

IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00377 COA

ZINA GAIL (GATTON) McHAND

APPELLANT

v.

GUY ELLIS McHAND, JR.

APPELLEE

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

TRIAL JUDGE: HON. MELVIN McCLURE, JR.

COURT FROM WHICH APPEALED: DeSOTO COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT:

H. R. GARNER

ALLEN B. COUCH

ATTORNEY FOR APPELLEE:

WALLACE C. ANDERSON

NATURE OF THE CASE: DOMESTIC RELATIONS

TRIAL COURT DISPOSITION: DIVORCE AND OTHER RELIEF GRANTED

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

SOUTHWICK, J., FOR THE COURT:

Zina and Guy McHand were divorced by the DeSoto County Chancery Court which also apportioned

financial relief and decided custody of the couple's twin daughters. Zina appeals the court's decision contending (1) that it erred in failing to make findings requested under Rule 52 of the Mississippi Rules of Civil Procedure, (2) that it erred in its award of child custody to Guy, (3) that it erred in ordering child support to be paid to Guy, and (4) that it erred in failing to distribute equitably the marital assets and debts. We conclude that the chancery court should have made findings of fact and conclusions of law and that its failure to do so was error. Accordingly, this case is remanded to the court for the provision of those findings. Our disposition of this case pretermits discussion of the remaining issues pending certification of the appropriate findings to this Court.

FACTS

Zina filed for divorce from Guy alleging irreconcilable differences and habitual cruel and inhuman treatment. Guy responded by counterclaiming for divorce on the same grounds. During the June 1994 trial of the parties' case, an agreement was reached concerning all issues in the case except child custody and support and liability for unpaid sales taxes from a catering business owned by the couple. The trial continued, and at its close, the chancery court rendered its opinion. Custody of the couple's children was awarded to Guy. Zina was ordered to pay monthly child support of \$200.00. Liability for the sales taxes was apportioned equally between them. The court did not explain the reasons for its decision. Following the court's opinion, Zina moved for separate findings of fact and conclusions of law. The motion was denied, and the chancery court entered its final decree of divorce in March 1995.

DISCUSSION

Rule 52 of the Mississippi Rules of Civil Procedure provides:

In all actions tried upon the facts without a jury the court . . . shall upon the request of any party to the suit . . . find the facts specially and state separately its conclusions of law thereon and judgment shall be entered accordingly.

M.R.C.P. 52(a). Complementing this rule, Uniform Chancery Court Rule 4.01 provides:

[W]here it is required or requested, pursuant to M.R.C.P. 52, the Chancellor shall find the facts specially and state separately his conclusions of law thereon.

Unif. Chan. Ct. R. 4.01. In *Lowery v. Lowery*, 657 So. 2d 817, 819-20 (Miss. 1995), the supreme court held that Rule 52 mandated that chancellors make findings of fact and conclusions of law when a party requests them. *Lowery*, 657 So. 2d at 819-20. In the absence of those findings, a remand must be made. *Id.* at 820.

Guy asserts that this Court need not remand this case for the appropriate findings consistent with *Lowery* since the evidence overwhelmingly supports the chancellor's decision. He alludes to the following passage from the supreme court's opinion in *Lowery*:

While in this case there is a substantial basis in the record for the chancellor's ultimate conclusion, we can not say that the evidence is overwhelming so as to obliterate the necessity for findings.

Id. at 819. Based upon this passage, Guy asks this Court to conduct a search of the record to find this overwhelming evidence. We will not do so. The observation quoted from *Lowery* did not amend the rules of practice to allow ignoring the requirement that findings and conclusions be made when requested. The rule is not discretionary.

Moreover, this Court is not a super-chancery court. The chancellor is the finder of facts and, as such, is entitled to explain the weight he gave to the evidence adduced at trial. *See Tricon Metals & Servs. v. Topp*, 537 So. 2d 1331, 1333 (Miss. 1989) (disposing of case on Rule 52 findings "reflect[ing] a credibility choice made in the context of hotly disputed and widely differing versions of the facts"). We cannot assume that role for him.

THE JUDGMENT OF THE DeSOTO COUNTY CHANCERY COURT IS REVERSED AND THIS CASE REMANDED FOR A MAXIMUM PERIOD OF SIXTY DAYS WITHIN WHICH THE COURT IS DIRECTED TO CERTIFY ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING THE JUDGMENT RENDERED IN THIS CASE. UPON RECEIPT OF THOSE FINDINGS AND CONCLUSIONS, THIS COURT WILL RESUME PROCEEDINGS ON APPEAL. IF ADDITIONAL TIME IS NEEDED TO CARRY OUT THIS JUDGMENT, THE TRIAL COURT SHALL CERTIFY TO THIS COURT THE LENGTH OF ADDITIONAL TIME NEEDED.

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