

IN THE COURT OF APPEALS 04/08/97

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

MANDATE ISSUED: 6/24/97

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 remanded this case for a maximum period of sixty days within which the chancery court was directed to certify its findings of fact and conclusions of law supporting the judgement rendered in this case. Therefore, the first issue is no longer before this court. We have reviewed the findings submitted by the court and affirm the judgment in all respects.

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, 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. 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. Zina appealed and we remanded the case in order for the chancellor to make findings of fact as requested by Zina pursuant to Rule 52 of the Mississippi Rules of Civil Procedure and Uniform Chancery Court Rule 4.01. The chancellor complied with this request.

DISCUSSION

The supreme court has stated that "[t]he 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." *Williams v. Williams*, 656 So. 2d 325, 329 (Miss. 1995). "This Court will affirm decisions of the chancellor, whenever based on credible evidence." *Id.*

1. Custody of the Children

Zina argues that the court erred in its award of child custody to Guy. The supreme court has consistently stated that "[t]he polestar consideration in all original child custody determinations is the best interest and welfare of the child." *Hayes v. Rounds*, 658 So. 2d 863, 865 (Miss. 1995), citing *Albright v. Albright*, 437 So. 2d 1003, 1004 (Miss. 1983). In determining what is in the best interest of the child, several factors are considered. They are:

- (1) age, health and sex of the child;
- (2) a determination of the parent that has had the continuity of care prior to the separation;

- (3) which has the best parenting skills and which has the willingness and capacity to provide primary child care;
- (4) the employment of the parent and responsibilities of that employment;
- (5) physical and mental health and age of the parents;
- (6) emotional ties of parent and child;
- (7) moral fitness or parents;
- (8) the home, school and community record of the child;
- (9) the preference of the child at the age sufficient to express a preference by law;
- (10) stability of home environment and employment of each parent and other factors relevant to the parent-child relationship.

Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983).

Zina and Guy's twins were seven years old at the time custody was awarded to Guy. The chancellor found that the age of the children was a factor in favor of the mother. However, after considering evidence that the children's health was good except for injuries they sustained while in the custody of their mother, the chancellor found that the health factor was in favor of the father. While recognizing that the sex factor is usually in favor of the parent with the same sex as the children, the chancellor found this factor neutral as between the parties.

The continuity of care factor was found in favor of the father. The chancellor stated that even though both parents cared for the children prior to separation, the evidence showed that the father spent more time with the children while the mother seemed more concerned with her catering business. As to the parenting skills factor, the chancellor found this factor in favor of the father. The chancellor looked to the parties' recent actions with the children as well as their track record in raising other children. In this regard, the chancellor found that the mother's track record in raising children was nowhere near the father's track record in raising his older daughters.

The chancellor found that the willingness and capacity of each parent to provide primary child care was in favor of the father. The mother worked from 8:00 a.m. until 5:00 p.m. at Olive Branch Sanitorium. The job required her to seek her mother's assistance in caring for the children after school, whereas the father worked in his chuck wagon catering business and completed his route early in the afternoon allowing him personally to care for his daughters after school.

The chancellor found the employment and responsibility of employment of the parents to be in favor of the father. As to the age of the parents, the health factors of the parents and the child, and the mental health of the parents, the chancellor found in favor of the father. Although the chancellor was presented with evidence that the father was much older than the mother (she was 29 and he was 56),

he found that the father's record of care for the children off-sets the age advantage the mother would otherwise have. The chancellor found that both parents had strong emotional ties to the children, but that the moral fitness factor was in favor of the father. In the court's findings of facts, the chancellor noted that "[t]here was testimony presented as to [Zina's] sexual nature, drinking, and smoking of marijuana which concerned the court greatly."

The home, school, community record, stability of the home environment, and employment were also factors in favor of the father. Based on these findings, the chancellor concluded that it would be in the best interest of the children to be in the custody of their father with visitation rights consistent with the Farese Visitation Schedule or Ohio plan commonly used in that district.

The chancellor applied the *Albright* factors. After reviewing the record, we cannot say he was manifestly in error.

2. 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." *Dufour v. Dufour*, 631 So. 2d 192, 194 (Miss. 1995), quoting *Gillespie v. Gillespie*, 594 So. 2d 620, 622 (Miss. 1992).

The chancellor in this case found that Zina should pay \$200 in child support. By the time of trial, Zina was employed from 8:00 a.m. to 5:00 p.m. at a sanatorium in Olive Branch. The chancellor stated that this decision was based on the assumption that Zina was making at least \$1,000 a month. Zina is not arguing that the \$1000 estimate is more or less than what she actually makes monthly. She only argues that because there is no proof in the record or exhibits that her adjusted gross income per month was \$1,000, the chancellor erred in using that figure to set the child support amount.

