

IN THE COURT OF APPEALS 04/08/97
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-01215 COA

J. KENT BOOTHE

APPELLANT

v.

JUDITH S. BOOTHE (PURVIS)

APPELLEE

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

TRIAL JUDGE: HON. WILLIAM JOSEPH LUTZ

COURT FROM WHICH APPEALED: MADISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

LEANN W. MERCER

ATTORNEY FOR APPELLEE:

SHARON PATTERSON THIBODEAUX

NATURE OF THE CASE: CHILD SUPPORT MODIFICATION

TRIAL COURT DISPOSITION: UPWARD MODIFICATION OF CHILD SUPPORT
OBLIGATION

BEFORE BRIDGES, C.J., DIAZ, AND KING, JJ.

BRIDGES, C.J., FOR THE COURT:

Kent Boothe (Boothe) and Judith Boothe Purvis (Purvis) were granted a divorce by Chancellor Montgomery in the Madison County Chancery Court on February 17, 1989. Purvis was granted physical custody of the parties' three children, and Boothe was ordered to pay child support in the amount of \$391.50 a month. Purvis sought an increase in child support in 1991, and on September 20, 1991, the Chancellor Montgomery denied any increase in child support, but did order Boothe to provide medical insurance coverage on his three sons. On April 27, 1994 Purvis again petitioned for an increase in child support as well as partition of jointly owned property, and requiring Boothe to maintain a life insurance policy for the benefit of the three boys. Boothe filed his cross-bill informing the court that he was entitled to recover a \$10,000.00 gift from his mother that was used as a down payment on the marital residence, in addition to his equitable proceeds from any sale of the marital residence. Chancellor Montgomery denied Purvis' request for additional child support in the absence of a material change of circumstances. Additionally, Chancellor Montgomery awarded Boothe the \$10,000.00 equity in the marital residence, and did not require Boothe to maintain a life insurance policy for the benefit of his sons. An opinion and final judgment were entered on December 27, 1994.

Chancellor Montgomery left office and was replaced by Chancellor Lutz on January 1, 1995. Purvis filed a motion for new trial or in the alternative to amend the judgment on January 5, 1995. Without a hearing and with an incomplete record, Chancellor Lutz issued an amended judgment on August 18, 1995, essentially reversing Chancellor Montgomery's judgment rendered eight months earlier. Boothe presents the following issues on appeal:

I. DID THE CHANCELLOR ERR IN MODIFYING THE JUDGMENT OF CHANCELLOR MONTGOMERY?

II. DID A MATERIAL CHANGE IN CIRCUMSTANCES EXIST TO WARRANT CHANCELLOR LUTZ'S REVERSAL OF CHANCELLOR MONTGOMERY'S JUDGMENT BY INCREASING BOOTHE'S CHILD SUPPORT PAYMENTS?

III. DID CHANCELLOR LUTZ ERR IN FASHIONING AN ESCALATIONS CLAUSE WITH RESPECT TO THE CHILD SUPPORT PAYMENTS?

IV. DID CHANCELLOR LUTZ ERR IN DETERMINING THE EQUITY IN THE MARITAL HOME AND THE DIVISION THEREOF?

The first issue being dispositive in this case, we will not address issues II-IV.

FACTS

Purvis filed a motion to modify former judgment of divorce and for partition of jointly owned

property in the Madison County Chancery Court on April 27, 1994. She alleged a material change in circumstances necessitating an increase in child support payments. In addition, Purvis asked that Boothe be required to maintain a life insurance policy for the boy's benefit. In respect to Purvis' and Boothe's jointly owned marital property, Purvis asked that the property be partitioned and that she be credited for any repairs and maintenance she paid for since the 1989 divorce. Boothe filed his answer and cross-bill for modification. He denied Purvis' allegations and affirmatively stated that he had made all the child support payments since the divorce, even when unemployed; voluntarily paid for the children's dental work; and that he was entitled to \$10,000.00 equity in the marital residence because his mother had given him that sum as an individual gift to use as a down payment. A hearing was held before Chancellor Montgomery on June 29, 1994. He heard the testimony and observed the demeanor of six witnesses. After such hearing and a review of the record, Chancellor Montgomery partitioned the marital residence, granting Boothe \$10,000.00 as his equitable share. However, Chancellor Montgomery held that no material change in circumstances had occurred warranting a modification of the previous support decree. Chancellor Lutz replaced Montgomery as chancellor on January 1, 1995. Purvis filed her motion for new trial or in the alternative to amend judgment on January 5, 1995. A hearing was held on Purvis' motion on February 21, 1995, and Chancellor Lutz told the parties that he would review the record and would request such additional information as needed. Without any further notice to either party, Chancellor Lutz issued a draft amended opinion on August 4, 1995. After receiving responses from each party, Chancellor Lutz issued a second amended opinion on August 18, 1995. Judgment was entered November 7, 1995, reversing the previous judgment of Chancellor Montgomery.

