

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00981 COA

JERRY CLYDE NIX, JR.

APPELLANT

v.

AMY HESTER NIX

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. VICKI R. BARNES

COURT FROM WHICH APPEALED: WARREN COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

WREN C. WAY

ATTORNEY FOR APPELLEE:

PRO SE

NATURE OF THE CASE: AWARD OF CUSTODY OF CHILD IN AN ACTION FOR DIVORCE

TRIAL COURT DISPOSITION: COURT GRANTED DIVORCE TO HUSBAND, BUT AWARDED CUSTODY OF CHILD TO MOTHER.

MANDATE ISSUED: 6/24/97

EN BANC

COLEMAN, J., FOR THE COURT:

The Chancery Court of Warren County granted Jerry Clyde Nix, Jr. (Jerry Nix), a divorce from his wife, Amy Leigh Hester Nix (Amy Nix), on the ground of adultery, and it awarded custody of the

Nixes' child, Jacy Marie Nix, to her mother, Amy Nix. Jacy's father, Jerry Nix, has appealed from the chancery court's final decree of divorce to raise issues of error in the chancellor's award of the custody of his daughter Jacy to Jacy's mother. We find that the chancellor did not err when she awarded custody of the Nixes' daughter Jacy to her mother, Amy Nix, and thus we affirm the chancellor's award of Jacy's custody to Jacy's mother.

I. FACTS

Jerry Nix, who was then five days shy of his twenty-sixth birthday, and Amy Nix, who was then an eighteen-year-old high school graduate, were married, each for the first time, on October 6, 1990, in Winona, Mississippi. Their daughter Jacy was born in the Grenada Lake Medical Center, Grenada, Mississippi, on August 27, 1991. Jerry Nix first worked as a policeman for the City of Winona, but on July 3, 1989, he began working for Entergy, the successor to Mississippi Power and Light and Company. As Entergy's employee, Jerry Nix moved to Grenada, where he worked first as a ground man and then as a meter reader. Entergy transferred Nix to Vicksburg in December, 1991, where he continued to work as a meter reader for Entergy until February 2, 1995. On that date, Entergy terminated Jerry Nix's employment as a part of Entergy's reduction in staff. Shortly after Entergy terminated his employment, Jerry Nix returned to Winona, where he resumed his former employment as patrolman on the City of Winona Police Force.

When the Nixes first moved to Vicksburg, Amy Nix remained at home to care for Jacy. Four months after the Nix family's move to Vicksburg, Amy Nix began working part-time as a teller at the Halls Ferry Branch of First National Bank of Vicksburg. She worked on Monday and Friday of each week. On July 5, 1994, Amy Nix began to work for Commercial Credit Corporation (Commercial Credit) in Vicksburg. Charles Rainer, the manager of the Commercial Credit office in Vicksburg, was her boss. Amy Nix engaged in three adulterous relationships after the Nixes moved to Vicksburg, the last of which was with her boss, Charles Rainer.

II. Litigation

On February 6, 1995, the Nixes filed a joint complaint for divorce in the Chancery Court of Warren County on the ground of irreconcilable differences. They entered into an agreement for the custody and maintenance of minor child and settlement of property rights which they also filed in the chancery court on the same day. Their agreement provided that "[b]oth parties shall have joint legal custody of [Jacy]." This same agreement further recited that Amy Nix was "a fit, suitable and proper person to have the actual physical custody" of Jacy. The agreement specified in appreciable detail Jerry Nix's visitation rights with his daughter.

On March 9, 1995, Jerry Nix filed both a motion to withdraw joint complaint for divorce and property settlement agreement and a complaint for divorce. In his complaint for divorce, Jerry Nix alleged that he was entitled to a divorce from Amy Nix "on the grounds of adultery, habitual cruel and inhuman treatment, and in the alternative irreconcilable differences." Nix further prayed for temporary and permanent custody of his daughter Jacy "with [Amy Nix's] having reasonable rights of visitation as the Court deems proper." Amy Nix responded to her husband's bill of complaint by filing her answer in which she incorporated a counter-claim for divorce from Jerry Nix on the ground of

habitual cruel and inhuman treatment, or in the alternative, the ground of irreconcilable differences. In her counter-claim for divorce, Amy Nix prayed for temporary and permanent custody of her daughter Jacy.

The chancellor conducted three separate hearings in this case. The first was a temporary hearing on March 17 and 20, 1995; the second was a trial on the merits of the Nixes' claims against each other for divorce on April 13, 1995; and a third hearing was conducted on June 26, 1995, in response to Jerry Nix's motion to reopen case which he filed on May 15, 1995. Among the reasons which Jerry Nix assigned to reopen the case were: (1) Jacy was suffering from severe flea bites that went unattended, (2) Amy Nix had moved another family into the small, already cramped quarters, (3) Amy Nix had forged Jerry Nix's name to an application for a VISA card, and (4) Amy Nix had forged Jerry Nix's father's name to an application for a preferred VISA card.

