

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-00737-COA

SHAIN C. SPEIGHTS

APPELLANT

v.

DANA WOODS SPEIGHTS

APPELLEE

DATE OF JUDGMENT:	04/05/2012
TRIAL JUDGE:	HON. DAVID SHOEMAKE
COURT FROM WHICH APPEALED:	LAWRENCE COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT:	JOSEPH PRESTON DURR W. BRADY KELLEMS
ATTORNEY FOR APPELLEE:	JAMIE HARDISON-EDWARDS
NATURE OF THE CASE:	CIVIL - CUSTODY
TRIAL COURT DISPOSITION:	AWARDED PHYSICAL CUSTODY AND \$2,500 IN ATTORNEY'S FEES TO APPELLEE
DISPOSITION:	AFFIRMED IN PART; REVERSED AND REMANDED IN PART - 11/05/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE GRIFFIS, P.J., BARNES AND JAMES, JJ.

JAMES, J., FOR THE COURT:

¶1. Shain and Dana Speights were granted an irreconcilable-differences divorce by the Lawrence County Chancery Court. Shain appeals the chancellor's decision to award physical custody of the parties' four minor children to Dana, in addition to the award of \$2,500 in attorney's fees to Dana. This Court affirms the award of physical custody. However, we find an abuse of discretion in the chancellor's award of attorney's fees. Thus, we reverse and remand that portion of the judgment.

FACTS AND PROCEDURAL HISTORY

¶2. Shain and Dana were married on July 14, 2000. During the marriage, the parties had four children. The parties separated on November 23, 2009. On April 30, 2010, Dana filed for divorce on the ground of habitual cruel and inhuman treatment or, in the alternative, on the ground of irreconcilable differences. On June 2, 2011, the Lawrence County Chancery Court entered a temporary order, granting Dana temporary custody of the parties' four minor children. The parties were awarded joint legal custody of the children, and Shain was granted visitation. On March 15, 2012, Shain filed an answer and counterclaim for divorce on the grounds of adultery and habitual cruel and inhuman treatment or, in the alternative, on the ground of irreconcilable differences.

¶3. A trial was held on March 19, 2012. The parties agreed to a divorce based on irreconcilable differences.¹ Dana was awarded physical custody of the parties' four children, and Shain was granted reasonable visitation. The chancellor ordered Shain to pay \$1,311.60 per month in child support to Dana. Shain was also ordered to pay \$2,500 in attorney's fees incurred by Dana. A \$15,564 retirement account held by Shain was split between the parties. Following the April 6, 2012 judgment of divorce, Shain filed the current appeal.

STANDARD OF REVIEW

¶4. Our scope of review in domestic-relations matters is limited. *Montgomery v. Montgomery*, 759 So. 2d 1238, 1240 (¶5) (Miss. 2000) (citing *Bell v. Parker*, 563 So. 2d 594,

¹ All other issues not agreed to by the parties were referred to the chancellor for a hearing on the merits.

597-97 (Miss. 1990)). This Court will not disturb a chancellor's judgment absent an abuse of discretion or manifest error. *Id.*

DISCUSSION

I. Custody

¶5. Shain argues that the chancellor's decision to award physical custody to Dana was unsupported by the evidence and was contrary to the best interest of the children. In child-custody cases, the polestar consideration is the best interest and welfare of the child. *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). The *Albright* test weighs the following factors for each parent:

Age[,] . . . health, and sex of the child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of the parent and child; moral fitness of the parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a preference by law; stability of [the] home environment and employment of each parent[;] and other factors relevant to the parent-child relationship.

Id.

¶6. The chancellor applied each of the *Albright* factors in determining which parent was better suited for physical custody of the minor children. Ultimately, the chancellor determined that it was in the best interest of the children to remain in Dana's custody. Shain contends that the chancellor erred in the *Albright* analysis of three factors: (1) the health and sex of the children, (2) parenting skills, and (3) the stability of the home environment.

¶7. To support his argument, Shain refers to an incident that occurred during the parties'

separation while the children were in Dana's care. Dana testified that on one morning, the parties' eleven-year-old son, who has ADHD, mistakenly ingested the wrong type of medication. Dana stated that she usually places all of the children's medication on the kitchen table. The parties' seven-year-old daughter takes medication for asthma. Dana testified that, at the time of the incident, the brand of their son's ADHD medication had been recently changed, and he mistakenly thought that the asthma medication was his new medication. According to Dana, the child was immediately taken to the emergency room for treatment. Dana testified that the child was not physically harmed, nor did he suffer any long-term effects from the ingestion. Dana also testified that she now gives each child their respective medications herself, and that she watches the children as they take the medication.

