IN THE COURT OF APPEALS 09/17/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00853 COA

THOMAS LAMAR FLOWERS

APPELLANT

v.

PAMELA LEWIS FLOWERS

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. ROGER CLAPP

COURT FROM WHICH APPEALED: RANKIN COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

ROSS R. BARNETT, JR.

ATTORNEY FOR APPELLEE:

ABE A. ROTWEIN

NATURE OF THE CASE: CIVIL - CHANGE OF CHILD CUSTODY, MODIFICATION OF CHILD SUPPORT

TRIAL COURT DISPOSITION: CUSTODY TO REMAIN WITH MOTHER, AMOUNT OF CHILD SUPPORT INCREASED.

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

BARBER, J., FOR THE COURT:

This case involves a petition for change of custody of the two minor daughters of Thomas and

Pamela Flowers filed in the Rankin County Chancery Court. The petition was filed by the father, Thomas Flowers. Pamela filed a counterclaim for an increase in the amount of child support to be paid by Thomas and requested that the court demand that Thomas abide by the provisions of the Louisiana divorce decree requiring him to maintain a plan of health insurance for his children. The final judgment denied Thomas' petition for change of custody and required Thomas to pay child support in the amount of $675.00 per month in addition to either maintaining a plan of health insurance for his children or reimbursing their mother for the same.

Thomas appeals from the chancellor's decision and asserts the following as error:

I. THE COURT ERRED IN FAILING TO AWARD CUSTODY TO THE FATHER

II. THE CHANCELLOR ERRED IN FAILING TO MAKE ADEQUATE FINDINGS UNDER *ALBRIGHT*

III. THE COURT ERRED IN RAISING CHILD SUPPORT PAYMENTS TO A LEVEL ABOVE THAT REQUIRED BY STATUTORY GUIDELINES

IV. THE COURT ERRED IN REQUIRING THE FATHER TO PAY COUNSELING FEES NECESSITATED BY THE MOTHER'S CONDUCT

FACTS

Thomas Lamar Flowers and Pamela Lewis Flowers were divorced in Louisiana on July 12, 1991. Two female children were born of the marriage. As of May 12, 1994, the girls were eight and four years of age. Custody of the children was subsequently awarded to their mother. Later, Pamela and the children moved to Rankin County, Mississippi, where she has resided since the divorce of the parties. Thomas remarried and moved to Mobile, Alabama, where he and his wife are expecting a child of their own. The divorce order entered in Louisiana required Thomas to pay child support of $677.00 per month. Support was later reduced to $630.00, when Thomas was furthering his education. Thomas was also ordered to maintain health and medical insurance for the children and was awarded reasonable visitation rights with the children.

On May 6, 1994 at approximately 3:00 A.M., Jerry Ainsworth, a former boyfriend of Pamela's, shot and killed himself on the steps of Pamela's home in Pearl, Mississippi. Jerry Ainsworth had discovered another person spending the night with Pamela at a time when the two minor children were living in the same home with her. Ainsworth fired his gun into Pamela's home before turning it on himself. The children were awakened by the noise and later learned that Ainsworth had committed suicide at their home.

Following that event, Thomas filed a petition to modify the former judgment of divorce on May 12,

1994 in the Chancery Court of Rankin County, Mississippi, alleging a material change in circumstances since the entry of the divorce decree. He further alleged that the change in circumstance had an adverse effect on the minor children and that it was in their best interest that custody be awarded to Thomas, and that Pamela pay child support to him.

ANALYSIS

STANDARD OF REVIEW

If substantial evidence in the record supports a chancellor's judgment, his findings will not be disturbed upon appeal. *Morreale v. Morreale*, 646 So. 2d 1264, 1266 (Miss. 1994). Stated another way, on appeal we are required to respect the findings of fact made by a chancellor if those findings of fact are supported by credible evidence and are not manifestly wrong. *Brennan v. Brennan*, 638 So. 2d 1320, 1323 (Miss. 1994). In divorce or other domestic relations cases, this is particularly true. *Id.* The word "manifest", as used in this context, requires that a chancellor's findings of fact must be unmistakably, clearly, plainly, or indisputably wrong before being disturbed upon appeal. *Brennan*, 638 So. 2d at 1323.

I. THE COURT ERRED IN FAILING TO AWARD CUSTODY TO THE FATHER

II. THE CHANCELLOR ERRED IN FAILING TO MAKE ADEQUATE FINDINGS UNDER *ALBRIGHT*

Because the first two assignments of error are closely related, we will analyze them together.

> There are two prerequisites to a modification of child custody. First, the movant must prove by a preponderance of the evidence that since the 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 adverse change has been shown, the moving party must show by [a] preponderance of the evidence that the best interest of the child requires the change in custody.

Newsom v. Newsom, 557 So. 2d 511, 515-16 (Miss. 1990).

