IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-01230 COA

WILLIAM E. SKINNER

APPELLANT

v.

MARY B. SKINNER

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. MICHAEL L. CARR JR.

COURT FROM WHICH APPEALED: ADAMS COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

WALTER BROWN

ATTORNEY FOR APPELLEE:

JOHN E. MULHEARN JR.

NATURE OF THE CASE: DOMESTIC

TRIAL COURT DISPOSITION: MOTION FOR CONTEMPT SUSTAINED,

MOTION FOR MODIFICATION DENIED,

$4500 ATTORNEYS FEES AWARDED

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

SOUTHWICK, J., FOR THE COURT:

William Skinner appeals the decisions of the Adams County Chancery Court finding him in willful contempt for failure to pay alimony, denying his motion to reduce his alimony obligations, and awarding Mary Skinner, his former wife, $4,500 in attorney's fees. Finding no error, we affirm.

FACTS

Mrs. Skinner was awarded a divorce in 1985 on the ground of habitual cruel and inhuman treatment. The chancellor awarded alimony of $2,158 per month until Mrs. Skinner died or remarried. At age sixty-five, Mrs. Skinner was to be paid $75,000. Mr. Skinner appealed. The court affirmed the award of periodic alimony, but reversed and ordered the $75,000 lump-sum award to be paid immediately, and the monthly award to continue until her death or remarriage. *See Skinner v. Skinner*, 509 So. 2d 867, 869 (Miss. 1987).

Mr. Skinner subsequently has been held in contempt of court three times. The first motion was filed in November 1990. In response, Mr. Skinner moved the court to reduce his alimony payments on the basis of a significant change in his financial condition. The chancellor held Mr. Skinner in contempt, denied his request for modification, and ordered him to pay past due alimony. Mr. Skinner paid the amount ordered by the court. Mrs. Skinner's second contempt motion was filed in November of 1991, and was granted. Mr. Skinner paid his alimony in full. The third motion was filed in June of 1992, and Mr. Skinner, to avoid a third judgment of contempt, paid his obligations on the eve of trial.

A fourth motion for contempt was filed in November of 1992, and is the subject of this appeal. Mr. Skinner responded to the motion by asking the court to reduce his payments. The court granted Mrs. Skinner a judgment in the amount of $11,309.64, found Mr. Skinner in contempt, denied his request for modification, and awarded Mrs. Skinner $4,500 in attorney's fees.

DISCUSSION

I. Contempt

Mr. Skinner contends that the judgment finding him in contempt was an error because he proved his financial inability to meet his obligations and also proved that his failure to pay was not willful or deliberate.

This Court will not reverse a chancellor's finding of contempt where it is supported by substantial credible evidence. *See Varner v. Varner*, 666 So. 2d 493, 496 (Miss. 1995), (citing *Shipley v. Ferguson*, 638 So. 2d 1295, 1297 (Miss. 1994)).

> Generally speaking, contempt matters are committed to the substantial discretion of the court which, by institutional circumstance and both temporal and visual proximity, is infinitely more competent to the matter than we are.

Cumberland v. Cumberland, 564 So. 2d 839, 845 (Miss. 1990). Failure to comply with an alimony decree is prima facie proof of contempt. *Rainwater v. Rainwater*, 110 So. 2d 608, 611 (Miss. 1959). The decree which stated the terms of Mr. Skinner's obligations and the undisputed proof that he had not met them, established a prima facie case for contempt of court. *See Collins v. Collins*, 158 So.

914 (Miss. 1935).

