IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-00974 COA

DANIEL LORAN WALKER

APPELLANT

v.

SUSAN LYNN GOLDEN WALKER

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. ROBERT L. LANCASTER

COURT FROM WHICH APPEALED: WEBSTER COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

JAN R. BUTLER

ATTORNEY FOR APPELLEE:

GEORGE M. MITCHELL, JR.

NATURE OF THE CASE: DOMESTIC

TRIAL COURT DISPOSITION: DIVORCE GRANTED ON THE GROUND OF ADULTERY, CHILD SUPPORT GRANTED, NO ALIMONY GRANTED, DEFENDANT FOUND IN CONTEMPT

EN BANC:

BRIDGES, P.J., FOR THE COURT:

The Chancery Court of Webster County granted Susan Walker a divorce on April 14, 1993, from Daniel Walker on the ground of adultery. After the chancellor denied the Walkers' post-trial motions, both appeal to this Court with Mr. Walker arguing:

> I. THAT THE CHANCELLOR ERRED BY PROHIBITING OVERNIGHT VISITATION WITH THE CHILDREN IN A RESIDENCE OR LODGING, IN WHICH A FEMALE OVER SIXTEEN YEARS OF AGE, NOT RELATED BY BLOOD OR BY MARRIAGE TO THE CHILDREN, SHALL ALSO OCCUPY OVERNIGHT.

II. THAT THE CHANCELLOR ERRED IN FINDING HIM IN CONTEMPT OF COURT FOR FAILING TO PAY CHILD SUPPORT PURSUANT TO A TEMPORARY ORDER TO DO SO.

III. THAT THE CHANCELLOR ERRED IN AWARDING MRS. WALKER ATTORNEY'S FEES IN THE CONTEMPT ACTION.

IV. THAT THE CHANCELLOR ERRED IN REQUIRING MR. WALKER TO PAY TEMPORARY ALIMONY.

V. THAT THE CHANCELLOR ERRED IN AWARDING MRS. WALKER $250.00 IN CHILD SUPPORT.

VI. THAT THE INCLUSION OF CERTAIN BUSINESS PROPERTY OF MR. WALKER'S IN MRS. WALKER'S PORTION OF THE DIVISION OF PROPERTY WAS AN ABUSE OF DISCRETION.

On cross-appeal, Mrs. Walker argues:

VII. THAT THE CHANCELLOR ERRED IN NOT AWARDING EITHER LUMP SUM OR PERIODIC ALIMONY.

VIII. THAT THE CHANCELLOR ERRED IN NOT AWARDING MRS. WALKER ATTORNEY'S FEES IN THE DIVORCE ACTION.

IX. THAT THE CHANCELLOR ERRED IN NOT AWARDING MRS. WALKER AT LEAST ONE-HALF OF ALL MEDICAL EXPENSES OF MINOR CHILDREN.

X. THAT THE CHANCELLOR ERRED IN NOT REQUIRING MR. WALKER TO BE RESPONSIBLE FOR PAST DUE TEMPORARY ALIMONY AND CHILD SUPPORT.

XI. THAT THE CHANCELLOR ERRED IN NOT REQUIRING MR. WALKER TO POST A SURETY BOND.

We hereby affirm in part and reverse in part.

THE FACTS

Mr. and Mrs. Walker were married on June 23, 1983. Two boys were born of the marriage in 1985 and 1987. The couple separated in May of 1992. At the time of trial Mr. Walker was thirty- eight years old and in the engine repair business. He has a bachelor's degree in science education. Mrs. Walker was thirty-three years old at trial and worked as a lab technician in Starkville, Mississippi. Mrs. Walker has her bachelor's degree in zoology.

Mrs. Walker filed for divorce on July 31, 1992. An order on temporary features was entered granting Mrs. Walker temporary care, custody, and control of the minor children. The chancellor gave Mr. Walker reasonable visitation with the children and required him to pay $250.00 per month in temporary child support and $250.00 per month in temporary alimony until the matter could be heard.

The trial was held on March 31, 1993. The decree of divorce was rendered on April 14, 1993, granting a divorce to Mrs. Walker on the ground of adultery. Mrs. Walker was awarded custody of the two minor children. Mr. Walker's visitation was standard except for the caveat that "[d]efendant shall not keep the children overnight in a residence or lodging, which a female over sixteen years of age, not related by blood or marriage to the children, shall also occupy overnight." Mr. Walker was also ordered to pay $250.00 per month in child support.

