IN THE COURT OF APPEALS 04/22/97

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00154 COA

CHARLES MOSS SHARMAN

APPELLANT

v.

KIMBERLY ANN LYMBERIS

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:

JOHN W. CHRISTOPHER

ATTORNEY FOR APPELLEE:

BENTLEY E. CONNER

NATURE OF THE CASE: CIVIL: CHILD CUSTODY

TRIAL COURT DISPOSITION: CUSTODY OF CHILD AWARDED TO APPELLEE WITH CHILD SUPPORT AND VISITATION AWARDED TO APPELLANT

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

THOMAS, P.J., FOR THE COURT:

Charles Moss Sharman (Charles) and Kimberly Ann Lymberis (Kimberly) are the unmarried parents of a child, Anna Madison Sharman. After a trial on the issue of custody, the trial court awarded custody of Anna Madison to Kimberly, subject to certain visitation rights in Charles, and required Charles to pay child support. Feeling aggrieved Charles presents the following issues on appeal:

> **I. WHETHER THE CHANCELLOR WAS MANIFESTLY WRONG IN GRANTING CUSTODY OF A MINOR CHILD TO DEFENDANT, KIMBERLY ANN LYMBERIS, IN THE ABSENCE OF A WRITTEN PLEADING PRAYING FOR RELIEF.**
>
> **II. WHETHER THE CHANCELLOR WAS MANIFESTLY WRONG IN AWARDING CUSTODY OF THE CHILD TO KIMBERLY ANN LYMBERIS.**

FACTS

During 1994, Charles and Kimberly began dating and on July 26, 1995, Anna Madison was born. Charles did not learn of the pregnancy until one month before the birth. When Kimberly told Charles of the pregnancy, she indicated that she wanted Charles to take responsibility for the new baby. Charles testified that he thought that meant for him to take the baby and raise the baby by himself; Kimberly testified that she thought that meant for them to live together and raise the baby.

After learning of Kimberly's pregnancy, Charles went with her to the doctor for the prenatal visits and was with Kimberly throughout the delivery. Upon leaving the hospital, Charles took Kimberly and the baby to his parent's home, where he was living. Charles testified that he thought he and Kimberly had an agreement under which she would only be at the Sharman residence for approximately two weeks and after two weeks she would leave and Charles would then become solely responsible for the rearing of the baby. After Kimberly resided at the Sharman residence for two weeks, Charles told her that is was time for her to leave. After Kimberly left the Sharman residence, she continued to make daily visits to the Sharmans for the purpose of seeing and being with Anna Madison. Charles testified that this agreement was not working out as Kimberly was coming over anytime she wanted and this was a problem for both Charles and his parents. Charles then filed a petition to establish paternity on September 5, 1995.

On or about September 15, 1995, Kimberly went to the Sharman residence and, after the Ridgeland Police Department arrived, took possession of Anna Madison. Later, the attorneys for the respective parties had a conference with the chancellor, with Charles' attorney making a motion ore tenus, for temporary relief. The court entered an order awarding temporary custody of Anna Madison to Kimberly.

Subsequently, on November 15, 1995, Kimberly sought a modification of the temporary order, which the court granted, modifying the previously scheduled visitation.

At the trial on the merits, on January 3, 1996, the parties entered a stipulation that Charles was the father of Anna Madison and that Kimberly was the mother, thereby establishing paternity by agreement. When Kimberly started presenting evidence going to her fitness as a mother, Charles'

attorney made an objection that she had not filed a pleading in response to his petition to determine paternity, and thus she was barred from presenting such evidence. The chancellor found that Charles had been placed on adequate notice of Kimberly's desire for the child's custody. The court allowed Kimberly leave to amend her pleadings and file a counterclaim.

During trial both parties presented witnesses concerning the fitness of both Kimberly and Charles to have the care, custody, and control of Anna Madison. Neither party nor any of their witnesses testified that either was unsuitable, unfit, or improper to have custody.

On January 12, 1996, Kimberly filed a counterclaim with the court. In this counterclaim she sought custody and child support. On February 7, 1996, the chancellor entered an order awarding custody of Anna Madison to Kimberly, granted Charles liberal visitation, and ordered payment of child support.

I.

WHETHER THE CHANCELLOR WAS MANIFESTLY WRONG IN GRANTING CUSTODY OF A MINOR CHILD TO DEFENDANT, KIMBERLY ANN LYMBERIS, IN THE ABSENCE OF A WRITTEN PLEADING PRAYING FOR RELIEF.

