IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2005-CA-00882-COA

DEWAYNE NORMAN **APPELLANT**

v.

KIMBERLY NORMAN **APPELLEE**

DATE OF JUDGMENT:	4/15/2005
TRIAL JUDGE:	HON. SEBE DALE, JR.
COURT FROM WHICH APPEALED:	LAMAR COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT:	SAMUEL E. FARRIS JONATHAN M. FARRIS
ATTORNEY FOR APPELLEE:	E. LINDSAY CARTER
NATURE OF THE CASE:	CIVIL - CUSTODY
TRIAL COURT DISPOSITION:	DIVORCE GRANTED ON GROUND OF IRRECONCILABLE DIFFERENCES, JOINT LEGAL CUSTODY OF MINOR CHILD AWARDED TO THE PARENTS, AND PHYSICAL CUSTODY OF CHILD AWARDED TO FORMER WIFE. FORMER HUSBAND ORDERED TO PAY CHILD SUPPORT.
DISPOSITION:	AFFIRMED - 10/10/2006
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

MYERS, P.J., FOR THE COURT:

¶1. Dwayne Norman sued Kimberly Norman for divorce and custody of their only daughter, Blaze Maria Norman. Kimberly Norman counterclaimed also seeking a divorce and custody of their daughter. The Normans agreed to a divorce on grounds of irreconcilable differences, but could not agree on the issue of primary physical custody of their minor child. The issue was litigated, and the

chancellor awarded physical custody of the child to Kimberly. Aggrieved by this decision, Dwayne Norman perfected this appeal raising the following issue:

> WHETHER THE CHANCELLOR ERRED IN AWARDING CUSTODY OF BLAZE MARIA TO KIMBERLY NORMAN BY FAILING TO PROPERLY APPLY THE *ALBRIGHT* FACTORS .

¶2. Finding no error, we affirm.

STATEMENT OF FACTS

¶3. Dewayne and Kimberly Norman were married on April 23, 1994. One child was born to the marriage, Blaze Maria, who at the time of trial in this matter, was seven years old. During the marriage both Dewayne and Kimberly were gainfully employed, and by all accounts were good and loving parents. Dewayne and Kimberly separated in September 2004, and on September 22, 2004, in the Chancery Court of Lamar County, Dewayne filed a complaint for divorce on the grounds of habitual drunkenness, habitual cruel and inhuman treatment, and in the alternative, irreconcilable differences. Dewayne also filed for a protective order for temporary relief and custody of Blaze Maria. On October 11, 2004, Kimberly filed her answer, counterclaim for divorce, and request for temporary relief and custody of Blaze Maria; the parties also agreed upon a temporary order and proposed a trial date of March 3, 2005.

¶4. A temporary order was entered on November 4, 2004, which provided for joint legal custody of their minor child, with Kimberly having temporary physical custody of the child subject to the liberal visitation rights of Dewayne. On March 3, 2005, the court granted the parties' joint motion for divorce on the grounds of irreconcilable differences, and a trial was held on the issues of child custody, visitation, and child support. After hearing testimony from witnesses on both sides and a court-appointed expert, Dr. John Patrick Galloway, the chancellor, ruling from the bench, awarded primary physical custody to Kimberly. The chancellor awarded Dewayne liberal visitation and

ordered him to pay monthly child support in the amount of $285. A final judgment of divorce was entered on April 18, 2005, which incorporated the March 3, 2005 bench ruling. Dewayne appeals this final judgment and argues that the chancellor erred in awarding physical custody of Blaze Maria to Kimberly by failing to properly apply the *Albright* factors.

LEGAL ANALYSIS

¶5. The standard of review in domestic relations cases is established and clear. Child custody matters fall within the sound discretion of the chancellor. *Sturgis v. Sturgis*, 792 So. 2d 1029, 1023, (¶12) (Miss. Ct. App. 2001). Therefore, when this Court reviews an award of child custody, the decision of the chancellor will be affirmed unless it is shown to be "manifestly wrong, clearly erroneous," or that the chancellor applied an erroneous legal standard. *Roberson v. Roberson*, 814 So. 2d 183, 184 (¶3) (Miss. Ct. App. 2002). The chancellor's decision must be supported by substantial evidence established by the record of the proceedings. *Id.*