¶8. Also in support of his argument, Shain references the children having head lice while in Dana's care. The chancellor found that this did not adversely affect the children because the head lice "only happened on two occasions . . . and there have been no further episodes." In his brief, Shain argues that this is incorrect. From the record, it is unclear where the chancellor got the notion that the children had head lice on only two occasions. At trial, the following exchange took place between Dana and Shain's attorney regarding the head lice:

Q: You spoke about the lice incident. Was that just with [two of the children]?

A: No. It was all the kids. When you have lice with one child, it's more than likely they all will have it.

Q: Now, was this only one occasion? Was that more than one occasion?

A: No. It was – it was several occasions, because we could never pinpoint

where it came from. I still, to this day do not know where it came from. But it has been dealt with. It's been treated. And they have not had it in a while – [a] long time.

While the record does not support the chancellor's finding that the children only had head lice on two occasions, Dana's testimony that the children were treated and have not since suffered from lice supports the chancellor's determination that no adverse effect occurred.

¶9. Shain argues that the "health of the children" and "stability of the home environment" factors favor him over Dana for a number of reasons. First, Shain points to the fact that Dana is a smoker. Dana testified that she normally smokes cigarettes outside of the home, but has on occasion smoked around the children while inside the home. Shain argues that Dana's smoking negatively affects the health of the children. However, Shain testified that his grandmother, who occasionally helps with the children while they are in his custody, smokes as well. The chancellor found that because there was no evidence of an adverse impact on the children from the grandmother's smoking or from Dana's smoking, the "health of the children" factor was neutral. The chancellor did, however, order that there be no smoking or consumption of alcohol in the presence of the children by either party or by family members.

¶10. Next, Shain argues that since the parties' separation, Dana has moved three times, and that her moving evinces instability of the home environment. However, Dana testified that during each of these moves, the children remained in the same school. Dana also testified that she has lived at her current address for over a year. For these reasons, the chancellor found that the children were not adversely affected as a result of the moves.

¶11. Shain also argues that the children would be more stable in his custody because he is employed and Dana is not. Dana testified that during the marriage, both parties agreed that Dana would forgo her career plans so that she could remain home and care for the children full-time. Dana stated that after the parties separated, she obtained employment, but quit working after five months because it was causing her to spend too much time away from the children. She also stated that she is currently looking for a job. The chancellor determined that because Dana had been the primary caregiver of the children since their births, it was in the children's best interest to remain in her custody. The chancellor did not find Dana's current unemployment to have a negative impact on the children.

¶12. Regarding the parties' parenting skills, Shain argues that Dana has made poor decisions regarding the children's care since the parties' separation. Specifically, Shain refers to Dana's decision to allow the children to take medication while unsupervised. As previously stated, Dana testified that she now supervises the children when they take medication, and the medication is no longer stored within the children's reach. The chancellor determined that the incident of the parties' son ingesting the wrong medication was an isolated incident, and held the following:

The Court is satisfied that was a mistake and is satisfied that the mother immediately corrected that problem by securing the appropriate medical treatment and by making sure that the medicine was given from her hand to [the child's] hand every day thereafter. Medicine was not thereafter left on the kitchen counter for [the child] to pick up and take.

¶13. Shain also references Dana's decision to expend money on Christmas gifts for the children instead of paying her monthly car note. According to Dana, Shain had given her

money, which she used to purchase gifts for the children. Dana stated that during that time, her vehicle was repossessed because she did not have the funds to make the monthly car payments. Shain argues that Dana's using funds for non-necessities and allowing her only means of transportation to be repossessed show poor parental judgment. However, Dana testified that she had purchased another vehicle at the time her first vehicle was repossessed, and the children are not without transportation.

¶14. "We will not disturb the findings of a chancellor unless the chancellor was manifestly wrong [or] clearly erroneous, or applied an erroneous legal standard." *Jordan v. Jordan*, 105 So. 3d 1130, 1133 (¶10) (Miss. Ct. App. 2012) (quoting *Taylor v. Bell*, 87 So. 3d 1134, 1137 (¶6) (Miss. Ct. App. 2012)). Accordingly, we decline to disturb the chancellor's findings. The record shows that the chancellor carefully applied each of the *Albright* factors, and the judgment is well supported by the evidence. We find no error in the chancellor's decision to award physical custody of the children to Dana.