The court in *Tucker v. Tucker*, 453 So. 2d 1294, 1297 (Miss. 1984)explained:

> Even though the chancellor finds a material adverse change in circumstances, a change in custody is not automatic. That finding is merely the first step, the one which then authorizes and indeed challenges the chancellor to then go forward and determine whether the best interests of the child justify a change of custody.

The *Tucker* court stated that the totality of the circumstances should be considered when evaluating whether a change in custody is warranted. Before custody is changed, the court should not only find that the overall circumstances have materially changed, but also that they "are likely to remain materially changed for the foreseeable future . . . ." *Id.* In *Bowden v. Fayard*, 355 So. 2d 662, 664 (Miss. 1978) the court stated that "[o]nce the court has determined which parent should have custody of the children, then they should be allowed the stabilizing influence of knowing where the home is." We must keep in mind that the best interests and welfare of the child are always our polestar considerations. *Tucker*, 453 So. 2d at 1297.

The chancellor in this case did find that there was a material change in circumstances that did adversely affect the children. He did not find, however, the second required element for changing custody. That being that the change in custody would be in the best interests of the children. The chancellor also found that the adverse conditions, which the children had been exposed to and which caused the material change in circumstances, were not likely to remain materially changed for the foreseeable future.

The court, in making its determination, carefully analyzed the factors noted for consideration in *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). In doing so, he placed great emphasis on the negative effect that uprooting the children from their current environment might have. The children had been in the custody of their mother for four years since the divorce. Furthermore, the school age daughter was an extremely high achiever and was receiving praise and recognition at school.

We agree that there were factors which weighed in favor of the father, Thomas. *Albright*, however, is not a mathematical formula that can be applied in these cases. Some factors may weigh strongly in favor of one parent; while others only weigh slightly in favor of another. The chancellor's decision in this case is supported by the record. Given our limited scope of review in such matters, we cannot say that he was manifestly in error by allowing the minor daughters to remain with their mother, Pamela.

III. THE COURT ERRED IN RAISING CHILD SUPPORT PAYMENTS TO A LEVEL ABOVE THAT REQUIRED BY STATUTORY GUIDELINES

IV. THE COURT ERRED IN REQUIRING THE FATHER TO PAY COUNSELING FEES NECESSITATED BY THE MOTHER'S CONDUCT

These issues are also related and can be addressed together.

The award of child support is a matter which is within the sound discretion of the chancellor. We will not reverse his determination of an award unless we find that the chancellor committed manifest error in its findings of fact or abused his discretion. *Gillespie v. Gillespie*, 594 So. 2d 620, 621 (Miss. 1992). "The process of weighing evidence and arriving at an award of child support is essentially an

exercise in fact-finding, which customarily significantly restrains this Court's review." *Id.* The court in *Thurman v. Thurman*, 559 So. 2d 1014, 1017 (Miss. 1990) stated that the amounts to be paid in child support as set out in section 43-19-101 of the Mississippi Code (Supp. 1995) are merely guidelines and "must not control the chancellor's award of child support." The court further explained:

> The cold law suggested in Washington as a national guideline, however desirable, to lead the states toward uniformity in child support must not dictate the amount of food, the need for clothing, the requirement of education or the standard of living of the children. Rather, this shall be done by a chancellor who hears all the facts, views the witnesses, and is informed at trial of the circumstances of the parties and particularly the circumstances of the children. . . . Certainly the guidelines are relevant and may be considered by a chancellor as an aid, but the guidelines may not determine the specific need or the specific support required. This is to be done by a chancellor at a time real, on a scene certain, and with a knowledge special to the actual circumstances and to the individual child or children.

Id. at 1017-18.

Thomas complains that the chancellor erred in this case by awarding child support in an amount that exceeded twenty percent, which is what the guidelines in the statute recommends for support of two children. Thomas was ordered to pay $675.00 per month in child support when his adjusted monthly gross income is only $3,005.50. He argues that this amount should only obligate him to pay $601.10 per month. Thomas reminds us that in accordance with section 43-19-103 any deviation from the statutory guidelines by the chancellor must be supported by a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate. Thomas also quotes the language in *Dufour v. Dufour*, 631 So. 2d 192, 195 (Miss. 1994) which held that "[b]ased on the fact that the child support award is greater than the amounts recommended by the guidelines and *not supported by the record* or the chancellors findings, the child support award should be reversed and remanded."

Thomas maintains that the chancellor erred in exceeding the guidelines because he did not make a specific written finding on the record of why he was doing so. Neither *Dufour* nor section 43-19-103 necessarily require such a finding when the deviation is supported by the record. In *Smith v. Smith*, 585 So. 2d 750, 753 (Miss. 1991), the court held that although the chancellor did not make an on-the-record finding to support the deviation from the amount suggested in the guidelines, there was no reversible error. In explaining its decision, the court noted that while the amount awarded may be high, it did not constitute error considering the circumstances of the custodial parent and the limited amount of support previously received from the noncustodial parent.