This Court will review a chancellor's decision de novo for issues presenting questions of law. *Whittington v. Whittington*, 608 So. 2d 1274, 1278 (Miss. 1992).

Charles commenced this action for adjudication of paternity and for custody of Anna Madison. Kimberly did not file an answer to the petition for adjudication of paternity and custody nor did she file a counterclaim or any pleading in which she sought custody or any affirmative relief before the trial on the merits. When Kimberly began putting on evidence going to the issue of her suitability to have custody, Charles' attorney objected on the ground that Kimberly had failed to file any affirmative pleadings praying for custody. The chancellor found that the evidence of her fitness as a mother was relevant and overruled the objection and allowed Kimberly to put on her evidence of her fitness to have custody. On appeal, Charles argues that it was error for the chancellor to overrule his objection in the absence of any pleading filed by Kimberly before trial praying for any type of relief.

Service of process in child custody matters is governed by Rule 81 of the Mississippi Rules of Civil Procedure. Rule 81(d)(1) provides that the matters listed therein are triable thirty (30) days after completion of process. Rule 81(d)(3) states that complaints and petitions in paternity will not be taken as confessed and Rule 81(d)(4) provides that no answer will be required in a paternity action. Rule 81 is clear in its requirement that a defendant is only required to appear and defend against a petition or complaint governed by the rule. Charles is arguing that because Kimberly failed to file a pleading, such as a counterclaim, she was procedurally barred from asserting any positive relief, but merely could only appear and defend.

Charles cites *Rawson v. Buta*, 609 So. 2d 426 (Miss. 1992), as support for his proposition. In *Rawson,* Buta filed for a divorce against Rawson who was served with process. *Id.* at 428. Rawson retained counsel but filed his answer thirty-two (32) days after process was served on him. *Id.* Buta moved to strike Rawson's answer and counterclaim on the ground that he did not file them. *Id.* at 428-29. The chancellor struck the answer and counterclaim filed by Rawson and proceeded to hear the case as uncontested and instructed the defense attorney that the defense could offer no proof. *Id.*

at 429. At the conclusion of the case the chancellor awarded Buta a divorce and other relief. *Id.* The Mississippi Supreme Court reversed the chancellor and stated:

> We hold that the statute does not bar a defendant from presenting proof rebutting the plaintiff's proof, although he or she may not have filed an answer. . . . Due to the special nature of a divorce proceeding in which the court may not enter a true default judgment, a defendant's failure to answer does not deprive the defendant of the right to put on evidence to rebut the allegation of the complaint. The defendant cannot offer evidence outside the scope of the complaint and cannot offer any evidence supporting an affirmative charge.

Id. at 430-31.

Charles' reliance upon *Rawson* is misplaced. The issue presented for the Court in *Rawson* was divorce and under which grounds the lower court should grant the divorce. The issue in the lower court for this case was child custody, which has a different focal point. The polestar consideration in a child custody suit is the best interest and welfare of a child, *Albright v. Albright*, 437 So. 2d 1003, 1004 (Miss. 1983), and with which individual would this interest be best obtained. Mississippi Code Annotated Section 93-5-24 requires that all custody decisions be based upon the best interest of the child. In a divorce proceeding the questions are rather different and more diverse than in a child custody matter. For a divorce proceeding the chancellor must determine such things as whose grounds for divorce has merit, whether alimony should be warranted, lump sum or periodic, the equitable distribution of assets, and many, many more considerations. In child custody proceedings the question is merely with which party is the best interest of the child served. Recognizing this fact, at trial the chancellor stated, "basically, the only argument, the only defense they can make against his [Charles] custody, reasonably, in these circumstances, is that custody would be better in Ms. Lymberis."

A lower court must consider those aspects of child custody proceedings that help to insure that both parties will have a full and fair opportunity to be heard. By only allowing Kimberly the opportunity to defend against custody would be to grant custody to the pleading party in disregard for the best interest of the child.

Charles maintains that the purpose of these procedural rules is to give the opposite party notice. However, no prejudice appears in the record to Charles. Charles made no claim of surprise. He knew, before the January 3, 1996, custody hearing that Kimberly would be seeking custody of her infant daughter. The chancellor stated that the problem was

> a procedural matter and if you [Charles' attorney] think that should be cured, we can adjourn right now. I will allow Mr. Conner [Kimberly's attorney] leave to amend his pleadings and file that counterclaim, and then we will come back here and try it at such time as we do. I'm not gonna leave here today hampered by the inability to do--to put this child where I think the child should be, and I'm going to hear the relevant testimony to deal with that.