Mrs. Walker was awarded ownership of the mobile home and all goods therein, except for a bedroom suite. Mrs. Walker was responsible for the payment of the delinquent taxes on the home, and the debt that was secured by the mobile home. Mrs. Walker was awarded the 1983 Chrysler, the Yazoo riding lawnmower and its trailer, the 1978 pickup, the 1976 pickup, the four horses, the four horse hot

walker, and the cow. Mr. Walker was awarded his business inventory, his tools, the 1983 Chrysler in his possession, a John Deere tractor, the frontend loader, and various other farming and mechanical implements and tools. He was also awarded his mobile office and the items therein.

Mrs. Walker's requests for alimony, attorney's fees for the divorce, and a surety bond were denied by the chancellor. Mrs. Walker was, however, granted attorney's fees for the contempt action. Mr. Walker was found in contempt for failing to pay the temporary support, but the contempt was purged by the division of property ordered by the chancellor. The court vacated the previous award of temporary support except for the April 1, 1993, child support payment. The parties divided their individual debts and were ordered to each pay half of certain other debts. Both parties filed various post-trial motions, all of which were denied.

STANDARD OF REVIEW

"Our scope of review in domestic relations matters is limited under the familiar rule that this Court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard." *Johnson v. Johnson*, 650 So. 2d 1281, 1285 (Miss. 1994) (citing *McEwen v. McEwen*, 631 So. 2d 821, 823 (Miss. 1994)). Keeping in mind the aforementioned standard, we shall discuss the issues in turn, combining issues II and IV for discussion.

ARGUMENT AND DISCUSSION

DIRECT APPEAL

> I. WHETHER THE CHANCELLOR ERRED BY PROHIBITING OVERNIGHT VISITATION WITH THE CHILDREN IN A RESIDENCE OR LODGING, IN WHICH A FEMALE OVER SIXTEEN YEARS OF AGE, NOT RELATED BY BLOOD OR MARRIAGE TO THE CHILDREN, SHALL ALSO OCCUPY OVERNIGHT.

Mr. Walker argues on appeal that it was error for the chancellor to restrict his visitation with his children by saying that the "[d]efendant shall not keep the children overnight in a residence or lodging, which a female over sixteen years of age, not related by blood or marriage to the children, shall also occupy overnight." We agree. While "[v]isitation and restrictions placed upon it are within the discretion of the chancery court,"

Visitation should be set up with the best interests of the children as the paramount consideration, keeping in mind the rights of the non-custodial parent and the objective that parent and child should have as close and loving a relationship as possible, despite the fact that they may not live in the same house.

White v. Thompson, 569 So. 2d 1181, 1185 (Miss. 1990).

Furthermore, the Mississippi Supreme Court has stated that actual danger or substantial detriment to the children must be shown before the chancellor may place restrictions on visitation. *Chamblee v.*

Chamblee, 637 So. 2d 850, 862 (Miss. 1994). In *Chamblee*, the chancellor granted the husband a divorce on the ground of adultery, and further granted the husband custody of the sole minor child. *Id.* at 861. In granting visitation to the mother, the chancellor's order required that during visitation with his mother, the minor child could not be in the presence of "any male companion [of his mother's] not related to her by blood or marriage." *Id.* at 859. The supreme court held the chancellor's restriction on visitation manifest error and reversed. *Id.* at 862. The court relied on previous case law to delineate the requirements for chancellor-imposed restrictions on visitation:

In *Cox v. Moulds*, 490 So. 2d 866 (Miss. 1986), this court stated that "something approaching actual danger or other substantial detriment to the children" must be found before a chancellor can place restrictions on visitation. The mere fact that a parent is having an affair is not enough to create the danger requisite to limit visitation. *Morrow v. Morrow*, 591 So. 2d 829 (Miss. 1991) states that "an extramarital relationship is not, per se, an adverse circumstance."

. . . .

Another case, *Dunn v. Dunn*, 609 So. 2d 1277 (Miss. 1992), is analagous to the case at bar. Michael Dunn admitted to having an affair with a co-worker and a divorce was granted on the grounds of adultery. The chancellor limited visitation with Michael so that the children could not be in the presence of the person he was having an affair with. This court stated, "absent any evidence that visitation with Michael and his lover would be harmful to the children, the chancellor erred and abused his discretion in placing such a restriction on Michael's visitation."

Chamblee, 637 So. 2d at 861-62. While one might initially agree with the chancellor's decision in this case, it is unsupported by case law of our state. We are bound by precedent imparted by the Mississippi Supreme Court. Our review of the record reveals no actual danger or substantial detriment that would justify a restriction such as the one placed by the chancellor on the visitation of Mr. Walker. Therefore, we reverse and render the chancellor's decision with respect to this issue. All other aspects of Mr. Walker's visitation shall remain the same.