Mr. Skinner's first defense to the cc
his obligations was impossible be
condition. The general rule is that
contempt if he can prove that he is w
his obligations. *Varner,* 666 So. 2d a
627 So. 2d 823, 826 (Miss. 1993)).
show inability to pay with particula
Varner, 666 So. 2d at 496, (citing
1264, 1267 (Miss. 1994)). His inabi
doubts is not sufficient. *Sappington*
(Miss. 1962). In order for a party t
inability to pay, he must show:

> That he earned all he could, that he lived economically and paid all surplus money above a
> wife. And such proof must be made with particularity and not in general terms. In such a c
> were and what his living expense was, including that of those legally dependent on him, but
> of other debts or expenses will not excuse or justify his default, unless such payment wa
> business or occupation, because the wife's right to alimony is a prior and paramount claim c
> his earnings were insufficient to support himself and pay alimony exonerate him if he has ot
> make the payments, even though it may be exempt.

Kincaid v. Kincaid, 57 So. 2d 263, 265 (Miss. 1952).

At trial, Mr. Skinner exhibited a continuing lack of knowledge of his own financial affairs. When questioned about his personal finances, he answered that his present wife paid all the bills and handled all the finances, that he simply gave her money each month, and she took care of it. When asked about specific payments, he indicated complete lack of knowledge. When questioned about his business finances, he repeatedly answered that he was not qualified to answer questions and to ask his accountant. He offered proof through his accountant and by financial statements, which included debts owed to the Internal Revenue Service, the Mississippi State Tax Commission, the Small Business Administration, his employee's trust fund obligations, judgment creditors, and "a myriad of other pressing, emergency and necessary financial obligations." The testimony of Mr. Skinner's accountant, Mr. Switzer, showed the disarray of Mr. Skinner's finances.

The question to be addressed is not whether Mr. Skinner's finances were in bad shape, but whether he could pay the alimony which was due, and if not, whether he paid all money above necessary living and business expenses toward his alimony obligations. Mr. Skinner's defense of inability to pay failed the *Kincaid* test: The evidence showed that he had property he could have used to pay the debt, and he had expenses which were clearly not necessary living or business expenses. *See Kincaid,* 57 So. 2d at 265.

Taking Mr. Skinner's assertion that his earnings were not sufficient to pay the alimony to be true, he still will not be excused if he owns property or has any other means of paying the debt which could have been used. The proof showed that Mr. Skinner owned a one-third interest in several hundred acres of family property in North Mississippi, and that he could have used his interest, which was valued at approximately $300,000, to pay alimony. Mr. Skinner admitted he owned the property and legally could sell the property to pay alimony, but explained that many years ago he had promised his mother, who lived on the land, that he would not sell the property. To Mr. Skinner, that promise takes precedent over his legal obligation to his former wife. He admitted that selling his interest in the land would not leave his mother destitute, but maintained that he would not sell it while his mother was alive.

Mr. Skinner argues on appeal that he is also unable to do anything with the property because of a lien created by a 1987 chancery court judgment. The 1987 judgment was one of the other proceedings in which he was brought into court to pay past-due alimony. The court held Mr. Skinner in contempt, and gave Mrs. Skinner a lien on the family property to secure payment of alimony owed to her at that time as well as in the future. The judgment stated:

> There is, by this Judgment, impressed upon the interest of William E. Skinner in real property in DeSoto County, Mississippi hereinafter described a lien in favor of Mary B. Skinner to secure payment of the Judgment granted herein and to also secure and insure all future payment of alimony, Mary B. Skinner is hereby granted the right to apply to this Court for foreclosure of said lien and to application of the proceeds arising therefrom to discharge payment of said obligations.

Mr. Skinner argues that because of the court's order, "this is not a source he can call upon." He claims that, in an effort to satisfy his debts, he tried to get a loan with this property as security but the bank would not lend him the money because it did not conclude he would be able to pay it back.

In one case, the lower court imposed a lien on the husband's property to insure payment of alimony. On appeal, the husband argued that such a lien was a prejudgment seizure of property in violation of his due process rights. *Morgan v. Morgan,* 397 So. 2d 894, 896 (Miss. 1981). The supreme court disagreed, holding that "[t]he lien in no way restricts [the husband's] right to dispose of the land or use it except that it will remain as security until he fully discharges his obligation to his former wife or makes other arrangements to secure payments by some reasonable means acceptable to the lower court." *Morgan,* 397 So. 2d at 897.