One reason the evidence is slim is that Zina's financial statement that is required under Uniform Chancery Court Rule 8.05, indicated that she was making no income. She filed three separate statements. One showed her income while she still operated the food service business, but it definitely was no longer relevant since she no longer did that. The rest showed no income at all. She never filed a statement after becoming employed. There is no explicit obligation to amend if circumstances change, but neither is there a requirement that the chancellor limit himself to what is on the financial statement. The rule itself permits the chancellor to excuse filing of the statements, and has been interpreted to allow a chancellor to rule without these documents. *Bland v. Bland*, 629 So. 2d 582, 587 (Miss. 1993). The chancellor was faced with the need to make a decision when one of the parties had not provided up-to-date information. The court's actions were understandable considering the reason for the condition of the evidence. The chancellor said he was giving Zina the benefit of the doubt and not assuming that she was making much more than minimum wage when he set the child support amount at \$200 per month. In his findings of facts submitted to this court, the chancellor said this:

As to the child support to be paid, the Plaintiff filed several financial declarations as required by the Uniform Chancery Court Rules, showing that she had no income, but she did not update her financial declaration when she became employed. On the last day of testimony the Plaintiff testified that she was working 8:00 to 5:00 at the sanatorium at

Olive Branch. The Court is sure she was not working for free. Therefore, the Court was faced with the situation of making an educated guess at what she was making. The Court found the minimum guidelines were appropriate and tried to apply the proper percentage, but determining the income was the problem. The court tried to be very conservative and favor the Plaintiff as to the amount. The court found that the Plaintiff's gross income was at least \$1,000, per month, (\$5.81 per hour based on a 40 hour week) and applying the 20% statutory guidelines, the Court fixed the child support at the rate of \$200.00, per month.

Additionally, Guy argues that this amount was not just an amount the judge got off the top of his head. He asserts that the chancellor asked Zina's attorney what was Zina's position and salary at the sanatorium. He was told that she worked as a receptionist and made approximately \$1,000 a month. This conversation is not in the record.

The chancellor on the record was seeking to be fair to both sides, but not unduly prolong the case. Support for two children under the guidelines of Section 43-19-101(1) would be 20% of Zina's income, adjusted as required by Section 43-19-101(3). The guideline amount is a "rebuttable presumption" of the amount of support that should be awarded. Miss. Code Ann. § 43-19-101 (1). There was certainly an opportunity in a motion for new trial for Zina to present an affidavit or other information regarding any factual error the court may have made, but her motion made no such allegation. She does not dispute the accuracy of the chancellor's estimate. We therefore do not dispute the validity of the exercise of discretion.

3. Distribution of Marital Debt

Zina and Guy jointly owned a catering business which incurred Tennessee sales tax liability. Zina argues that the chancellor should have applied the mandatory *Ferguson* guidelines in determining who should pay these taxes. More specifically, Zina argues that the court should have used the guidelines "in making an Equitable division of marital property accumulated or acquired during the parties' marriage" based on the facts and evidence presented during the trial. While it is true that the supreme court has directed chancery courts to evaluate the division of marital assets by following the guidelines set out in *Ferguson* and to support their decisions with findings of fact and conclusions of law for purposes of appellate review, application of the factors is not warranted here. The *Ferguson* guidelines are used to aid chancellors in their adjudication of marital property division. *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994). After reviewing the record, we found that the parties in this case had already agreed on how the marital property would be distributed. One of the three issues left to be resolved by the chancellor was merely who would pay the Tennessee sales tax liability. The chancellor was presented with sufficient evidence that this business was jointly owned and operated by both Zina and Guy and that the debt was jointly incurred during the operation of the jointly owned business. At the conclusion of the trial, the chancellor said this:

As to the liability for the Tennessee Sales Tax, each of the parties will be jointly and severally liable to the state of Tennessee for this amount, but as between the two parties, each of the parties, will be responsible for half of this amount each.

We cannot say that the chancellor abused his discretion in holding the parties jointly and severally liable for the debt. Therefore, this issue is without merit.

THE JUDGMENT OF THE DeSOTO COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., DIAZ, AND HERRING, JJ., CONCUR.

PAYNE, J., CONCURRING IN PART AND DISSENTING IN PART WITH SEPARATE WRITTEN OPINION, JOINED BY COLEMAN AND KING, JJ.

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

Although I concur in regard to the child custody issue, I cannot concur in the calculation of child support. I have no argument with the estimation of the non-custodial parent's *gross* income by multiplying the minimum wage times forty hours a week; however, my reading of Subsection (3)(b) (i) and (ii) of Section 43-19-101, Miss. Code Ann., which was not quoted in the majority opinion, is that before calculation of child support by the applicable percentage, such amounts as withholdings of income tax and social security, over which the employee has no control, are to be deducted first.

Therefore, I would remand this case for an evidentiary hearing and specific findings of fact and conclusions of law applying all of the language of the guidelines.

COLEMAN AND KING, JJ., JOIN THIS SEPARATE WRITTEN OPINION.