IN THE COURT OF APPEALS 05/21/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00752 COA

JOSEPH ROBERT ACOSTA

APPELLANT

v.

ELEANOR HARDEMAN ACOSTA

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. HARVEY T. ROSS

COURT FROM WHICH APPEALED: LEFLORE COUNTY CHANCERY COURT

ATTORNEY(S) FOR APPELLANT:

STEPHEN E. WALDRUP

ATTORNEY(S) FOR APPELLEE:

WILLIAM LARRY LATHAM

NATURE OF THE CASE: DOMESTIC RELATIONS - MODIFICATION OF DIVORCE DECREE; PETITIONS TO ENFORCE JUDGMENT; CITATIONS FOR CONTEMPT TRIAL COURT DISPOSITION:FORMER HUSBAND FOUND IN CONTEMPT OF COURT AND ORDERED TO BE INCARCERATED UNTIL PURGED OF DELINQUENCY OF $23,692.00.

BEFORE THOMAS, P.J., BARBER, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This case involves multiple petitions and motions by both Joseph Robert Acosta and Eleanor

Hardeman Acosta based upon their original Tennessee divorce. The Leflore County Chancery Court ultimately found Joseph in willful contempt of court for failure to pay Eleanor $23,692.00 for child support, an educational trust fund, alimony, and medical expenses. It ordered Joseph's incarceration until he purged himself of contempt by paying that debt. We find that the court was not manifestly wrong or in error and affirm on all issues, except one. We reverse and remand for the sole and limited purpose of the chancery court's determination of proper attorneys' fees pursuant to the *McKee v. McKee* factors.

FACTS

Joseph and Eleanor were divorced in Tennessee in May 1993. The court order provided that Eleanor would have custody of their three minor children and that Joseph would have visitation rights. Joseph was ordered to pay monthly alimony and child support. One-third of the alimony was to be placed in an educational trust fund for their minor children. Finally, Joseph was to pay, also as alimony, all marital debts.

Both Joseph and Eleanor subsequently moved to Greenwood. In December 1994, Joseph filed a petition for modification of the original decree. In January 1995, Joseph filed an amended petition to enforce judgment and citation for contempt, modification, and other relief. In February 1995, Chancellor Barnwell ordered that the court had jurisdiction to rule on issues such as child custody and support, visitation, and enforcement of the original Tennessee divorce decree. He further stated that all other issues were pretermitted until a hearing on the merits which was set for June 7, 1995. In May 1995, Eleanor filed a petition to enforce judgment and citation for contempt against Joseph.

On June 7, 1995, Chancellor Barnwell entered an order based on a temporary hearing on Joseph's amended petition. That order reaffirmed that custody of the parties' three minor children would remain with Eleanor and only modified visitation rights. It stated that the order regarding visitation would be temporary and reserved the right to modify custody and visitation in the future if equitable and necessary to do so. Finally, the order stated that all other issues not addressed would be held for further adjudication, and that all other provisions of the original Tennessee decree not modified would remain fully binding upon the parties. Also on June 7, Eleanor filed a notice of hearing on her petition to enforce judgment and citation for contempt against Joseph. The hearing was set for June 21, 1995.

On June 14, Joseph filed a motion for continuance of the June 21 hearing, requesting a continuance until July 12, or as soon thereafter as possible. On July 13, the court filed an agreed order (dated June 26) rescheduling the hearing on Eleanor's petition to July 12 in response to Joseph's motion for continuance. On June 26, Joseph filed a motion to make more definite and certain the allegations in Eleanor's petition to enforce judgment and citation for contempt. On June 26, he also filed a motion to consolidate his amended petition with Eleanor's petition against him. The court did not rule on Joseph's motion to make more definite and certain. However, on July 11 Joseph's counsel, in a telephone conference with another chancellor, Harvey T. Ross, moved *ore tenus* for a continuance of the scheduled July 12 hearing. The court denied his request for a continuance. Also on July 11, Eleanor filed a response to Joseph's motion to make more definite and certain.