> II. WHETHER THE CHANCELLOR ERRED IN FINDING MR. WALKER IN CONTEMPT OF COURT FOR FAILING TO PAY CHILD SUPPORT PURSUANT TO A TEMPORARY ORDER TO DO SO; AND

> IV. WHETHER THE CHANCELLOR ERRED BY REQUIRING MR. WALKER TO PAY TEMPORARY ALIMONY.

Mr. Walker's second and fourth issues concern the order on temporary features that was entered by the chancellor prior to the divorce proceeding and, therefore, shall be addressed together. In the temporary order, Mr. Walker was required to pay both child support and alimony until the matter was disposed of in the chancery court. It was agreed that both Mr. Walker's objection to the temporary order and Mrs. Walker's motion to cite for contempt would be dealt with during the trial

for divorce. Both issues were satisfactorily addressed at trial.

Mr. Walker did not make all of the payments that were required by the temporary order and feels aggrieved after being held in contempt and ordered to pay temporary alimony. These issues will be addressed only insofar as to affirm the actions of the chancellor with regard to the temporary order and its requirements. Implicit in the standard of review we stated earlier is the fact that the chancellor has wide discretion in deciding domestic relations matters. *Johnson,* 650 So. 2d at 1285. Accordingly, we affirm the chancellor's finding of contempt, as well as the purging of same, in the divorce decree and affirm the chancellor's decision to award temporary alimony prior to the divorce decree.

V. WHETHER THE CHANCELLOR ERRED IN AWARDING MRS. WALKER $250.00 IN CHILD SUPPORT.

Mr. Walker argues on appeal that the chancellor's award of $250.00 in support for the Walkers' two minor children was excessive. We disagree. While the chancellor when awarding child support should look to the guidelines set out in the Mississippi Code at section 43-19-101, these are only guidelines and not absolute rules. *Chamblee v. Chamblee*, 637 So. 2d 850, 862 (Miss. 1994). The supreme court has also stated:

The guidelines for child support awards as now set out in Miss. Code Ann. § 43-19-101 (Supp. 1989) must not control the Chancellor's award of child support. 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.

Thurman v. Thurman, 559 So. 2d 1014, 1017 (Miss. 1990).

It is our opinion that the chancellor in the case before us correctly followed the law in awarding $250.00 child support for two children and, accordingly, we affirm.

VI. WHETHER THE INCLUSION OF CERTAIN BUSINESS PROPERTY OF MR. WALKER'S IN MRS. WALKER'S PORTION OF THE DIVISION OF PROPERTY WAS AN ABUSE OF DISCRETION.

Mr. Walker finally argues that the chancellor abused his discretion in awarding certain property of value to his business to Mrs. Walker in the property settlement.

It is well established by this Court that the chancery court has the authority to order an equitable division of property that was accumulated through the joint efforts and contributions of the parties.

Brown v. Brown, 574 So. 2d 688, 690 (Miss. 1990). However, there is no automatic right to an equal division of jointly-accumulated property, but rather, the division is left to the discretion of the court.

Draper v. Draper, 627 So. 2d 302, 305 (Miss. 1993). It is our opinion that the chancellor did not abuse his discretion in dividing the property between Mr. and Mrs. Walker, and therefore, we affirm.

CROSS APPEAL

> VII. WHETHER THE CHANCELLOR ERRED IN NOT AWARDING EITHER LUMP SUM OR PERIODIC ALIMONY TO MRS. WALKER.

On cross appeal, Mrs. Walker first argues that the chancellor erred in not awarding either lump-sum or periodic alimony. This Court is bound by the following precedent set forth by the supreme court:

> This Court's standard of review is limited in domestic relations cases where the chancery court has decided upon the terms of alimony. The chancellor's decision on alimony will not be disturbed on appeal unless it is found to be against the overwhelming weight of the evidence or manifestly in error . . . . The amount of alimony awarded is a matter primarily within the discretion of the chancery court because of 'its peculiar opportunity to sense the equities of the situation before it.'

Tilley v. Tilley, 610 So. 2d 348, 351 (Miss. 1992). Our review of the record in this case does not persuade us to find that the chancellor's decision not to award either lump-sum or periodic alimony was either manifestly erroneous or against the overwhelming weight of the evidence. We shall, therefore, affirm the judgment of the chancery court with respect to this issue.

> VIII. WHETHER THE CHANCELLOR ERRED IN NOT AWARDING MRS. WALKER ATTORNEY'S FEES IN THE DIVORCE ACTION.