DISCUSSION

¶6. Dewayne contends that the trial court erred when it awarded physical custody of his daughter to his former wife. Dewayne complains that the chancellor did not make specific findings delineating each applicable *Albright* factor and that there was no clear evidence to support the chancellor's decision to award physical custody of his daughter to Kimberly. Both this Court and the Mississippi Supreme Court have addressed this issue on several occasions and have steadfastly held that:

> The polestar consideration in matters of child custody is the best interest of the child. *Rushing v. Rushing*, 724 So. 2d 911, 916 (¶24) (Miss. 1998). In considering the best interest of the child, the court must evaluate and apply the factors set out in *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). In considering the best interest of the child, the court must evaluate and apply the following factors: (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 of the parents; (6) emotional ties of parent and child; (7) moral fitness of the 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 (11) other factors relevant to the parent-child relationship. *Albright v. Albright*, 437 So. 2d 1003, 1005 (¶14) (Miss. 1983).

Alderson v. Alderson, 810 So. 2d 627, 629 (¶5) (Miss. Ct. App. 2002).

¶7. In the case at bar, Dewayne correctly asserts that "a chancellor's failure to make specific findings as to each individual *Albright* factor is reversible error." *Davidson v. Coit*, 899 So. 2d 904, 911 (¶18) (Miss. Ct. App. 2005) (citing *Powell v. Ayars*, 792 So. 2d 240, 249 (¶33) (Miss. 2001)). However, Dewayne incorrectly contends that the chancellor failed in his duty to consider and apply the *Albright* factors. The record clearly establishes that the chancellor acted in the best interest and welfare of the child in awarding physical custody of Blaze Maria to Kimberly, and both considered and applied the *Albright* factors.

¶8. In his bench ruling, the chancellor correctly identified the *Albright* factors as the controlling authority in child custody cases. The chancellor found the following *Albright* factors to be neutral: age, health and sex of the child; the employment of the parents and responsibilities of that employment; the physical and mental health of the parents; the moral fitness of the parents; and the stability of the home environment and employment of each parent. Although not expressly enumerated, the chancellor's consideration of the emotional ties of parent and child, and the home, school and community record of the child are evidenced by the testimony on these subjects offered at trial and the admission of the child's school attendance record into evidence. These, too, were found to be neutral factors. The chancellor found no *Albright* factors to favor only Dewayne, but found that a determination of the parent that has had the continuity of care prior to the separation, which had the best parenting skills, and which had the willingness and capacity to provide primary child care favored Kimberly. The preference of Blaze Maria as to whom should have physical

custody is not considered because at the time of trial she was seven years old, an age insufficient to express a preference by law.

¶9. Dewayne contends that the chancellor abused his discretion and ruled against the overwhelming weight of the evidence in his evaluation of which parent had the continuity of care prior to the separation, which had the best parenting skills, and which had the willingness and capacity to provide primary child care. Specifically, Dewayne argues that he was the parent that provided the continuity of care: ensuring Blaze Maria's school attendance; caring for her after school; taking her to ball practice; and taking her skating, fishing and camping. Although it is undisputed that Dewayne was and is a good father, the record indicates that throughout Blaze Maria's life Kimberly dressed her for school every day, bathed her, washed her clothes, and cooked her meals. After considering the above facts, the chancellor reached the conclusion that Kimberly provided the continuity of care prior to the separation, had the best parenting skills, and was willing and capable of providing primary child care.

¶10. We have reviewed the record. Clearly the chancellor considered the custody decision a close question. In making his decision the chancellor relied on the testimony of the parties, testimony of family and friends, in equal numbers on behalf of each side, and an independent court-appointed expert in family matters. The chancellor ultimately determined that both Dewayne and Kimberly were good parents deserving of custody. However, forced to make a determination as to a grant of physical custody, the chancellor held that under the *Albright* factors and based upon continuity of care prior to the separation, parenting skills, and willingness and capacity to provide primary child care, the evidence weighed in favor of Kimberly.