On July 12, Chancellor Ross held the scheduled hearing in Coahoma County. Eleanor, Eleanor's counsel, and Joseph's counsel were present, but Joseph did not appear. The court heard testimony

from Eleanor and ultimately found Joseph in willful contempt of court. It ordered him to be incarcerated until he purged himself of contempt by paying Eleanor $23,692.00. Joseph now appeals that order.

ANALYSIS

STANDARD OF REVIEW

The Mississippi Supreme Court has held that, on appellate review, a chancellor's findings of fact will not be disturbed if substantial evidence supports those factual findings. *Brooks v. Brooks*, 652 So. 2d 1113, 1124 (Miss. 1995) (citations omitted). In a domestic relations context, an appellate court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong or clearly erroneous, or if an erroneous legal standard was applied. *Setser v. Piazza*, 644 So. 2d 1211, 1215 (Miss. 1994) (citations omitted); *see also Steen v. Steen*, 641 So. 2d 1167, 1169 (Miss. 1994) (citation omitted) (appellate review is limited since the court will not disturb chancellor's findings unless manifestly wrong or clearly erroneous, or if erroneous legal standard was applied); *Crow v. Crow*, 622 So. 2d 1226, 1228 (Miss. 1993) (citations omitted) (appellate court is required to respect findings of fact made by chancellor that are supported by credible evidence and not manifestly wrong, particularly regarding divorce and child support matters). An appellant court is required to respect a chancellor's findings of fact that are supported by credible evidence, particularly in the areas of divorce and child support. *Steen*, 641 So. 2d at 1169 (citations omitted).

> I. DID THE CHANCERY COURT ERR IN RULING ON ELEANOR'S CONTEMPT ACTION AND IN THE MANNER THAT IT HEARD IT?

Joseph argues that Chancellor Barnwell, a chancellor in the Seventh Chancery Court District, subdivision 7-2, should have heard all matters concerning the parties because he had initially been assigned to hear them. He contends that Chancellor Barnwell had already heard some matters in the case, and that no record evidence existed to justify transferring the case to Chancellor Ross in the Seventh Chancery Court District, subdivision 7-1. He believes that Chancellor Ross should have declined to hear the case, and that the case should be remanded for a trial before Chancellor Barnwell.

Mississippi statutory law provides for a seventh chancery court district composed of the counties of Bolivar, Coahoma, Leflore, Quitman, Tallahatchie, and Tunica. Miss. Code Ann. § 9-5-23 (1972). The seventh district has two chancellorships denominated as Place One and Place Two, respectively. *Id.* § 9-5-25. Mississippi Rule of Civil Procedure 81 expounds that contempt actions are triable seven days after completion of service of process in any manner other than publication, or thirty days after the first publication if process is by publication. M.R.C.P. 81(d)(2). Rule 81 recognizes that some matters, because of their simplicity or need for speedy resolution, should be tried after a brief notice to the defendant or respondent. M.R.C.P. 81 cmt. Moreover, Mississippi Rule of Civil Procedure 77(b) sets forth the rule that no hearing, other than one heard ex parte, can be conducted outside the geographical area of the court without the consent of all affected parties. M.R.C.P. 77 cmt. (citation omitted).

In the present case, the record indicates that Chancellor Barnwell expressed his concern that the contempt petition be heard in a timely manner and simply reassigned the case to Chancellor Ross because Ross's docket was less congested than his own. The seventh chancery court district's division into two subdistricts is irrelevant here because Chancellors Barnwell and Ross are the two chancellors within the seventh district and either one can hear a matter on the merits. Joseph contends that the matter had been set to be heard before Chancellor Barnwell on July 25 and 26, 1995. The fact that either Joseph's or Eleanor's contempt matter may have been scheduled to be heard by Chancellor Barnwell does not preclude him from reassigning either case, particularly since: (1) both matters dealt with contempt that required timely resolution; (2) the transfer was proper and did not violate any rules; and (3) the merits of either contempt matter had not yet been heard. The hearing was ultimately held in Coahoma County, which is properly within the seventh chancery court district's geographical area. No need existed to hold the hearing outside the district's boundary, just as no need existed to obtain either parties' consent to move it. We believe that Chancellor Barnwell's decision of reassignment to Chancellor Ross was valid, and that the hearing was properly held within the seventh chancery court district.