Mr. Skinner's argument that this lien prevents him from doing the very thing the lien was designed to secure, i.e. make payments of alimony, is without merit. Mr. Skinner's testimony made clear that he simply refuses to sell the land. If in fact some practical problems have been caused by the existence of the lien, they may be addressed by the chancellor, particularly if foreclosure proceedings are commenced.

In addition to the family property, Mr. Skinner has a note for $24,000, arising from the sale of his business, payable in monthly installments of $3,000. Mrs. Skinner argues that he has not attempted to collect this debt, and if collected, the monthly installments would be more than his monthly alimony

obligation. Mr. Skinner argues that this note is uncollectible. When asked what steps he was taking to enforce the note, which was eight months past due at the time of trial, he replied that "I think the attorneys have been talking," but he could not be more specific. He did not prove compliance with the *Kincaid* test: That he "earned all he could," and used all means available to pay alimony.

Mrs. Skinner also argues that numerous other expenses paid by Mr. Skinner were neither necessary to the continuation of his business nor were they necessary living expenses for himself or his dependants. These expenses include financial support of his two adult married daughters. The evidence revealed that he paid the note on a car that his daughter drove, paid the insurance on the other daughter's car, and paid a veterinary bill for one of his daughter's. Mr. Skinner argues that one of the cars was in his name and that he paid his daughter's insurance while she was in the hospital suffering an alcohol abuse problem, and that these payments are "an act of kindness and only involved $500." Because these expenses are not living or business expenses and Mr. Skinner's two daughters were no longer his legal dependants at the time the expenses were incurred, Mr. Skinner did not meet the requirement of *Kincaid* that he pay all money over necessary living and business expenses to his former wife.

There is sufficient evidence in the record that Mr. Skinner could have paid the debt owed to his wife. While Mr. Skinner did offer proof that he had substantial debts in addition to alimony, he did not offer evidence with sufficient particularity that he was in fact unable to pay the alimony to relieve him of contempt on the basis of inability to pay.

Mr. Skinner's second defense was that his failure to pay was not willful or deliberate. If a defendant can show that his violation of the court's order was not willful or deliberate and that he attempted to comply to the maximum of his ability, then he will not be found in contempt of court. Mr. Skinner argues that his partial payments of amounts less that the amount owed was evidence that he honestly tried to pay.

In light of Mr. Skinner's testimony that he refused to use available property to satisfy the debt, his testimony that used his funds for expenses other than those necessary for living and continuing his business, and in light of his admitted lack of attention to his personal as well as business finances, there was substantial credible evidence to support the chancellor's finding that Mr. Skinner's failure to pay was willful.

Therefore, the judgment of contempt is affirmed.

II. Modification

In September of 1993, Mr. Skinner, in response to the latest motion for contempt, filed his second request for modification. The chancellor denied his request. Mr. Skinner contends that the chancellor's denial was against the overwhelming weight of the evidence in that he showed a significant change in circumstances.

A chancellor is afforded broad discretion in the area of modification, and this Court will reverse only when the chancellor was manifestly in error in a finding of fact or if there has been an abuse of discretion or when an erroneous legal standard was applied. *McEwen v. McEwen*, 631 So. 2d 821, 823 (Miss. 1994).

Authority for the modification of alimony is set by statute:

> When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching . . . or any allowance to be made to her or him . . . . The court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require.

Miss. Code Ann. § 93-5-23 (Supp. 1996).

The chancellor can only modify a divorce decree if he finds there has been a material change in the circumstances of one or more of the parties. *Varner*, 666 So. 2d at 497. The change must occur as a result of arising circumstances of the parties not have been reasonably anticipated at the time of the agreement. *Id. (*citing *Tingle v. Tingle*, 573 So. 2d 1389, 1391 (Miss. 1990)). Mr. Skinner argues that he showed that there had been a material and substantial change in circumstances since the court's last order denying his request for a reduction, which was in August of 1991. Mr. Skinner argues that the economy in Natchez has dramatically changed with the advent of large discount pharmacies, and his one man pharmacy cannot compete, as evidenced by the federal and state tax liens, judgments, and other financial problems that he experienced in the two years relevant to his motion for modification.

