IN THE COURT OF APPEALS 09/17/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01045 COA

STEPHANIE HALLMAN (CARD)

APPELLANT

v.

RICKY HALLMAN

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. JANE R. WEATHERSBY

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

J. MURRAY AKERS

ATTORNEY FOR APPELLEE:

GAINES S. DYER

NATURE OF THE CASE: CIVIL- CHILD SUPPORT

TRIAL COURT DISPOSITION: CHANCELLOR RULED THAT MINOR CHILD WAS EMANCIPATED

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

BARBER, J., FOR THE COURT:

Stephanie Hallman Card appeals from a judgment of the Chancery Court of Washington County in favor of her former husband, Ricky Hallman. The chancellor found that the couple's minor daughter

was emancipated; terminated future child support payments; applied interest to support payments made in arrears; ordered the father to make all payments accruing during the pendency of the litigation; ordered the mother to repay to the father all voluntary overpayments of child support; and granted a judgment against the mother for the difference in the overpayments and the arrearage. Aggrieved by that decision, Stephanie appeals raising the following issues:

> I. THE CHANCELLOR ERRED IN FINDING THAT THE MINOR DAUGHTER OF THE PARTIES WAS EMANCIPATED AND IN TERMINATING CHILD SUPPORT PAYMENTS.
>
> II. THE CHANCELLOR ERRED IN ORDERING A REFUND OF THE OVERPAYMENTS OF CHILD SUPPORT AND GRANTING A JUDGMENT AGAINST THE APPELLANT.
>
> III. THE CHANCELLOR ERRED IN REFUSING TO AWARD APPELLANT ATTORNEY'S FEES.

FACTS

Stephanie and Ricky Hallman were divorced on February 19, 1980. Six years later, the court entered an agreed order finding the father in contempt and awarding the mother a judgment for back support in the amount of $5,475.00. Monthly support payments of $150.00 were ordered at that time, $75.00 of which was to apply to the judgment, and an immediate payment of $75.00 was made against the judgment, reducing the amount to $5,400.00. On September 18, 1989, a second consent order was entered raising the father's support payments to $150.00 per month and continuing an additional payment against the earlier judgment of $75.00 per month. The new total payment was $225.00 per month.

The father regularly made monthly payments in the amount of $225.00 until he unilaterally suspended all payments at the time he filed his petition to modify in April 1995. In his petition, the father claimed an overpayment of $2,625.00 and sought a judgment in that amount against the mother. The father failed to apply any interest factor to the judgment or his payment of it. By adding interest at the legal rate and amortizing the father's payments against the judgment with interest at eight percent, the father had fully satisfied his debt with the July 1994 payment and the total overpayment was $718.96.

The chancellor also found that the father was in arrears in the amount of $600.00 for support which had accrued between the time the father unilaterally stopped making payments and the date of the hearing. Rather than award the mother a judgment in the amount of $600.00, the chancellor deducted the arrearage from the amount of the previous overpayment and awarded a judgment against the mother in the amount of $118.96.

The mother attempted to offer proof that all child support payments received by her were applied exclusively to the support of the minor child. The father objected to such testimony and announced to the court that he was not contending that the overpayment had been used for any other purpose. The chancellor deemed it to have been stipulated that all overpayments of child support were used exclusively for the child.

In May 1995, one week after graduating from high school, and two weeks before her eighteenth birthday, the minor daughter moved from her mother's home into a residence then occupied by her twenty-one-year-old boyfriend. The move was without her mother's consent and against her wishes and resulted from an argument between mother and daughter. The mother tried to maintain a close relationship with the daughter and continuously urged her to return home.

During the time the daughter continued to reside with the boyfriend, the daughter was not employed; and neither she nor her boyfriend were financially independent. The daughter depended on her mother to buy her clothes, pay her telephone bill, and help with the grocery purchases. The mother testified that she continued to assist her daughter financially because she did not want to see her suffer.

When the mother became financially unable to continue her support, she terminated all assistance. The daughter then recognized her inability to maintain any independence. She acknowledged her continued reliance on parental support and nurture by returning to her mother's home on or about the first week of August 1995. At the time of the hearing, the daughter had enrolled in college. She was relying on an academic scholarship, a grant, and support from her mother to pay her college expenses.

> I. THE CHANCELLOR ERRED IN FINDING THAT THE MINOR DAUGHTER OF THE PARTIES WAS EMANCIPATED AND IN TERMINATING CHILD SUPPORT PAYMENTS.

Stephanie asks this Court to decide whether an intermittent act of transience in moving from the home of the custodial parent, without more, constitutes legal emancipation of an eighteen-year-old child, and if so, can emancipation be transitory and reversible. We find that, given the circumstances in the case at bar, there was no emancipation. Thus, it is not necessary for us to reach the issue of whether emancipation can be reversible.