In the record before us we find that in the original decree, Thomas was ordered to pay $677.00 per month in child support. This amount was later reduced to $630.00 per month when Thomas sought to pursue further schooling. Apparently, the original amount was not reinstated when the schooling

ended. The chancellor did find that Thomas' income had, however, significantly increased since the time of the original decree. The original decree also required Thomas to maintain health and medical insurance for the children. Thomas has admittedly failed to do so, and the chancellor found that he was in noncompliance with the original judgment of divorce. As did the court in *Smith*, we find that there is sufficient evidence in the record to support the chancellor's decision in this matter.

Thomas cites *Dufour* in support of the proposition that the chancellor erred in requiring him to pay for counseling for one of his children when such counseling was necessitated by Pamela's conduct. We find, however, that *Dufour* is not instructive on this issue. Rather, we look to the factors relevant to this case as outlined in *Brabham v. Brabham*, 84 So. 2d 147, 153 (Miss. 1955):

1. The health of the husband and his earning capacity;

2. The health of the mother and her earning capacity;

3. The entire sources of income of both parties;

4. The reasonable needs of the child;

5. The necessary living expenses of the husband;

6. Such other facts and circumstances bearing on the subject that might be shown by the evidence.

In light of these factors, we find that the record supports the chancellor's judgment that these costs fairly should be borne by Thomas. Given the above findings and the applicable law, we find no merit in Thomas' assertions of error. We, therefore, affirm the decision of the chancellor.

THE JUDGMENT OF THE RANKIN COUNTY CHANCERY COURT IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

FRAISER, C.J., THOMAS, P.J., KING, McMILLIN, AND PAYNE, JJ., CONCUR. COLEMAN, J., DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY DIAZ AND SOUTHWICK, JJ. BRIDGES, P.J., NOT PARTICIPATING.

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COLEMAN, J., DISSENTS IN PART:

With utmost deference to my colleagues in their majority opinion, I respectfully dissent only as to their resolution of the third issue, which is:

> III. THE COURT ERRED IN RAISING CHILD SUPPORT PAYMENTS TO A LEVEL ABOVE THAT REQUIRED BY STATUTORY GUIDELINES

Section 43-19-101 of the Mississippi Code states:

> (1) The following child support award guidelines shall be a rebuttable presumption in all judicial or administrative proceedings regarding the awarding or modifying of child support awards in this state:
>
> Number of Children Percentage of Adjusted Gross Income
>
> Due Support That Should Be Awarded For Support

1 14%

2 20%

3 22%

4 24%

5 or more 26%

> (2) The guidelines provided for in subsection (1) of this section apply unless the judicial or administrative body awarding or modifying the child support award *makes a written finding or specific finding on the record* that the application of the guidelines would be unjust or inappropriate in a particular case as determined under the criteria specified in Section 43-19-103.

Miss. Code Ann. §43-19-101 (1972).(emphasis added).

I agree with the majority that "an 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." *Gillespie v. Gillespie,* 594 So. 2d 620, 622 (Miss. 1992). Furthermore, "[t]he process of weighing evidence and arriving at an award of child support is essentially an exercise in fact-finding, which customarily significantly restrains this Court's review." *Id.* Nevertheless, "a chancellor can depart from the guidelines with written findings of their inappropriateness." *Johnson v. Johnson,* 650 So. 2d 1281, 1288 (Miss. 1994) (citing *McEachern v. McEachern,* 605 So. 2d 809, 813-14 (Miss. 1992)). However, "[w]ithout a written justification, such a departure is error by law and reversible." *Id.* at 1288. I submit that the latter quotation applies to the case *sub judice* and requires that we reverse and remand this issue to the trial court.

True, the Mississippi Supreme Court affirmed the chancellors' departure from the guidelines established by Section 43-19-101 without their written justificatons in the cases of *Thurman v. Thurman,* 559 So. 2d 1014, 1017 (Miss. 1990), and *Smith v. Smith,* 585 So. 2d 750, 753 (Miss. 1991). Nevertheless, Section 43-19-103, an expression of the people's will through the legislature's passage and the governor's signing of that law, requires the chancellor to make a written finding on the record that the application of the guidelines would be unjust or inappropriate.

The Mississippi Supreme Court enforced that provision in *Johnson v. Johnson* by opining that "[w] ithout a written justification, such a departure is error by law and reversible." *Id.* at 1288. In the case *sub judice* the chancellor's award of $675.00 per month exceeded the presumptively correct amount of $601.10 by more than ten percent. This much of a departure from the statutorily decreed amount of child support with no justification by the chancellor disregards the requirement of Section 43-19-103 that he do so. Thus, while I join the majority in affirming the chancellor's resolution of all other issues, I dissent to that part of the majority opinion which affirms the chancellor's award of an amount of child support which exceeds the guideline established by Section 43-19-103. I would reverse and remand this case on this issue only so that the chancellor might comply fully with the requirement of Section 43-19-103 that he make a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate.

DIAZ AND SOUTHWICK, JJ., JOIN THIS SEPARATE WRITTEN OPINION.