In one recent supreme court case on point, the husband, in seeking to have his support obligations reduced, argued that he had many other financial obligations and that he had subsisted on borrowed funds from his parents and his sisters. *Varner,* 666 So. 2d at 497. The court held that "[p]ersonal bills cannot be used as a factor to reduce support payments." *Id.*

The parties strongly disagree about the significance of certain evidence. Mrs. Skinner argues that Mr. Skinner' s financial position has actually improved since the August 1991 decision. She points out that he no longer has a child in college that he is obligated to support; he sold his business and moved into a building with lower rent; he reduced corporate debt as well as a debt with Trustmark Bank; and the value of his family property increased. She argues that Mr. Skinner's improved position is evidenced in his balance sheet which shows an increase in assets. In response, Mr. Skinner points out that his moving into a building with lower rent was because he was evicted from his other building and forced to sell his business. He claims that he only reduced his corporate debts by borrowing $33, 000 from another source to make the payments, and that his "robbing Peter to pay Paul" method of bookkeeping reflects a financial tailspin. Mr. Skinner further notes that she is ignoring that he was forced to assume individually a $75,000, tax lien IRS and a $17,500 Mississippi State Tax Commission tax lien on the corporation so that the sale of his business would go through.

In *Shipley v. Ferguson*, 638 So. 2d 1295, 1298 (Miss. 1994), the court held that known tax liability which resulted in a subsequent judgment against the husband did not rise to the level of a change of circumstances which warranted modification. *Id.* at 1298. While *Shipley* dealt with modification of child support, it is instructive on the issue of whether tax liability is a change in circumstances that was not reasonably anticipated at the time of the decree.

Mr. Skinner also argues that the chancellor did not consider his evidence because the chancellor's finding focused on Mr. Skinner's "loosely" operating his business. After hearing the evidence, the chancellor admonished Mr. Skinner that he needed to do a better job running his business, and that alimony is a "top burner" priority and needed to be treated as such.

The chancellor had substantial evidence that Mr. Skinner's financial condition had not changed significantly since the last judgment denying modification.

III. Attorney's Fees

Mr. Skinner contends that the chancellor's award to Mrs. Skinner of $4,500 in attorneys fees was error given the nature of the case and the fact that Mrs. Skinner did not prove an inability to pay her own fees. An award of attorney's fees is proper where a party is found in contempt for failure to pay alimony. *See, e.g.*, *Varner*, 666 So. 2d at 498. Additionally, attorney's fees are proper where there are successive unsuccessful attempts by a party to seek modification of a divorce decree. *Shipley v. Ferguson*, 638 So. 2d 1295, 1301 (Miss. 1994).

This case involves Mr. Skinner's fourth finding of contempt, and his second unsuccessful attempt to have the divorce decree modified. We find that attorney's fees were proper.

The amount of the award is entrusted to the sound discretion of the chancellor. *Cheatham v. Cheatham*, 537 So. 2d 435, 440 (Miss. 1988). When deciding the amount of the award, the judge must take into account these factors: a sum sufficient to secure one competent attorney; the relative 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; 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 preclusion of other employment by the attorney due to the acceptance of the case. *Id.* (citing *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982)). Mrs. Skinner's attorney submitted an itemized account of the fees incurred, but the record does not reflect that the chancellor specifically applied each of the *McKee* factors to this case. The supreme court has affirmed an award of attorney's fees for contempt where the judge did not specifically apply the *McKee* factors, but the award appeared to be reasonable. *Varner*, 666 So. 2d at 498. The award of $4,500 was reasonable.

THE JUDGMENT OF THE ADAMS COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT. STATUTORY DAMAGES AND INTEREST ARE AWARDED.

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

BRIDGES, P.J., NOT PARTICIPATING.