Chancellor Lutz found that there was material change warranting an increase in child support payments from \$391.50 to \$510.00 per month, with an annual escalation clause increasing the monthly payments by \$50.00 through 1999. Boothe was also required to change the beneficiary of his life insurance policy from his mother to his sons. Chancellor Lutz, in partitioning the marital residence categorized both the \$10,000.00 gift from Boothe's mother as well as a \$2,000.00 gift from Purvis' father as gifts to the marriage, and disallowed a credit to either party. Chancellor Lutz awarded each party half the equity in the marital home. However, Lutz failed to use current fair market values in dividing the marital residence, instead relying on an outdated purchase price. Additionally, he allowed credit for unsubstantiated principal payments.

I. DID THE CHANCELLOR ERR IN MODIFYING THE JUDGMENT OF CHANCELLOR MONTGOMERY?

Rule 63(b) of the Mississippi Rules of Civil Procedure states:

If for any reason the judge before whom an action has been tried is unable to perform the duties to be performed by the court after a verdict is returned, or after the hearing of a non-jury action, then any other judge regularly sitting in or assigned under law to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties, he may in his discretion grant a new trial.

M.R.C.P. 63 (b). Under this rule, Chancellor Lutz had the authority to continue what had previously been in the discretion of Chancellor Montgomery. In the instant case, Purvis moved for a new trial or an amended judgment. Chancellor Lutz not only amended Montgomery's previous judgment, he reversed it entirely, and without the benefit of a hearing. The Mississippi Supreme Court has addressed the importance of a hearing in a case very similar to the case sub judice. In *Love v. Barnett*, 611 So. 2d 205, 207-08 (Miss. 1992), a chancellor died in office before entering the final judgment. The other chancellor entered the final judgment, but not before he modified the bench opinion of the deceased chancellor. *Id.* at 206. The other chancellor did not hold a hearing, nor did he review the transcript. *Id.* The supreme court reversed the chancellor's modification and remanded for consideration of the proposed modification, holding that the chancellor's judgment was arbitrary and capricious. *Id.* at 208. The supreme court stated:

However, we find that in this case Chancellor Bullard was best situated to determine the appropriate remedy as he listened to the testimony of the differing parties. Indeed, the provisions of his oral ruling from the bench are amply supported in the record, while the subsequent modifications are not. It was Chancellor Bullard who listened to the testimony and was in the best position to determine matters such as transportation and medical insurance.

Id. at 208. In assessing its role of appellate reviewer, the Mississippi Supreme Court expounded on the impotence of a lifeless record:

[E]ven if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.

Gavin v. State, 473 So. 2d 952, 955 (Miss. 1985). "Being able to observe the demeanor of the witnesses, to scrutinize their reactions and responses to the questions propounded by counsel, puts the fact trier in a uniquely superior position to glean the truth from testimony." *Johnson v. Brewer*, 427 So. 2d 118, 126 (Miss. 1983).

Essentially, Chancellor Lutz sat as an appellate judge with only the "cold, printed record" to review. He did not have the benefit of live testimony that the Mississippi Supreme Court has deemed so crucial in making findings of fact. Unlike Chancellor Montgomery, Chancellor Lutz did not observe the demeanor of the witnesses, he did not scrutinize their reactions or responses, therefore denying him the "uniquely superior position to glean the truth from testimony" that the fact trier has. Moreover, in making his decision about the increase in child support payments, Chancellor Lutz did not have as a part of the record the parties' financial statement as required by Rule 8.05 of the Mississippi Uniform Chancery Court Rules. Additionally, there is no evidence that Chancellor Lutz took into consideration the fact that Boothe had adopted his new wife's two daughters subsequent to Chancellor Montgomery's judgment.

THE JUDGMENT OF THE MADISON COUNTY CHANCERY COURT IS REVERSED AND REMANDED FOR A HEARING ON PURVIS' MOTION FOR A NEW TRIAL OR IN THE ALTERNATIVE TO AMEND JUDGMENT. COSTS ARE TO BE ASSESSED TO APPELLANT.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., CONCURS WITH SEPARATE WRITTEN OPINION. HERRING, J., NOT PARTICIPATING.

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PAYNE, J., SPECIALLY CONCURRING:

I feel compelled to speak to the majority's condemnation of Chancellor Lutz's amended judgment in this case. Clearly, Mississippi Rule of Civil Procedure 63(b) authorized Chancellor Lutz to hear the motion for new trial or, in the alternative, amended judgement. It is the extent to which Chancellor Lutz modified Chancellor Montgomery's final judgment which troubles the majority. The fact that Chancellor Lutz's amended judgment, in essence, "reversed" Chancellor Montgomery's final judgment does not, as a matter of law, render Chancellor Lutz's amended judgment erroneous. Even the same chancellor could reverse himself upon a motion for new trial or amended judgment.

I find troubling the majority's use of *Love* as analogous to the present case. Unlike in *Love*,

Chancellor Lutz did have the benefit of a transcript of the proceedings. Even a cursory reading of Chancellor Lutz's amended final judgment makes it clear that not only did Chancellor Lutz read the transcript and review the evidence, but that he acted to settle all of the disputes between the parties so as to insure that the parties found resolution.

I believe that Judge Lutz acted within his authority in acting to modify the final judgment. However, out of an abundance of caution, I concur with the majority that this matter should be remanded for a hearing.