

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00306 COA

H. WAYNE GRAY

APPELLANT

v.

CATHERINE A. GRAY

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. JASON H. FLOYD, JR.

COURT FROM WHICH APPEALED: CHANCERY COURT OF HARRISON COUNTY

ATTORNEY FOR APPELLANT:

JAMES L. GRAY

ATTORNEY FOR APPELLEE:

PATRICIA CHAMPAGNE

NATURE OF THE CASE: DOMESTIC - CHANGE OF CUSTODY

TRIAL COURT DISPOSITION: CUSTODY WAS CHANGED FROM FATHER TO MOTHER AND FATHER WAS ORDERED TO PAY CHILD SUPPORT, PAST MEDICAL EXPENSES, ETC.

MANDATE ISSUED: 6/24/97

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Catherine Gray's motion for modification of custody, contempt, and temporary relief was granted.

Wayne Gray appealed arguing: (1) Catherine failed to present evidence sufficient to show a material change in circumstances to warrant a change of custody; (2) the couple's son, Jeffrey, should have been declared emancipated; (3) the chancellor improperly applied the child support statutory guidelines; and (4) even if the award of support is upheld, Jeffrey's part of the support should be paid directly to him. We reverse and remand only on the computation of child support. In all other respects, the decree is affirmed.

## FACTS

Catherine and Wayne Gray were granted a divorce in 1991 based on irreconcilable differences. At the time of the divorce, the couple had two children, Jeffrey (age 15) and Theresa (age 13). Both children then wanted to live with their father. The judgment of divorce incorporated into its terms a child custody agreement signed by both parties. The parties would have joint legal custody of the children, but the primary physical custody was awarded to Wayne. The agreement did not provide for child support payments to be made to the custodial parent, but did provide that "the party with whom each child resides with for more than 50% of the calendar year shall claim that child as a tax exemption for that given year."

In 1995, Catherine filed a motion for modification and contempt, alleging that there had been a material change in circumstances of the parties. She requested that the chancellor give her the physical care and custody of the children. She also requested that the chancellor require Wayne to pay child support, past medical expenses of the children and maintain \$50,000 life insurance for the children. A hearing was held after which the Chancellor awarded physical custody of both children to Catherine. He also ordered Wayne to pay \$368.00 per month in child support, \$626.35 for past medical expenses of the children, and to obtain dependent medical insurance coverage on the children.

## DISCUSSION

### *1. Substantial Evidence Warranting Change in Custody*

Wayne argues that Catherine did not present enough evidence to warrant a change in custody of the children. He contends that the reason cited by the chancellor for changing custody did not meet the requisites set out by the supreme court. The only reason alleged, proven, or relied upon by the chancellor was that the children now stated that they live with their mother.

The supreme court has given the following rules for a change in custody:

First, the moving party must prove by a preponderance of evidence that, since entry of the judgment or decree sought to be modified, there has been a material change in circumstances which adversely affects the welfare of the child. Second, if such an adverse change has been shown, the moving party must show by like evidence that the best interest of the child requires the change of custody.

*Riley v. Doerner*, 677 So. 2d 740, 743 (Miss. 1996).

The supreme court has upheld changes in physical custody when the only basis was that the child expressed a desire to reside with the previously noncustodial parent. *Bell v. Bell*, 572 So. 2d 841, 846 (Miss. 1990). The children in this case expressed a preference to live with their mother. At the time of the hearing, Theresa was 17 and Jeffrey was 19. The chancellor said this:

These two children are -- one is a senior in high school and the other is a junior in college. They are certainly old enough to be able to speak their preference and for this Court to listen diligently and with due consideration to their wishes. The Court has done that, and the Court is going to grant the change in custody from Mr. Gray to Mrs. Gray for both of these children.

The older child, a college student, does not regularly reside with either parent. There was ample evidence that since the divorce, the children with some frequency have changed their minds regarding where they wish to live. The chancellor is not obligated to memorialize each change of heart with a change in custody. Still, the chancellor heard the evidence and determined it was in the best interest of the children to have physical custody awarded to the mother. We do not find the decision to be manifestly in error. *Morrow v. Morrow*, 591 So. 2d 829, 832 (Miss. 1991).

