gross monthly pay is $3,500.00. However, Boutwell has, in the past, received substantial bonuses from his law firm. At the time of the custody modification hearing, Boutwell had earned a $10,000.00 bonus for the first half of 1995. In 1994, Boutwell's financial statement indicated that he had received bonuses totaling approximately $47,000.00. The chancellor excluded these bonuses from his calculation of the child support award and arrived at the $400.00 support award by multiplying the statutory guideline of fourteen percent by Boutwell's adjusted gross income of approximately $2,800.00.

Passmore cites Section 43-19-101(3)(a) of the Mississippi Code which states that "[t]he amount of 'adjusted gross income' . . . shall be calculated as follows: (a) Determine gross income from all potential sources that may reasonably be expected to be available to the absent parent . . . ." *Id.* (Rev. 1993). Passmore argues that bonuses should be included as income from *all potential sources* while Boutwell contends that his bonuses fall out of this category because the bonuses cannot *reasonably be expected.* However, his situation is no different than that of a commissioned salesman, a sole practitioner, an insurance agent, a practicing physician, nor a business owner--none of whom can exempt a large portion of their income from the reach of chancery court for child support adjudications.

A modification of the child support provisions of a divorce decree is permitted only when there has been a material or substantial change in circumstances of one of the parties. *Shipley v. Ferguson*, 638 So. 2d 1295, 1297 (Miss. 1994). In the present case, the material change in circumstances was the child's reaching school age. As a result, the chancellor's award of full physical custody of the minor child to Mrs. Passmore required a change in the amount of child support.

As in child custody cases, 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). Although Mississippi statutory law provides for child support guidelines regarding an award or modification of child support, Miss. Code Ann. § 43-19-101(1) (Rev. 1993), the child support award is still within the sound discretion of the chancellor. *Grogan v. Grogan*, 641 So. 2d 734, 740-41 (Miss. 1994). 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).

In the present case, we find that the chancellor did err in excluding Boutwell's bonuses from his calculation of the child support award. At the time of the custody hearing, the evidence indicated that during the previous eighteen months Mr. Boutwell had received, at regular intervals, bonuses from his law firm totaling approximately $57,000.00. In calculating the child support award, the chancellor

accepted Boutwell's argument that these bonuses could not reasonably be expected and therefore excluded the bonuses from Boutwell's gross income. The chancellor reasoned that the short period of time over which Boutwell had actually received the bonuses was not lengthy enough to sufficiently establish that the bonuses were such that could reasonably be expected to continue. We disagree.

We find that "bonuses" paid by a law firm to an associate constitute more than a mere gratuitous offering. Our collective legal experience leads us to the conclusion that "bonuses" flowing to an associate as a result of the firm's completion of a particularly lucrative case are a firmly anticipated part of an associate's compensation. The fact that Boutwell only began receiving these "bonuses" during the past year and a half is irrelevant. Suppose Boutwell had been a new law school graduate just starting a solo practice and his net earnings from his first year of practice had been $89,000.00. Would we say that his one year in the legal profession was not an adequate track record on which to base a child support calculation? We would not. We reiterate, however, a previous point made earlier in this opinion, that a child support award may be modified upon a showing of a material or substantial change in circumstances by one of the parties. Should Mr. Boutwell find his income to have decreased materially or substantially, he is certainly free to petition the court for modification of the child support award.

We therefore remand this cause to the chancery court and instruct the chancellor to recalculate the child support award in a manner which is consistent with this opinion and Mississippi Code section 43- 19-101(4) where it applies.

THE JUDGMENT OF THE CHANCERY COURT OF HOLMES COUNTY IS AFFIRMED AS TO THE AWARD OF CHILD CUSTODY AND IS REVERSED AND REMANDED FOR A RECALCULATION OF THE CHILD SUPPORT PAYMENT. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

McMILLIN AND THOMAS, P.JJ., DIAZ, KING, AND SOUTHWICK, JJ., CONCUR. BRIDGES, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY COLEMAN, J. HERRING, J., NOT PARTICIPATING.

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BRIDGES, C.J., DISSENTING:

I respectfully dissent to the majority's reversal of the chancellor's computation of child support due to Passmore. Simply put, the majority is engaging in appellate fact-finding which is clearly prohibited by mountains of precedent in this state. The issue that is the focus of the majority's reversal is whether to include any bonuses received by Boutwell in his job as an attorney in his "adjusted gross income" as used in determining the amount of child support he is to pay.

The chancellor found, in pertinent part, the following:

> Plaintiff, Marc Boutwell, age 30, is a resident of Lexington, Mississippi. He is employed as an attorney by the Barrett Law Offices in Lexington. According to Exhibit P-1, financial declaration statement, he earns $3500 per month before payroll deductions are applied. After payroll deductions are applied, he receives $2802.67. *This income figure does not include any bonuses the Barrett Law Firm may declare.* Plaintiff either has received or anticipates receiving approximately $10,000 as a bonus for 1995. His 1994 tax return reflects income, *including an extraordinary bonus year*, of $89,005.00. *However, Barrett Law Firm has no set bonus policy upon which plaintiff may rely.*
>
> The Court has analyzed the proof pursuant to the nine factors set forth in Draper v. Draper, No. 94-CA-00317 (July 20, 1995) and section 43-19-101 and 43-19-103, Mississippi Code of 1972. Application of the guidelines of 14% results in a calculation of $392.28 (i.e., $2802.67 x 14%). *The court finds the sum of $400.00 per month to be fair, just and reasonable and in line with the statutory requirements of 43-19-101, 43-19-103 and the Draper rules.* (Italics added).

Our standard of review is as follows:

> The issues before this Court may readily be divided into questions of law and questions of fact. Our review of a chancellor's findings is well settled and very familiar. This Court will always review a chancellor's findings of fact, but the court will not disturb the factual findings of a chancellor when supported by substantial evidence unless the court can say with reasonable certainty that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard. *Even if this Court disagreed with the lower court on the finding of fact and might have arrived at a different*

conclusion, we are still bound by the chancellor's findings unless manifestly wrong.

Cummings v. Bernderman, 681 So. 2d 97, 100 (Miss. 1996)(Italics added).

I must admit that I am tempted to engage in a debate over whether bonuses for associate attorneys are includible in their "adjusted gross income," but to do so would ignore the very point I am trying to make. The chancellor in this case unequivocally stated in his findings of fact that he had thoroughly considered the law and facts relating to issue of the includability of the bonuses in adjusted gross income. The majority's discussion leads this writer to believe that they are reversing because they would have found differently. As stated above, these are not grounds for reversal. It is my opinion that there was substantial evidence supporting the chancellor's findings, and he is certainly not manifestly wrong.

Furthermore, I am disturbed by the majority's final comment that "[s]hould Mr. Boutwell find his income to have decreased materially or substantially, he is certainly free to petition the court for modification of the child support." This Court was created to facilitate the efficient resolution of disputes. The majority's comment seemingly promotes future litigation. This is especially true in light of the fact that at the time of trial in 1995, Boutwell's bonus estimate showed a significantly slower pace than during the extraordinary previous year of 1994. In other words, the majority's holding incites and almost guarantees future litigation on this point. By allowing the chancellor's decision to stand, we would not only uphold the clear precedent of the law, but we would further the purposes of this Court. For these reasons, I respectfully dissent.

COLEMAN, J., JOINS THIS SEPARATE WRITTEN OPINION.