II. Attorney's Fees

¶15. Next, Shain argues that the chancellor erred in awarding \$2,500 in attorney's fees to Dana. "The award of attorney['s] fees in divorce cases is left to the discretion of the chancellor, assuming he follows the appropriate standards." *Creekmore v. Creekmore*, 651 So. 2d 513, 520 (Miss. 1995) (citing *Adams v. Adams*, 591 So. 2d 431, 435 (Miss. 1991)). "Attorney['s] fees are not generally awarded unless the party requesting such fees has established the inability to pay." *Id.* (citing *Dunn v. Dunn*, 609 So. 2d 1277, 1287 (Miss. 1992)). Regarding attorney's fees, the chancellor held the following:

The Court finds that the Plaintiff did not have the income or financial resources with which to employ an attorney. The Court finds that the Defendant, Shain Speights, has assets and income which has enabled him to pay attorney's fees for his representation in the cause. The Court finds that it would be inequitable under the circumstances . . . to not order the Defendant, Shain Speights, to pay and be responsible for the attorney's fees of the Plaintiff, Dana Speights. Therefore, the Court, taking into consideration the Court's familiarity with the time and work necessary to properly and adequately represent a party in a child custody dispute[,] . . . finds that an appropriate attorney's fee to be paid . . . would be in the amount of \$2,500.

¶16. Although Dana offered testimony regarding her lack of income, she did not offer any evidence of the amount of attorney's fees she incurred. The record shows that Dana's attorney briefly mentioned her intention to offer evidence of attorney's fees at the conclusion of trial, but she never did so. At no time during trial did Dana or her attorney provide the chancellor with evidence of attorney's fees. Thus, it is unclear to this Court how the chancellor arrived at a figure of \$2,500. Further, there is no financial statement from Dana in the record to substantiate her inability to pay.

¶17. "An award of attorney's fees should be 'fair and should only compensate for services actually rendered after it has been determined that the legal work charged for was reasonably required and necessary.'" *Jordan*, 105 So. 3d at 1135 (¶20) (quoting *Dunn*, 609 So. 2d at 1286). It has long been the practice of trial courts to apply the factors in *McKee v. Mckee*, 418 So. 2d 764, 767 (Miss. 1982), in awarding attorney's fees. Although it is not necessarily reversible error for the chancellor not to make an on-the-record analysis of the *McKee* factors,² without any evidence of fees in the record, we have absolutely no way of

² See *West v. West*, 88 So. 3d 735, 747 (¶57) (Miss. 2012).

determining whether the chancellor's award was reasonable.

¶18. In response to the dissenting opinion, it was not necessary for the appellant to request a reconsideration in order to preserve the matter for appeal. The case of *Concannon v. Reynolds*, 878 So. 2d 107 (Miss Ct. App. 2003), was decided on limited facts, as were other cases cited in the dissenting opinion. These cases did not have the effect of altering Mississippi Rule of Appellate Procedure 3(a), which states:

(a) *Filing the Notice of Appeal.* In all cases, both civil and criminal, in which an appeal is permitted by law as of right to the Supreme Court, there shall be one procedure for perfecting such appeal. That procedure is prescribed in these rules. . . . [D]ecisions or orders in conflict with these rules shall be of no further force or effect.

The proper filing of a notice of appeal is the first step in perfecting an appeal. No request for a rehearing or request for reconsideration is necessary. The dissenting opinion also relies on Mississippi Code Annotated section 9-1-41 (Rev. 2002), which states:

In any action in which a court is authorized to award reasonable attorneys' fees, the court shall not require the parties seeking such fees to put on proof as to the reasonableness of the amount sought, but shall make the award based on the information already before it and the court's own opinion based on experience and observation; provided however, a party may, in its discretion, place before the court other evidence as to the reasonableness of the amount of the award, and the court may consider such evidence in making the award.

¶19. In the present case, the chancellor made insufficient findings and there is insufficient proof in the record for this court to determine whether the chancellor's findings were fair and reasonable. Although the statute gives the court broad discretion, the award of attorney's fees cannot be upheld by this court unless the record supports the award. An award of attorney's fees may be sufficient in a simple matter before the court, where the award is based on the

court's experience and observation. However, in a case of this nature, where there are many billable hours that the court is unable to observe or lacks knowledge of, it is incumbent upon the party requesting fees to place before the court evidence as to the reasonableness of the amount of the award, so that the record as a whole can support the award of attorney's fees. Because the chancellor's award of \$2,500 is not supported by the evidence, we reverse and remand this portion of the judgment for a proper assessment of attorney's fees.

¶20. THE JUDGMENT OF THE LAWRENCE COUNTY CHANCERY COURT IS AFFIRMED IN PART AND REVERSED AND REMANDED IN PART. ALL COSTS OF THIS APPEAL ARE ASSESSED EQUALLY BETWEEN THE APPELLANT AND THE APPELLEE.

