IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00870 COA

MARILYN TROTTER BROWNLEE YOUD

APPELLANT

v.

JARED C. BROWNLEE

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

COURT FROM WHICH APPEALED: PANOLA COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

ROBERT H. BROOME

ATTORNEY FOR APPELLEE:

JOHN THOMAS LAMAR JR.

NATURE OF THE CASE: DOMESTIC - CHILD CUSTODY

TRIAL COURT DISPOSITION: PRIMARY CUSTODY AWARDED TO FATHER

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

SOUTHWICK, J., FOR THE COURT:

This appeal involves a custody battle over a child whose parents became dissatisfied with their joint custody arrangement as set out in their irreconcilable differences divorce decree. After finding that there had been a material change in circumstances warranting a change of custody, the chancellor found that it would be in the best interest of the child to be in the custody of the father. The court awarded the mother liberal visitation rights. It is from that decision that the mother appeals arguing that the chancellor misapplied the *Albright* factors.

Finding no merit to her argument, we affirm.

FACTS

Marilyn Youd and Jared Brownlee were granted an irreconcilable differences divorce on October 13, 1993. The parties agreed in the divorce decree that they would have joint custody of their then-three and a half year old son. From October 1993 until May 1994, the child was with his father from Sunday until Friday each week, and with his mother on the weekend. From May 1994 until April 1995, the child was with his father for four days a week and with his mother three days a week. In January of 1995, the mother sought a modification of that decree stating that there had been a material change in circumstances and requesting that she be given primary custody of the child, child support, and attorney fees. The father cross-petitioned and requested that he be given primary custody of the child with child support and attorney fees. A hearing was held on April 7, 1995. The chancellor decided to allow the parties some time to agree to another arrangement as far as custody was concerned before he took any action. After the parties did not agree within the allotted time, the chancellor stated that this in itself was a material change in circumstances adverse to the best interest of the child. Another hearing was conducted on July 6, 1995 at which time the court heard arguments by counsel. In his written opinion, the chancellor applied the *Albright* factors to determine what would be in the best interest of the child. He concluded that it would be in the best interest of the child to be in the custody of his father, Brownlee, with liberal visitation rights to the mother, Youd.

DISCUSSION

"[T]he supreme court will not reverse a chancellor’s findings of fact where the Court finds those facts supported by substantial credible evidence in the record unless the chancellor committed manifest error." *Morrow v. Morrow*, 591 So. 2d 829, 832 (Miss. 1991). Furthermore, the supreme court has stated:

> 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).

Each party agreed that there was a material change in circumstances warranting a change in custody. In fact, both parents petitioned the court for such a change. A material change in circumstances is considered in the totality of circumstances. *Morrow*, 591 So. 2d at 833. The mother argues that the trial judge erred in awarding the father custody of their son because the court failed to properly apply the *Albright* factors. She argues specifically that the fact that the father's "employment requires him to be away from home for ball games, parades and other band activities as well as during school days" along with the fact that the court found both parents fit to care for the child, means she is better able to care for him in that she is unemployed and would be able to give him around-the-clock care. She also argues that the chancellor erred in finding that the child would be better off in the public school, rather than in private school in Memphis.

1. Did the chancellor misapply the Albright factors?

The Mississippi supreme court has consistently held that the "polestar consideration in child custody cases is the best interest and welfare of the child." *Newsom v. Newsom*, 557 So. 2d 511, 514 (Miss. 1990). 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).

In applying the factors, the chancellor found that age of the child was a factor in favor of the mother,

but the sex of the child and the continuity of care of the child were factors in favor of the father. As to the parenting skills factor, the chancellor found that both parents "have equally good parenting skills." The chancellor found that the education factor was in favor of the father and the fact that the mother was unemployed was a factor in her favor. 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 both parents equally fit. The chancellor found that both parents had strong emotional ties to the child; that both parents are morally fit; and that both have "an equally stable home environment." Finally, the chancellor concluded that it would be in the best interest of the child to be in the custody of his father with liberal visitation rights given to the mother.

The mother argues that two of the *Albright* factors were misapplied. Specifically, she argues that the "willingness and capacity to provide primary child care, and the employment of the parent and responsibilities of that employment" were factors in her favor. She contends that because she is unemployed and able to spend twenty-four hours a day, seven days a week with the child compared to the fact that the father's employment situation would cause him to be away from home from 7:15 A.M. until 5:00 P.M. five days a week, as well as on nights and weekends for ball games, she is better fit to care for the child. However, she ignores the fact that the father testified that he had a willing and able babysitter who kept the child while he was away. The babysitter testified, giving the chancellor an opportunity to observe her personality and demeanor. She testified that the relationship between the child and his father seemed to be very good and that the child "seems like a very well adjusted child." She further testified, "[w]hen I tell him, his daddy is coming, his face lights up, and he seems very well cared for." Certainly, we cannot fault a parent for being employed. Furthermore, the child is now kindergarten age, and he would be attending school on the same campus on which Brownlee teaches. Although the mother argues that being able to drop off and pick up the child from a private school is also a factor in her favor, the record is devoid of any evidence that the father would be unable to do the same. Furthermore, there is no evidence that the private school is a more suitable school for the child than the public school in which the child's father works. The supreme court has stated that "[n]o one individual factor should carry any greater weight than the other." *Smith v. Smith*, 614 So. 2d 394, 397 (Miss. 1993).

Finding that the chancellor properly considered and applied the *Albright* factors, we cannot say he was manifestly wrong or that his decision was against the overwhelming weight of the evidence in finding that the child's best interests would be served in his father's custody.

THE DECREE OF THE CHANCERY COURT OF PANOLA COUNTY IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.