## 2. *Emancipation*

"Emancipation of a child has been defined by this Court as freeing the child 'from the care, custody, control, and service of its parents; the relinquishment of parental control, conferring on the child the right to its own earnings and terminating the parent's legal obligation to support it.'" *Sester v. Piazza*, 644 So. 2d 1211, 1217, quoting *Caldwell v. Caldwell*, 579 So.2d 543, 549 (Miss.1991). A party is not responsible for the support of a child once the child is emancipated, either by reaching majority age or otherwise. *Sester v. Piazza*, 644 So. 2d at 1217.

Wayne argues that his son, Jeffrey, should have been declared emancipated because the undisputed testimony showed that his "living essentials" were provided by his school loans, grants, scholarships and his own salary. Wayne also contends that in times when Jeffrey's needs were not met, his parents and grandmother provided those needs.

Jeffrey was a second year student at the University of Southern Mississippi and was living in a place of his own while attending school. To defer some of his college expenses, Jeffrey received a Pell Grant, a Stafford loan, and a scholarship worth \$1,150 per semester. He also worked about twenty-two hours per week earning \$4.50 an hour. It was clear at the trial level that despite the substantial effort exerted by Jeffrey to provide for himself financially, his wages and other income were insufficient to cover his expenses.

In *Duncan v. Duncan*, 556 So. 2d 346, 348 (Miss.1990), the supreme court found that an eighteen year old college student who worked only part time, had an acceptable scholastic record, and could not provide for her continuing education on her own was not emancipated. Likewise, Jeffrey is still dependent upon his parents to support him. Wayne does not dispute the fact that Jeffrey could not provide all of his essentials while attending school. Jeffrey is to be commended for working to help defray some of the expenses of his education. This, however, does not mean he should be declared emancipated. There was no error in the chancellor's ruling.

## 3. *Application of statutory guidelines for child support*

The supreme court has said that "[a]n award of child support is a matter within the discretion of the chancellor and we will not reverse that determination unless the chancellor was manifestly wrong in his finding of fact or manifestly abused his discretion." *Gillespie v. Gillespie*, 594 So. 2d 620, 622 (Miss.1992).

Section 43-19-101 sets out the guidelines for determining the amount of child support to be awarded. The statute provides that "[t]he guidelines 'shall be a rebuttable presumption in all judicial or administrative proceedings regarding the awarding or modifying of child support awards in this State....'" Miss. Code Ann. 43-19-101(1). "Furthermore, 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 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.'" *Dufour v. Dufour*, 631 So. 2d 192, 193 (Miss. 1994) quoting Miss. Code Ann. 43-19-101(2).

Wayne contends that the chancellor should have considered other factors in determining if the application of the guidelines were fair. The chancellor refused to consider any other factors and stated that there had to be "extreme circumstances" present before he would depart from the guidelines. He awarded support in the amount of 20% of Wayne's adjusted income. The chancellor stated this:

The court is further required by law, except in *extreme circumstances*, those circumstances if the court finds them to be extreme must detail those circumstances, the court finds no extreme circumstances that would require it to do other than that required by law which is to award Mrs. Gray, the mother of these children, 20 percent of Mr. Gray's adjusted gross income for their support. That 20 percent would be \$368 a month.

In response to this ruling, counsel for Wayne asked the court to explain where he found that "extreme circumstances" was necessary to depart from the guidelines.

MR. GRAY: Your Honor, you mentioned in the law, and I am trying to understand this, there have to be extreme circumstances. Where is that found?

THE COURT: It's found in the law books, Mr. Gray.

Neither the supreme court or the statute requires such a finding of extreme circumstances. The court has said, "[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). The court further stated that "[w]hen entering a child support decree, the chancellor should consider all circumstances relevant to the needs of the children and the capacities of the parents. The reasonable needs of the children are obviously the beginning point in such inquiry. There is always some minimum level of food, clothing, shelter, day care, education, medical care and the like that must be provided. Above that, what is reasonable turns on the circumstances--and one of the major circumstances is the financial resources reasonably available to each parent." *Id.*

The factors are case-specific. Wayne argues that relevant factors in this case include that the older child is substantially providing for himself, even if not so completely, as to be emancipated. Many of the expenses that might normally justify the guideline percentages are being provided for in other

ways for the college student. We agree that such issues are relevant considerations.