LEE, C.J., GRIFFIS, P.J., BARNES, ISHEE, ROBERTS AND MAXWELL, JJ., CONCUR. IRVING, P.J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. CARLTON, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION. FAIR, J., CONCURS IN PART AND DISSENTS IN PART WITHOUT SEPARATE WRITTEN OPINION.

CARLTON, J., CONCURRING IN PART AND DISSENTING IN PART:

¶21. I respectfully concur in part and dissent in part with respect to the majority's opinion. I concur with the majority's decision affirming the chancellor's award of physical custody of the parties' four minor children to Dana. However, since I find no abuse of discretion by the chancellor in his award of attorney's fees to Dana, I would also affirm this decision.³ See

³ See also *McKee v McKee*, 418 So. 2d 764, 767 (Miss. 1982) (An award of attorney's fee in divorce case to a party must be supported by findings and evidence showing the requesting party is unable to pay; *McKee* sets forth factors for the court to follow to use as guidelines in determining an appropriate fee.); *Lindsey v Lindsey*, 219 Miss. 540, 544, 69 So. 2d 203, 204 (1954) (acknowledging chancellor's authority to award attorney's fees in divorce cases where equity requires such).

Miss. Code Ann. § 9-1-41 (Rev. 2002);⁴ I also respectfully submit that Shain failed to preserve for appellate review his claim that insufficient evidence or findings support the chancellor's award of attorney's fees by failing to object, failing to request reconsideration or amended findings, and by failing to request a new trial or relief from the judgment.⁵ I therefore dissent in part from the majority opinion as to this issue.

¶22. Here, the complaint shows that Dana claimed an inability to pay her attorney's fees, and her complaint requested that the court order Shain to pay all attorney's fees and costs of court. Shain denied Dana's averment, and in his counter-complaint, Shain also asserted that the trial court should award him, not Dana, reasonable attorney's fees. In satisfying the factual findings required by precedent and equity, the chancellor first determined that Dana lacked ability to pay her attorney's fees. *See Lindsey v. Lindsey*, 219 Miss. 540, 544, 69 So.

⁴ See also *Regency Nissan Inc. v. Jenkins*, 678 So. 2d 95, 103 (Miss. 1995) (Supreme court recognized that an abuse-of-discretion standard of review applies to review of attorney's fees, and found that the appellant failed to show how the award constituted an abuse of discretion; the appellant unsuccessfully argued that the trial court erred because it failed to comply with the United States Court of Appeals for the Fifth Circuit's requirements for establishing the reasonableness of attorney's fees.); *Williamson v. Williamson*, 81 So. 3d 262, 276 (¶¶29-30) (Miss. Ct. App. 2012) (finding appellant failed to preserve his claim of insufficiency-of-evidence supporting attorney's fee award by failing to object before trial court; abuse-of-discretion standard applies on appeal for review of award of attorney's fees).

⁵ See *Williamson*, 81 So. 3d at 276 (¶¶29-30) (issue of insufficiency of evidence in support of attorney's fee award waived on appeal for failure to object to issue before trial court); *McCarrell v. McCarrell*, 19 So. 3d 168, 172 (¶17) (Miss. Ct. App. 2009) (waiver of the issue of sufficiency of findings in support of attorney's fee award); *Concannon v. Reynolds*, 878 So. 2d 107, 108-09 (¶¶6-8) (Miss. Ct. App. 2003) (refusing to review reasonableness of attorney's fee award on appeal where appellant failed to move for amended finding, new trial, or relief from judgment).

2d 203, 204 (1954) (chancellor must find inability to pay to support an award of attorney's fee award in a divorce case); 7 Jeffrey Jackson & Mary Miller, Encyclopedia of Mississippi Law § 8:68, at 260 (2001) (award of attorney's fee in divorce case must be supported by finding that requesting party lacked ability to pay).

¶23. With respect to reasonableness of the amount of the attorney's fee award, the Legislature established in Mississippi Code Annotated section 9-1-41:

[T]he court shall not require the party seeking such fees to put on proof as to the reasonableness of the amount sought, but shall make the award based on the information already before it and the court's own opinion based on experience and observation; provided however, a party may, in its discretion, place before the court other evidence as to the reasonableness of the amount of the award, and the court may consider such evidence in making the award.

The Legislature last amended section 9-1-41 in 1990. Previously, in *Cheatam v Cheatam*, 537 So. 2d 435, 440 (Miss. 1988), the supreme court recognized that *McKee* set forth the following factors for the chancellor to consider as guidelines when determining an appropriate amount of fees sufficient to employ one competent attorney:

[R]elative financial ability of the parties, the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, as well as the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case.