II. DID THE CHANCERY COURT ERR IN HEARING EVIDENCE ON ELEANOR'S PETITION TO ENFORCE JUDGMENT AND CITATION FOR CONTEMPT?

Joseph argues that the court's order of February 16, 1995, precluded Chancellor Ross from hearing evidence on Eleanor's contempt petition on the merits. He contends that Chancellor Barnwell's February 16 order pretermitted certain issues until such time as the matter could be heard on its merits. He argues that Joseph's petition was set to be heard before Chancellor Barnwell on July 25 and 26, and that no emergency reason existed to hear Eleanor's petition prior to those dates.

The Mississippi Supreme Court has stated that it will not consider issues on appeal with no citation to authority. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1282 (Miss. 1993) (citations omitted); *Estate of Mason v. Fort*, 616 So. 2d 322, 327 (Miss. 1993) (citations omitted); *Smith v. Dorsey*, 599 So. 2d 529, 532 (Miss. 1992) (citations omitted). This Court has the discretion to refuse consideration of issues without citation to authority. *Kelly v. State*, 553 So. 2d 517, 521 (Miss. 1989) . We therefore may consider an assignment of error due to the novelty of the events surrounding it, even if a party fails to cite authority in support of that assignment. *Id.* (citations omitted). We believe that this discretion applies to both criminal and civil cases.

Although Joseph failed to cite authority for this assignment of error, we exercise our discretion and nevertheless address the merits. The order of February 16 regarding Joseph's petition, and to which Joseph refers, stated that the court had jurisdiction over the parties and the subject matter, pursuant to the Uniform Child Custody Act, and could rule on issues such as child custody and support, visitation, and enforcement of the original Tennessee divorce decree. The order set a hearing on the merits for June 7, 1995. It stated that all other issues would be pretermitted until such time as the matter could be heard on the merits.

A chancery court has the power to punish any person for breach of an order of decree of the court by fine or imprisonment, or both. Miss. Code Ann. § 9-5-87 (1972). The court's authority to find a person in willful contempt of court is clearly evident. *Id.* Mississippi Rule of Civil Procedure 81

allows for an expedient trial on the merits of a contempt action. M.R.C.P. 81(d)(2). We believe, for the reasons outlined in our discussion of Joseph's first assignment of error, that Chancellor Barnwell's assignment of Eleanor's petition to Chancellor Ross was proper. We do not believe that the February 16 order precluded Chancellor Ross from hearing, and ruling upon, the merits of Eleanor's petition at the July 12 hearing. Moreover, Chancellor Barnwell's June 7 order addressed Joseph's petition. That order: (1) was the result of a temporary hearing; (2) only modified visitation; (3) stated that all other issues not addressed would be held for further adjudication; and (4) stated that all other provisions of the original Tennessee divorce decree remained in effect. We believe that the June 7 order likewise did not preclude the reassignment of Eleanor's petition, nor Chancellor Ross from hearing the merits of the matter.

III. DID THE CHANCERY COURT ERR IN DENYING JOSEPH'S *ORE TENUS* MOTION FOR A CONTINUANCE, OF THE SCHEDULED JULY 12 HEARING, MADE IN THE TELEPHONE CONFERENCE ON JULY 11?

Joseph contends that he did not have time to prepare for the July 12 hearing due to Eleanor's late response on July 11 to his motion to make more definite and certain her allegations of contempt. He argues that Chancellor Ross's denial of his *ore tenus* motion for a continuance was therefore manifest error.

A party involved in litigation may move for a more definite statement if a pleading to which a responsive pleading is permitted is so vague or ambiguous that the party cannot reasonably frame a responsive pleading. M.R.C.P. 12(e). If the motion is granted and the order is not obeyed within ten days after notice of the order or within such time that the court deems sufficient, the court shall strike the pleading to which the motion was directed or make an order that it deems just. *Id.*

In the present case, Joseph filed his motion to make more definite and certain on June 26, 1995. However, the chancery court never heard Joseph's motion. It did not rule on, nor did it grant, that motion. The court issued no order for Eleanor to follow. Eleanor was therefore under no obligation to submit any response to the motion. The court was not obligated to take any action regarding either Eleanor's lack of response or her actual July 11 response, which in fact she did file. No failure to comply with a court order existed because no order existed.