Moreover, in the original settlement agreement the parties did not make provisions for child support to be paid to the custodial parent. The record shows that Catherine actually has a higher income. The result of the chancellor's modification is that the custodial parent under the original decree was receiving no child support, but after the modification the higher-income parent has custody and is receiving child support. We find that more than just rigid application of the guidelines is necessary to support the award. "Extreme circumstances" need not be proven before a departure from the guidelines is permitted. Consideration is to be given to all evidence that the chancellor finds relevant regarding the needs of the children.

We should not be read to say that a chancellor has to justify following the guidelines. That is how this opinion is characterized by the dissent. What the majority actually is doing is the not very revolutionary holding that the parties in a divorce action are entitled to the chancellor's proper application of the law. Proper application includes not misstating the requirements that would justify a departure. The problem in this case is that the chancellor set the evidentiary standard for departure from the guidelines too high. If a chancellor states on the record that he is absolutely bound by the guidelines, that is error under *McEachern*. If instead the chancellor states that he is bound unless a certain level of evidence is presented and the level stated is erroneous, then that also is reversible error. The dissent suggests the misstatement should be ignored and the child support affirmed. That arrogates to us the discretion that is the chancellor's. We cannot as the dissent would, or at least we should not, say that had the chancellor properly recalled the requirements for departure from the guidelines, that he would have made the same decision. That is for him to say, or not.

#### *4. Child Support Recipient*

Wayne argues that if Jeffrey is found to be due child support, the payments should be made directly to Jeffrey rather than to his mother since Jeffrey is basically living on his own. Jeffrey testified that he had moved from an apartment to a house while attending college. The supreme court has said:

We have recognized that a child support judgment is awarded to the custodial parent for the benefit and protection of the child, the underlying principle being the legal duty owed to the child for the child's maintenance and best interest. This Court has recognized that the child support benefits belong to the child, who is the only party that may compel an accounting of child support sums from the parent who receives them. It is thus plain that the custodial parent's assertion of the child's right of child support is not by virtue of the parent's legal right to those funds, but by virtue of the fiduciary relationship owed to the child.

*Wilson v. Wilson*, 464 So. 2d 496, 498 (Miss. 1985). (Citations Omitted).

There is certainly a difference in the nature of the contact that a custodial parent has with a child once that child has left to live elsewhere, such as at college. Nonetheless, child support is still to be paid directly to the custodial parent for a number of reasons, not the least of which is accountability. The supreme court has stated that "[t]he custodial parent is merely the conduit through which the support money passes for the benefit of the children." Because Wayne has offered no proof that Catherine would not pass the support money on to Jeffrey for his benefit, we reject this argument.

**THE JUDGMENT OF THE CHANCERY COURT OF HARRISON COUNTY IS  
AFFIRMED IN PART AND REVERSED AND REMANDED FOR FURTHER  
PROCEEDINGS ON THE ISSUE OF THE AMOUNT OF CHILD SUPPORT**

**OWED BY APPELLANT. COSTS OF THE APPEAL ARE ASSESSED TO THE  
APPELLANT.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING,  
HINKEBEIN, AND KING, JJ., CONCUR.**

**PAYNE, J., CONCURRING IN PART AND DISSENTING IN PART, WITH SEPARATE  
WRITTEN OPINION.**

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PAYNE, J., CONCURRING IN PART, DISSENTING IN PART:

I concur in all of this opinion except the point on which we are reversing -- child support.

Section 43-19-101 of the Mississippi Code sets forth the guidelines for determining the amount of child support. In the present case, the chancellor followed the guidelines. Section 43-19-103 says that the chancellor may rebut the presumption of the justness of the guidelines "by making a specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case as determined according to" stated criteria. Miss. Code Ann. 43-19-103 (1972). Even if the chancellor misstated (*i.e.*, "extreme circumstances") what would be necessary to cause him to refuse to follow the guidelines, nowhere does the statute or our cases construing it require that a chancellor has to justify his *not* deviating from the guidelines. The majority cites *McEachern v. McEachern*, 605 So. 2d 809, 814 (Miss. 1992) as authority for appellant's demanding that the

chancellor consider certain circumstances in making his award of child support. *McEachern* was a case where the court was deviating from the guidelines and therefore had to state its justification. *Id.* The guidelines presume all of the things that need to be taken into consideration for following them. Since the chancellor was under no duty to justify the guidelines, I would find that there is nothing to show that the chancellor abused his discretion in ruling according to the statutory guidelines. Without more, the father should not be able to have the chancellor's ruling overturned on appeal.

I would affirm on all issues.