On August 9, 1995, the chancellor rendered her Ruling of the Court in which she made the following findings of fact which are relevant to the issues which Jerry Nix has presented to this Court for its resolution:

[Jacy] is presently age three, of good health and is female. Prior to the separation, Amy Hester Nix had the continuity of care; however, at the final hearing Mr. Nix indicated he had provided more parental care for Jacy than the testimony reflected at the temporary hearing. Testimony was unrefuted that [Jacy] had not spent any considerable lengths of time away from Mrs. Nix prior to the parties' separation. Mr. Nix had seldom kept the child by himself during her three years. Mrs. Nix has been the primary care giver, therefore, she possesses the best parenting skills. Mrs. Nix stayed at home with [Jacy] until she was eight months old and then went to work part time. [Jacy] from age eight months until age three was kept in the home of one child care provider. Both parents have a willingness and capacity to provide primary care, however, because of Mr. Nix's present employment with the Winona Police Department which requires him to work different shifts; 6 -- 2, 2 -- 10, 10 -- 6, four days on and two days off, the care would be provided with Mr. Nix's mother's assistance. Mr. Nix has to attend the police academy for [ten] weeks, at which time Mr. Nix's mother will provide care for [Jacy]. The employment of the parents and responsibilities of that employment is such that Mrs. Nix is presently employed in Tupelo at a grocery store. Mr. Nix's hours as a police officer rotate and his net income is \$1,024.00 per month. Both parents appear physically in good health; however, Mrs. Nix takes some prescription medications for her nerves and also had doctor visits for said purpose. Mrs. Nix is twenty two years old and Mr. Nix is thirty years old.

There are strong emotional ties with Amy Hester Nix and [Jacy] as Mrs. Nix spent more time with the child prior to the separation than did Mr. Nix. [Jacy] had resided in the [Nixes'] home in Vicksburg, Mississippi, since she was four months old and attended a Montessori school before she went to Winona with her father on March 3, 1995. Jacy stayed with her father and paternal grandparents from March 3, 1995, until the hearing on March 17, 1995. Jacy spent the weekend with her mother from March 17, 1995, until she went to school on Monday, March 20, 1995. Jacy's teacher observed her at school from September, 1995 until March 3, 1995, and again on March 20, 1995. Jacy's teacher testified at the temporary hearing on the second day of the trial being Monday March 20, 1995. The teacher stated that Jacy showed no emotional or developmental problems. Jacy lived with her father and grandparents from March 20, 1995 until the [c]ourt [o]rder of April 6, 1995. Jacy has been in the temporary custody of Amy Hester since the court order of April 6, 1995,

with Jerry Clyde Nix, Jr., having visitation rights. Jacy Marie Nix is not at an age sufficient to express a preference of custody.

Mr. Nix's home environment at his parents' residence appears stable. The testimony at the final hearing indicated that Mrs. Nix has improved some of her housekeeping skills. Since the temporary order was entered Amy Nix has relocated to Tupelo; and she and [Jacy] reside in the guest house of her aunt and uncle. She testified that she plans to move the mobile home to land owned by her grandfather in Tupelo. Amy Hester Nix presented photos of her home at the permanent hearing and of her residence at her aunt and uncle's guest house at the hearing on June 26, 1995. Amy Hester Nix plans to enroll Jacy in a Baptist pre-school program. The Court must consider all of the factors in light of the best interest of [Jacy].

The additional testimony presented on June 26, 1995, was unrefuted that [Jacy] had experienced certain insect bites on her body. The deposition of [Jacy's] pediatrician, Dr. Roy, indicated that Jacy experiences allergic reactions to insect bites. There were certain allegations of forgery made by Mr. Nix.

During the trial on April 13, 1995, James Earl Hester, Amy Nix's father, had opined that it was in the best interest of Jacy for Jerry Nix to have Jacy's custody. The chancellor evaluated Jacy's maternal grandfather's opinion as follows: "Mr. Hester's testimony indicated that he has been married six times, has an arrest record of spousal abuse, and has limited observation of Jacy with either of her parents." This Court finds James Earl Hester's testimony fully supported the chancellor's findings which we have quoted. Moreover, the record also contains Mr. Hester's testimony that he had never visited his daughter and her family since she had moved to Vicksburg and that he had not enjoyed a close relationship with her since she had married nearly five years earlier.

In her conclusions of law, the chancellor cited *Williams v. Williams*, 656 So. 2d 325, 330 (Miss. 1995), for the proposition that adultery is only one factor in determining child custody and *Albright v. Albright*, 437 So 2d. 1003, 1005 (Miss. 1994), for that proposition that "[m]arital fault should not be used as a sanction in custody awards." Pursuant to her findings of fact and conclusions of law contained in her ruling of the court, the chancellor rendered a final judgment on August 22, 1995, in which she awarded "the permanent care, custody and control of [Jacy]" to her mother, Amy Nix. Jerry Nix has appealed from that final judgment to persuade this Court that the chancellor erred when she awarded Jacy's custody to his former wife.