Charles, if correct, would have this Court deprive a parent of an important substantive right to care for their child, simply because she did not affirmatively assert that right by filing a Rule 81(d)(1)

petition. Child custody proceedings implicate the fundamental relationship between parent and child, and we must recognize that due process must be provided to protect the substantive rights of both parties to a child custody determination.

Other courts that have dealt with factually similar happenings have stated that the overriding criterion for guidance in child custody matters is the best interest of the children involved, and courts should not dispose of such matters on procedural technicalities. *Smith v. Smith*, 643 S.W.2d 320, 323 (Tenn. 1982). In a Pennsylvania Superior Court case the court stated:

> The substantial rights of the parties that must be considered here and which are of paramount importance are the best interests of the children, not the interest of the litigants. The children were not adversely affected by this procedural defect. If the court were to deny the Gatzes custody on the basis of their failure to intervene within thirty days as required by the court's order or for their failure to file a counterclaim, custody of the children would have been decided on the basis of a procedural defect, rather than on the merits. Obviously, this could not have been in the best interests of the children.

Heddings v. Steele, 496 A.2d 1166, 1170 (Pa. Super. Ct. 1985).

To follow Charles' argument the paramount consideration for this Court would be a procedural mistake rather than the best interest of the child. While Charles' complaint may have merit, the error of Kimberly's attorney is minor compared with the possible consideration of ignoring testimony of Kimberly's fitness as a mother. The requirement that Kimberly plead affirmatively was a procedural requirement that was cured by the allowance of the lower court for her to file a counterclaim.

With the future of this child at stake, the court was correct in allowing Kimberly an opportunity to be heard. As this procedural failure did not prejudice Charles, we should not overturn the lower court on appeal.

II.

WHETHER THE CHANCELLOR WAS MANIFESTLY WRONG IN AWARDING CUSTODY OF THE CHILD TO KIMBERLY ANN LYMBERIS.

The standard of review of findings of fact made by a chancellor is extremely deferential. This Court will not disturb a chancellor's decision unless it is manifestly wrong or clearly erroneous. *Denson v. George*, 642 So. 2d 909, 913 (Miss. 1994) (citing *Bowers Window and Door Co., Inc. v. Dearman*, 549 So. 2d 1309 (Miss. 1989); *Love v. Barnett*, 611 So. 2d 205, 207 (Miss. 1992)).

"In all child custody cases, the polestar consideration is the best interest of the child." *Sellers v. Sellers*, 638 So. 2d 481, 485 (Miss. 1994); *Moak v. Moak*, 631 So. 2d 196, 198 (Miss. 1994).

In the lower court's findings of fact and conclusions of law, the chancellor correctly set forth the standard to be followed as having been established in the case of *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983). The chancellor then went through the factors one by one. Charles argues that the chancellor's findings were not manifestly wrong on the first eleven (11) *Albright* factors. However, the chancellor's findings of fact on the twelfth (12) factor, the best interest of the child, are totally at odds and are not supported by the facts. The chancellor's order on the twelfth factor reads in

pertinent part as follows:

> The Court finds that it is in Anna Madison's best interest that Kimberly should have primary physical and legal custody of Anna Madison. . . . Charlie depends heavily on his parents. They provide him with home and financial security. Remove the Sharman's from the picture and the Court can only guess at what Charlie could offer Anna Madison. The Court does not have to engage in such conjecture with Kimberly.

Charles' argument hinges on the fact that all the factors determined by the chancellor found equally between himself and Kimberly, except for the fact that he relies heavily on his parents. He contends that the chancellor cannot engage in conjecture; however, the chancellor did not speculate on this matter. It was shown during trial that Charles has lived with his parents most of his adult life and his parents babysat for Anna Madison while he worked at nights as a waiter for a resturant. Kimberly showed at trial that she would be living alone and was financially independent. The chancellor opted for the stability of Kimberly over the good intentions of Charles who has very supportive parents. This is not manifestly wrong or clearly erroneous.

Since the chancellor was in a much better position to weigh the credibility of the witnesses, the parties, and the evidence presented and had a large amount of discretion in making his

determination, his decision should not be reversed here without a much greater showing. Charles' final assignment of error is without merit.

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

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. HINKEBEIN, J., NOT PARTICIPATING.