Mrs. Walker also argues that the chancellor erred in not awarding her attorney's fees on the divorce action. "The standard for an award of attorney['s] fees on a motion for modification of support is basically the same as that applied in an original divorce action." *Setser v. Piazza*, 644 So. 2d 1211, 1216 (Miss. 1994). Furthermore, "[t]his Court will not reverse the chancellor on an award of attorney['s] fees unless manifest error is revealed by the record." *Id.* at 1216. Finding no manifest error, we affirm the chancellor's decision as it relates to attorney's fees.

IX. WHETHER THE CHANCELLOR ERRED IN NOT AWARDING MRS. WALKER AT LEAST ONE-HALF OF ALL MEDICAL EXPENSES OF THE MINOR CHILDREN.

Mrs. Walker argues that it was error for the chancellor not to award her one half of the medical expenses of their minor children. Adhering to the standard of review we spoke of previously in this opinion, we once again can see no error in the chancellor's decision as it relates to the medical expenses of the children and, therefore, we shall not disturb it. Finding no merit in this issue, we affirm.

X. WHETHER THE CHANCELLOR ERRED IN NOT REQUIRING MR. WALKER TO BE RESPONSIBLE FOR PAST DUE TEMPORARY ALIMONY AND CHILD SUPPORT.

It is apparently the position of Mrs. Walker that she is owed the temporary support and alimony not paid by Mr. Walker pursuant to the chancellor's temporary award of support prior to the divorce. The court specifically vacated its temporary award of support in paragraph ten (10) of the judgment of divorce, and all obligations imposed by it have merged into the judgment of divorce. This Court need not address this issue further.

XI. WHETHER THE CHANCELLOR ERRED IN NOT REQUIRING MR. WALKER TO POST A SURETY BOND.

Mrs. Walker finally argues that the chancellor erred in not requiring Mr. Walker to post a bond to secure payment of his obligations. A chancellor is authorized to require a bond to secure payment by section 93-5-23 of the Mississippi Code. Furthermore, the decision whether to require a bond is within the discretion of the chancery court. Other than a concern that Mr. Walker will not meet his financial obligations pursuant to the judgement of divorce, Mrs. Walker has shown no sufficient reason to revisit the chancellor's decision not to require the posting of bond by Mr. Walker. We, therefore, affirm the decision of the chancellor.

PAYNE, J., FOR THE COURT:

> III. WHETHER THE TRIAL COURT ERRED IN AWARDING MRS. WALKER ATTORNEY'S FEES IN THE CONTEMPT ACTION.

Mr. Walker argues on appeal that the chancellor erred in awarding Mrs. Walker attorney's fees in the contempt action. Because this issue arises from an award of attorney's fees in a *contempt* action, not a direct appeal from a divorce action, we are compelled to affirm the chancellor on this issue.

"In a civil contempt proceeding, the trial court has discretion to award reasonable attorney fees to make the plaintiff whole and to reinforce compliance with the judicial decree." *Hinds County Bd. of Supervisors v. Common Cause*, 551 So. 2d 107, 125 (Miss. 1989). "An award of attorney fees in a contempt case is proper." *Herrington v. Herrington*, 660 So. 2d 215, 218 (Miss. 1994) (quoting

Smith v. Smith, 545 So. 2d 725, 728-29 (Miss. 1989) (citation omitted)); *Newell v. Hinton*, 556 So. 2d 1037, 1043 (Miss. 1990) (citing *Stauffer v. Stauffer*, 379 So. 2d 922, 924 (Miss. 1980)). The Mississippi Supreme Court addressed an issue similar to the present case in *Varner v. Varner*, 666 So. 2d 493, 498 (Miss. 1995). In *Varner*, the court held that because Barbara Varner "was successful on her motion for contempt, it follows she is eligible for an award of attorney fees." *Id.* In affirming the award of attorney's fees, the court recognized that "[b]ut for Don's repeated failure to pay, Barbara would not have incurred the expense of bringing multiple contempt actions against her former husband." *Id.* Additionally, in *Mount v. Mount*, the court reversed the chancellor who denied an award for attorney's fees in an action in which Mr. Mount was in contempt of court for failure to obey the court order to pay the home mortgage. *Mount v. Mount*, 624 So. 2d 1001, 1005 (Miss. 1993). The court stated, "[u]nder Mississippi law, if Mr. Mount was found to be in contempt of court, he is liable for Carolyn's attorney fees." *Id.* (citations omitted).