III. REVIEW AND RESOLUTION OF THE ISSUES

Jerry's specific issues read as follows:

- I. The Ruling of the Court granting custody of the minor child to her mother, [was] contrary to the overwhelming weight of the evidence.
- II. The lower Court failed to analyze and apply proper case standards in its findings that the paramount best interest of the child would be served by placing her in the custody of the mother.
- III. The lower Court erred in failing to find that Jerry Nix, the father, was the proper person to have custody of Jacy, the minor child of the parties.

While Nix included all three of the foregoing issues in the statement of issues which Mississippi Rule of Appellate Procedure 28a(3) requires, the argument contained in his brief was not organized around each of the three issues. Instead, Jerry Nix's argument incorporates all three issues; thus, the Court's opinion deals with all three issues collectively.

In *Williams v. Williams*, 656 So.2d 325 (Miss. 1995), the Mississippi Supreme Court reiterated the standard of review for issues of child custody. The Court explained:

The standard of review in child custody cases is quite limited. A chancellor must be manifestly wrong, clearly erroneous, or applying an erroneous legal standard in order for this Court to reverse. This Court will affirm decisions of the chancellor, whenever based on credible evidence.

Id. at 330 (citations omitted). Neither should this Court substitute its judgment for that of the chancellor. See *Kirk V. United States Fidelity & Guaranty*, 214 Miss. 441, 58 So.2d 924 (1952).

In *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983), the Mississippi Supreme Court provided the bench and bar with the following factors which it deemed relevant to the determination and award of the custody of a child:

We reaffirm the rule that the polestar consideration in child custody cases is the best interest and welfare of the child. The age of the child is subordinated to that rule and is but one factor to be considered. Age should carry no greater weight than other factors to be considered, such as: health, and sex of the child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship.

We begin our review of these issues with the observation that Jerry Nix essentially reargues the evidence which both he and Amy Nix had presented to the chancellor during the course of the three hearings and trial which the chancellor conducted from March 17, 1995, through June 26, 1995. Nix's argument emphasizes his former wife's admitted adulterous relationship with her boss at Commercial Credit, her poor housekeeping skills, the red-bug bites which were discovered on Jacy's limbs, and her neglect of Jacy's spiritual training. In her *pro se* brief, Amy Nix invites this Court's attention to the testimony of her witnesses, among whom were Marcia McCall, with whom Amy Nix had first left Jacy when she began working part-time as a bank teller, and Tammi Boone, a teacher's assistant at the Montessori School in Vicksburg, where the Nixes had enrolled Jacy, which contradicted or explained the evidence which Jerry Nix introduced for the chancellor's consideration.

From our review of the chancellor's findings of fact, we find that she specifically considered the following factors which the supreme court enumerated in *Albright*: Jacy's age, health, and sex; a determination that Amy Nix had had the continuity of Jacy's care prior to the Nixes' separation; the parenting skills of both Jerry and Amy Nix, including who had the willingness and capacity to provide primary child care; the employment of both Jerry Nix as a police officer who worked varying shifts

and Amy Nix as an employee in a grocery store in Tupelo, to where she had moved after the conclusion of the trial on the merits of their respective claims for divorce, and the responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the fact that Jacy was "not at an age sufficient to express a preference of custody;" and the stability of home environment and employment of each parent.

In *Voss v. Stewart*, 420 So. 2d 761, 765 (Miss. 1982), the Mississippi Supreme Court explained the fact-finding role of the trial judge as follows:

The lower court judge, in this case, had sole authority for determining the credibility of the witnesses. We have heretofore held that the findings of a court in such circumstances are entitled to the same weight as a jury verdict, and we have further held that the findings of fact should not be disturbed unless they are manifestly wrong.

(Citations omitted.)

"[T]he polestar consideration in child custody cases is the best interest and welfare of the child." *Albright*, 437 So. 2d at 1005. Our standard of review requires that we affirm the chancellor's award of Jacy's custody to her mother, Amy Nix, unless we can demonstrate that she was "manifestly wrong, clearly erroneous, or appl[ied] an erroneous legal standard" when she found that it was in Jacy's best interest to award custody of her to her mother, Amy Nix. This Court ought not substitute its judgment for that of the chancellor unless it is persuaded that our standard of review requires it to do so.

The chancellor had the sole authority for determining the credibility of the witnesses for both Jerry and Amy Nix. The record contains sufficient evidence, which the chancellor found to be credible, to support her findings of fact. Moreover, the chancellor was correct to hold as a matter of law that she could not award custody of Jacy to Jerry Nix exclusively because of Amy Nix's

admitted adultery. Thus, we affirm the final judgment of the Warren County Chancery Court in which it awarded custody of Jacy to her mother, Amy Nix.

THE JUDGMENT OF THE CHANCERY COURT OF WARREN COUNTY IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT, JERRY CLYDE NIX, JR.

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