¶24. Here, the record shows that the chancellor followed the statutory provisions of section 9-1-41 and also considered the *McKee* factors. Consistent with section 9-1-41, the chancellor applied his experience and observation to the information before the court in determining the reasonableness of the amount of attorney's fees required to procure one competent attorney

in that community for this case.⁶ See *Gulf City Seafood Inc. v. Oriental Foods Inc.*, 986 So. 2d 974, 978-79 (¶18) (Miss. Ct. App. 2007) (identifying section 9-1-41 as Mississippi's law governing reasonableness of attorney's fees).

¶25. As stated, in the judgment granting the divorce, the chancellor found Dana lacked the income or financial resources to employ an attorney. In addressing Shain's counter-complaint for attorney's fees, the chancellor determined that Shain possessed sufficient assets and income to enable him to pay attorney's fees for his representation. Consistent with precedent and section 9-1-41, the chancellor then found that in light of Dana's inability to pay, equity required that he order Shain to pay for Dana's attorney's fees. The chancellor then determined that, after taking into consideration the court's familiarity with the time and work necessary to properly and adequately represent a party in a child-custody dispute such as this case, an appropriate attorney's fee to be paid for and on behalf of Dana would amount to \$2,500.

¶26. The record reflects that the complaint was filed in April 2010. The record also shows that motions for continuance were filed, as well as a motion and an amended motion for temporary relief. The record shows that a notice of hearing and amended notice of hearing

⁶ In *Mauk v Columbus Hotel Co.*, 741 So. 2d 259, 269-70 (¶32) (Miss. 1999), the supreme court recognized that the reasonableness of an attorney's fee award lies within the court's discretion. The supreme court also stated that the *McKee* factors serve as a guide for determining the reasonableness of the award; and that the Legislature gave guidance to the courts in determining the reasonableness of attorney's fees by instructing courts to make the award based on information already before them and the courts' own opinions based upon experience and observation. *Id.* See Miss. Code Ann. § 9-1-41.

were filed and a temporary order issued. Discovery was served, and Dana filed a motion to compel discovery responses from Shain. As noted above, the record reflects Shain filed a counterclaim and answered Dana's complaint for divorce on March 15, 2012. The judgment of divorce was entered on April 6, 2012, and a consent to submit certain issues to the court for adjudication was filed. Shain's testimony in the record also shows that a restraining order was entered. The record shows that during the course of litigating this case, the chancellor reviewed evidence of the extensive financial information of the parties. *See* Miss. Code Ann. § 9-1-41 (allowing court to make decision based upon evidence before the court).

¶27. In this case, the chancellor clearly found that Dana lacked the ability to pay her attorney's fees.⁷ The record shows that the chancellor rendered such a finding of inability to pay on behalf of Dana, and as noted, information before the court supports that finding by the chancellor. After finding Dana lacked financial ability to pay her attorney, the chancellor stated that taking the court's familiarity with the time and work necessary to properly and adequately represent a party in a child-custody dispute such as the present matter, an appropriate fee would amount to \$2,500.⁸ Additionally, the comments by the chancellor reflect that he considered the factors set forth in *McKee* in determining the fee sufficient in this case to employ one competent attorney in that community. I find the chancellor's

⁷ As stated, the jurisprudence pertaining to an award of attorney's fees in domestic cases indeed requires that to support such an award, the chancellor must factually determine a party's inability to pay.

⁸ As acknowledged, section 9-1-41 allows the chancellor to base his orders upon evidence in the record.

decision consistent with section 9-1-41 and precedent. The record reflects that the chancellor considered his knowledge of the complexity of this domestic-relations case based upon the information before the court and the court's observation and experience as to the customary charge for a competent attorney in that community. Shain, as the appellant, fails to identify an abuse of discretion or insufficiency in the chancellor's award of attorney's fees. I also note that Shain failed to raise a question about the fee or its sufficiency below with the trial court.

See Williamson v. Williamson, 81 So. 3d 262, 276 (¶¶29-30) (Miss. Ct. App. 2012) (issue of insufficiency of evidence in support of attorney's fee award waived on appeal for failure to object to issue before trial court); *McCarrell v. McCarrell*, 19 So. 3d 168, 172 (¶17) (Miss. Ct. App. 2009) (waiver of issue of sufficiency of findings in support of attorney's fee award); *Concannon v. Reynolds*, 878 So. 2d 107, 108-09 (¶¶6-8) (Miss. Ct. App. 2003) (refusing to review reasonableness of attorney's fee award on appeal where appellant failed to move for amended finding, new trial, or relief from judgment). I therefore find no abuse of discretion in the chancellor's award of attorney's fees. Accordingly, I concur in part and dissent in part.