In the present case, the chancellor held, "The Defendant [Mr. Walker] is found in contempt of Court for wilfully failing to obey the Court's order to pay temporary support." The chancellor went on to order that "Plaintiff [Mrs. Walker] is awarded attorney's fees from the Defendant [Mr. Walker] in the contempt action in the sum of $300.00." We cannot say the chancellor erred in making this award in light of his finding that Mr. Walker was in contempt of the court's order.

We also find it necessary to point out that on May 5, 1993, Mrs. Walker filed a written motion for the chancellor to make findings of fact. The record reveals that the chancellor summarily denied all post-trial motions (which included Mrs. Walker's motion for findings of fact) in his "Order Denying Motions For New Trial Etc." which was filed on July 28, 1993. This was error in light of Uniform Chancery Court Rule 4.01 and Mississippi Rule of Civil Procedure Rule 52(a).

Uniform Chancery Court Rule 4.01 states:

> In all actions *where it is requested*, pursuant to M.R.C.P. 52, the Chancellor *shall find* the facts specially and state separately his conclusion of law thereon. The request must be made either in writing, filed among the papers in the action, or dictated to the Court Reporter for record and called to the attention of the Chancellor.

Unif. Chan. Ct. R. 4.01 (emphasis added).

Mississippi Rule of Civil Procedure Rule 52(a) reads:

> In all actions tried upon the facts without a jury the court may, and *shall upon the request of any party to the suit* or when required by these rules, find the facts specially and state separately its conclusion of law there on and judgment shall be entered accordingly.

M.R.C.P. 52(a) (emphasis added).

The Mississippi Supreme has held that the trial court is mandatorily required to make such findings upon the request of one of the parties and that it is reversible error for the trial court to fail to make such findings. *Lowery v. Lowery*, 657 So. 2d 817, 818 (Miss. 1995). In *Lowery*, our supreme court held that "[w]hile in this case there is a substantial basis in the record for the chancellor's ultimate conclusion, we can not say that the evidence is overwhelming so as to obliterate the necessity for

findings." *Id.* at 819. Granted, unlike the present case, the appellant in *Lowery* raised the trial court's failure to make findings of fact and conclusions of law as an issue on appeal. *Id.* While, this precedent would require this Court to reverse for such findings, we find it unnecessary in light of our discussion on the case law on attorney's fee awards in contempt actions. In other words, a remand for such findings is not required because the precedent supporting attorney's fee awards in contempt actions, as discussed above, requires us to affirm the award. However, if we were to follow the reasoning of the dissent that reversal of the award is required, we would otherwise penalize Mrs. Walker for the chancellor's failure to make a specific finding when she, in fact, followed the proper procedure to request findings of fact and conclusions of law. We find no basis to reverse the award of attorney's fees in the contempt action.

Accordingly, the award of attorney's fees in the contempt action is affirmed.

THE JUDGMENT OF THE CHANCERY COURT OF WEBSTER COUNTY IS REVERSED AND RENDERED IN PART AND AFFIRMED IN PART. THE COSTS OF THIS APPEAL ARE TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.

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

BRIDGES, P.J., DISSENTS TO ISSUE III JOINED BY THOMAS, P.J.

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BRIDGES, P.J., DISSENTING TO ISSUE III:

I would respectfully dissent from the majority's conclusion on issue III. Our supreme court has held that a party seeking attorney's fees must clearly demonstrate the inability to pay the fees, and in the absence thereof, the chancellor may not award such fees. *Rogers v. Rogers*, 662 So. 2d 1111, 1116 (Miss. 1995)*; Martin v. Martin*, 566 So. 2d 704, 707 (Miss. 1990). In *Rogers*, the husband was found in contempt, and the wife was awarded her attorney's fees for her petition. *Id.* at 1113. The court upheld the award of attorney's fees because the record revealed testimony that the wife *could not pay her attorney's fees. Id.* at 1116 (emphasis added).

If the record fails to reflect the inability to pay, or if the party seeking the fees does not testify that she is unable to pay the fees, then the chancellor *must* find that the party was unable to pay her attorney's fees, a factor necessary in making such an award. *Johnson v. Johnson*, 650 So. 2d 1281, 1288 (Miss. 1994) (emphasis added)*; McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982).

My review of the record does not reveal the requisite testimony that Mrs. Walker is unable to pay her attorney's fees. I am also unable to discern any finding of fact made by the chancellor regarding Mrs. Walker's inability to pay her attorney's fees. Being bound by the above precedent, I would reverse and render the award of attorney's fees to Mrs. Walker on the contempt action and, therefore, respectfully dissent from the majority's decision on issue III only.

THOMAS, P.J., JOINS THIS SEPARATE WRITTEN OPINION.