The court in *Williams v. Rembert*, 654 So. 2d 26 (Miss. 1995) found that where a minor child moved from the custodial parent's home and accepted full-time employment, without more, does not establish emancipation. Emancipation has been defined as "the freeing of a child *for all the period of its minority* from the care, custody, control, and service of its parents; the relinquishment of parental control, conferring on the child the right to its own earnings and terminating the parent's legal obligation to support it." *Caldwell v. Caldwell*, 579 So. 2d 543, 549 (Miss. 1991) (emphasis added). "[P]arental emancipation signifies a surrender and renunciation of the correlative rights and duties touching the care, custody, and earnings of the child." *Id.* As in *Caldwell*, the facts of this case demonstrate that there was no renunciation of parental rights and duties by the mother.

In this set of facts, the child returned to the mother's home within three months of departing and began attending college. Furthermore, the child never obtained employment, had no independent financial resources, and continued to request and accept financial aid from her mother. Likewise, the mother did not relinquish parental control and did not renounce her duties as a parent. Instead, she continued to support her daughter financially and implored her at every opportunity to return home, which she eventually did. Therefore, we conclude that the chancellor erred in finding that the child was emancipated and in discontinuing further support from the father.

Although not considered as a basis for determining this issue, our conviction that no emancipation occurred is strengthened by the recent passage of a statutory provision which was enacted for the purpose of clarifying emancipation for child support. We are reassured that our resolution is in accord with legislative intent.

II. THE CHANCELLOR ERRED IN ORDERING A REFUND OF THE OVERPAYMENTS OF CHILD SUPPORT AND GRANTING A JUDGMENT AGAINST THE APPELLANT.

The overpayment of support, which occurred prior to the time the minor daughter moved from the mother's home, resulted from the father not realizing that he had already satisfied his prior arrearage and by his continuing to pay $75.00 per month toward it. It was stipulated at trial that all child support payments, including overpayments, were spent exclusively for the benefit of the child.

Stephanie argues that, having affirmatively taken the position that the mother did not divert any of the child support payments to her own benefit, the father was limited to looking to the daughter for any repayment, after her emancipation. *Harrell v. Duncan*, 593 So. 2d 1 (Miss. 1991). Stephanie explains that, according to *Harrell*, such would have been the case had the father continued to make payments to the mother after the child reached the age of twenty-one, i.e. emancipation, and if all such payments were used exclusively for the child. Furthermore, the mother would not have been liable for a refund to the father absent sufficient and credible proof that the mother used some portion of the overpayments for her own benefit. *Id.*

Stephanie contends that, in light of *Harrell*, the chancellor erred in ordering her to repay the overpayments to Ricky. The chancellor correctly held that Ricky was in arrears in the amount of $600.00, representing payments of $150.00 each for the months of May, June, July, and August, 1995, which Ricky unilaterally withheld after he filed his petition to modify. Rather than order Ricky to pay this sum to Stephanie, the chancellor gave him a credit for this amount against the overage of $718.96. This resulted in a judgment against Stephanie for the difference of $118.96.

Ricky replies to this argument by maintaining that the holding in *Harrell* does not apply here because the facts of that case are distinguishable from those in the case at bar. The facts of *Harrell* are that at the time the overpayments accrued, the daughter for whose benefit the payments were made, had already reached the age of majority; whereas in our case, the overpayments were made prior to the child's emancipation.

Ricky cites the case of *Manning v. Tanner*, 594 So. 2d 1164, 1169 (Miss. 1992), in support of his proposition that the Mississippi Supreme Court has approved the usage of an overpayment credit against a child support arrearage. The facts in *Manning*, however, can also be plainly distinguished from the facts before us. In *Manning*, the court found that the mother who received the support payments had used them for her own benefit and not for the benefit of the child. The court found that allowing the mother to keep the money under these circumstances would result in the mother's unjust enrichment. Furthermore, it would have been completely illogical for the court to have held that this money should be collected from the child, because the child had never benefitted from the support payments.

Given the facts presented to us, there can be no claim of unjust enrichment because the parties stipulated to the fact that all child support payments had gone to the benefit of the child. Thus, the remedy provided in *Manning* is not applicable here. We find although, that both *Manning* and *Harrell* are instructive as to this matter and are in accord with each other. While we recognize that the facts of *Harrell* are not directly on point, we decline to limit the scope of the supreme court's ruling to the facts of that case. In *Harrell*, the court stated that "[c]hild support is awarded to the custodial parent for the benefit and protection of the child. Child support benefits belong to the child, and not the parent who, having custody, receives such benefits under a fiduciary duty to hold and use them for the benefit of the child." *Harrell*, 593 So. 2d at 6 (quoting *Cumberland v. Cumberland*, 564 So. 2d 839, 847 (Miss. 1990)).