¶11. "We may not always agree with a chancellor's decision as to whether the best interests of a child have been met, especially when we must review that decision by reading volumes of

documents rather than through personal interaction with the parties before us." *Hensarling v. Hensarling*, 824 So. 2d 583, 586-87 (¶8) (Miss. 2002) (citing *Wright v. Stanley*, 700 So. 2d 274, 280 (Miss. 1997); *Williams v. Williams*, 656 So. 2d 325, 330 (Miss. 1995)). However, in child custody cases, we are bound by our standard of review and must give deference to the chancellor's determination of the "weight and credibility of the evidence." *Alderson* at 629 (¶4). It is not our duty as an appellate court to substitute our judgment for the chancellor's, rather our duty is merely to determine if the chancellor's ruling is supported by evidence. *Brewer v. Brewer*, 919 So. 2d 135, 141 (¶23) (Miss. Ct. App. 2005). "So long as there is substantial evidence in the record that, if found credible by the chancellor, would provide support for the chancellor's decision, this Court may not intercede simply to substitute our collective opinion for that of the chancellor." *Id*. (citing *Bower v. Bower*, 758 So. 2d 405, 412 (¶33) (Miss. 2000)).

¶12. Here, the chancellor's findings are supported by credible evidence in the record. Whether this court may or may not have given greater weight to different testimony is of no consequence. Our role is simply to determine if there is credible evidence to support the chancellor's decision. *Id*. Therefore, we must affirm.

CONCLUSION

¶13. The chancellor properly considered each *Albright* factor and stated the factual findings and legal conclusions relied upon in awarding custody to Kimberly. There was substantial evidence to support the chancellor's ruling, and this Court can find no abuse of discretion by the chancellor. The issue is without merit. Accordingly, we find no reversible error and affirm the award of primary physical custody of the minor child to Kimberly Norman.

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

KING, C.J, IRVING, CHANDLER, AND BARNES, JJ., CONCUR. SOUTHWICK, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY LEE, P.J., GRIFFIS, ISHEE AND ROBERTS, JJ.

SOUTHWICK, J., DISSENTING:

¶15. The parties and the majority of this Court agree that the chancellor failed to discuss several of the *Albright* factors. Whether to require on-the-record discussions of each factor has already been decided by the Mississippi Supreme Court. The decision is that reversible error occurs when the chancellor does not articulate reasoning on each one. *Powell v. Ayars*, 792 So. 2d 240, 244-45 (Miss. 2001). The state's highest court has in essence declared that findings on each *Albright* factor are a structural requirement for a valid chancellor's opinion regarding child custody. Perhaps the Supreme Court's view is that the advantages of certainty in that obligation trump any need for prejudice to be shown in a chancellor's failure to comply.

¶16. The Supreme Court has in related contexts also required on-the-record findings. As part of a decision on equitable distribution, the chancellor's findings on that subject's analogous list of Supreme Court-announced factors must be stated. *Lauro v. Lauro*, 847 So. 2d 843, 847 (Miss. 2003).

¶17. Itemized findings are not mandated to modify child support. *See Staggs v. Staggs*, 919 So. 2d 112, 124 (Miss. Ct. App. 2005) (citing *Wright v. Stanley*, 700 So. 2d 274, 283 (Miss. 1997) (affirming an increase in child support based upon increase in father's income, increase in cost of living, and increased needs of children due to age)). However, if a chancellor determines that the statutory guidelines on child support would be unjust or inappropriate, there must be on-the-record findings on the reasons. *Chesney v. Chesney*, 910 So. 2d 1057 (Miss. 2005).

¶18. As a final example, the Supreme Court has required chancellors to consider suggested factors in making decisions regarding alimony, but there does not appear to be a mandate that the

conclusions as to each factor be articulated on the record. *Holley v. Holley*, 892 So. 2d 183, 185 (Miss. 2004). The presumption that a chancellor has considered all relevant evidence applies in decisions concerning alimony. *Holcombe v. Holcombe*, 813 So. 2d 700, 704 (Miss. 2002). However, as *Powell* demonstrates, this presumption does not apply in all areas of domestic relations. The issues involved in this appeal concern an area in which the presumption is inapplicable.

¶19. I find that we err in affirming, regardless of the reasonableness of the argument that the chancellor's view on each factor was discoverable from the nature of the evidence. I would not reverse, however. An order could be entered requiring the chancellor to make findings as to each factor. The parties could then be provided an opportunity to file supplemental briefing after those findings are made.

¶20. With respect, I dissent.

LEE, P.J., GRIFFIS, ISHEE AND ROBERTS, JJ., JOIN THIS OPINION.