The court in *Harrell* reasoned that Mrs. Harrell had received the child support payments as a fiduciary for the child and that there was no evidence that she had used any of the payments for her personal benefit. Thus, Mrs. Harrell was not liable to the father for any amount, absent sufficient and credible proof that she used some portion of the child support for her own benefit. The court held that the father's proper remedy was either to claim against his daughter or prove that Mrs. Harrell used or benefitted from the funds. The court found that the mere fact that the father had overpaid his child support was by no means conclusive proof that Mrs. Harrell was liable to him for that amount. The court in no way indicated that its holding would be any different if the overpayments had been made while the child was not yet emancipated, and we will not make such an inference here. Conversely, the court in *Manning* expressly held that an overpayment could be credited against an arrearage where the mother, or fiduciary, had been unjustly enriched by such overpayment. As stated previously, because the parties stipulated to the fact that all support payments had gone to the benefit of the child, this remedy is not properly available in the case at bar. Therefore, we hold, as did the court in *Harrell*, that where there is no finding that any portion of the overpayments benefitted the custodial parent, the parent is not liable for the overage amount. This is especially true here, where the payments, although arguably inadvertently made, were strictly voluntary. This is dissimilar to *Harrell*, where the chancellor had erroneously ordered the continuation of the support payments past the child's twenty-first birthday. Given the above, the judgment against Stephanie is reversed.

III. THE CHANCELLOR ERRED IN REFUSING TO AWARD APPELLANT ATTORNEY'S FEES.

In the case at bar, Stephanie was successful in prosecuting her petition for judgment for the arrearage

of $600.00. Additionally, she should have been successful in defending Ricky's petition for modification.

> The duty of the father to support his children is absolute though it is shared with the mother. However, when the responsibility of support by the father is reduced to judgment by order of the court, it is his duty to comply therewith. In the event of default of payments though it is not accompanied by a finding of contempt due to present inability to pay or for other reasons, attorney's fees nevertheless are the responsibility of the father. Otherwise the responsibility of support could be diminished by the inability of the mother to obtain an attorney.

Pearson v. Hatcher, 279 So. 2d 654, 656 (Miss. 1973).

For these reasons, we find that Stephanie should be awarded reasonable attorney's fees.

THE JUDGMENT OF THE WASHINGTON COUNTY CHANCERY COURT IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE TAXED TO APPELLEE.

FRAISER, C.J., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. BRIDGES, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, P.J.

IN THE COURT OF APPEALS 09/17/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01045 COA

STEPHANIE HALLMAN (CARD)

APPELLANT

v.

RICKY HALLMAN

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

BRIDGES, P.J., DISSENTING:

I respectfully dissent from the majority's conclusions on all three issues presented by this appeal. With regard to the issue of the emancipation of the daughter, I believe that the chancellor was correct in concluding that the daughter was emancipated. The main function of this Court is to correct errors made in lower courts, and, accordingly, "[o]ur 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)).

The chancellor in the case before us properly made her decision based on the totality of facts and circumstances, a point made clear in her findings of fact. I cannot agree that the chancellor was manifestly wrong, clearly erroneous, or that she applied some erroneous legal standard in finding as she did. To reconsider the facts of this case would essentially usurp the discretionary role given to the chancellor in this case, and to concur with the majority's opinion would, in my opinion, violate our standard of review.

Furthermore, the majority appears to read the statute cited in support of their conclusion as all but mandating a determination by a chancellor of emancipation upon the satisfaction of one the statute's prerequisites. This was not the intent of the Mississippi legislature in enacting this Bill, a position proved by the wording of the statute. More importantly, this new statute had yet to be enacted when the chancellor rendered her decision. Even in light of the guidance that this new statute could have provided, the chancellor's decision could and should be left undisturbed.

I am, however, troubled by provision "d" of the statute. This provision includes the requirement that a minor "obtain[] full time employment" before the court is given the choice to find that the minor is actually emancipated. The majority used this requirement in support of its reversal of the chancellor's decision. My review of comparable statutes in other states reveals that other states have chosen not to include this extra requirement. While I am duty bound to follow the letter of the law as put forth by the Mississippi legislature, it appears that the inclusion of this requirement may lead to future situations similar to the one that faces us now.

I also respectfully dissent from the majority's reversal of the chancellor's award to Ricky of part of

the overpayment of child support left after the subtraction of his arrearage. I am left unsatisfied by the result achieved by the majority's holding. Neither *Manning* nor *Harrell* are directly on point and both can be distinguished from our case. The majority seems to imply that *Harrell* is instructive in this matter. If the only guidance for the remand of this issue is *Harrell*, Ricky will either have to sue his daughter or face the impossible task of tracing the funds given as support. This hardly strikes me as a realistic solution. It is my opinion that the solution suggested by the chancellor was realistic, workable, and properly within her discretion, and therefore, I would not disturb it.

I finally respectfully dissent from the majority's reversal of the chancellor's refusal to award Stephanie attorney's fees in the prosecution of her petition for a judgment of an arrearage. "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, the award of attorney's fees in a divorce case is generally left to the discretion of the chancellor. *Brooks v. Brooks*, 652 So. 2d 1113, 1120 (Miss. 1995) (citation omitted). I feel strongly that the chancellor's decision relating to the award of attorney's fees rests solely within the discretion of the chancellor and, therefore, should remain undisturbed. Further, on remand, the chancellor should not be required to award attorney's fees to Stephanie. A proper course of action would be for the chancellor to reconsider the facts surrounding this issue and to give findings of fact supporting any further conclusion drawn.

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