The Mississippi Supreme Court has held that "[a] defendant may avoid a judgment of contempt by establishing that he is without the present ability to discharge his obligations." *Varner v. Varner*, 666 So. 2d 493, 495 (Miss. 1995). In the present case, Joseph's request to delay Eleanor's contempt petition hearing was based on his request for a more definite and certain statement of Eleanor's allegations and, more specifically, a request listing the amounts paid within the categories of alimony, child support, the educational trust fund, and marital debts. That information is completely different from information comprising simply an inability to pay, the latter of which forms a valid defense to a contempt action. No further response or categorical specificity of arrearages by Eleanor could have aided Joseph either in his request for a more definite and certain statement or in his defense against her petition for contempt. Eleanor and Joseph both possessed the same documentary evidence. We believe that Joseph was not prejudiced by the court's failure to hear his motion, Eleanor's July 11 response the day prior to the actual hearing, or the court's denial of his *ore tenus* motion for a

continuance.

IV. DID THE CHANCERY COURT ERR IN FINDING JOSEPH IN CONTEMPT?

Joseph believes the chancery court erred in finding him in contempt because no evidence existed to indicate whether the failure to pay occurred before or after his petition to modify was filed. He argues that alimony payments were not vested when his petition to modify was filed, so that the chancery court had the authority to relieve him of those payments. He states that the court had the power to relieve him of child-support payments that had not vested when he filed his petition to modify, if his payments were current at that time. However, he also propounds that the court lacked the authority to relieve him of alimony payments because it lacked the power to modify that portion of the Tennessee divorce decree. Joseph further contends that no evidence existed to show what specific amounts remained unpaid for child support, alimony, or the educational trust fund. He believes that because the court had the power to modify child support amounts that became due after he filed his petition for modification, the court erred in finding him in contempt without any evidence of what sums were past due in each category.

The Mississippi Supreme Court has held that it will not reverse a chancellor's finding where it is supported by substantial credible evidence, and that standard applies to contempt matters as well. *Varner*, 666 So. 2d at 496 (citation omitted). "[D]etermination of punishment for contempt falls within the discretion of the chancellor, and this Court will not reverse on appeal absent manifest error or application of an erroneous legal standard." *Id.* (citation omitted).

Regarding the issue of modification of child-support payments, the court has held that "once child support payments become vested they cannot be modified or forgiven by the court." *Setser*, 644 So. 2d at 1215 (citations omitted). "Unlike alimony modification, child-support reduction may not relate back to the date of the filing [of the petition for modification]." *Id.* (citation omitted). If the court grants a modification, the payor party is responsible for any child-support payments that vested during the litigation of the motion for modification. *Id.* at 1215-16.

Regarding alimony, a party receiving lump-sum alimony obtains a vested right in the amount, and that judgment may not subsequently be modified or terminated by court order. *Williams v. Williams*, 528 So. 2d 296, 298 (Miss. 1988) (citation omitted). However, periodic alimony relates back to the date of the filing of the petition for modification. *Setser*, 644 So. 2d at 1215; *Cumberland v. Cumberland*, 564 So. 2d 839, 847 (Miss. 1990) (alimony reductions may relate back to the date of filing for modification). A payee party has no vested right in periodic alimony payments when those payments are unilaterally reduced by a payor party after the payor files a petition for modification. *McHann v. McHann*, 383 So. 2d 823, 826 (Miss. 1980). However, the validity of a payor party's unilateral reduction of periodic alimony payments after the filing of that party's petition for modification is

subject to the approval of the court. *Lee v. Lee*, 181 So. 912, 912 (Miss. 1938).

The Mississippi Supreme Court has also held that a finding of contempt of court is within the chancellor's sound discretion and that clear and convincing proof is required. *Setser*, 644 So. 2d at 1216 (citation omitted); *see also Varner*, 666 So. 2d at 496 (defendant may avoid a contempt judgment by showing, with particularity, that he is without the present ability to discharge his obligations). A finding of contempt is improper where a party files for a modification that requests a reduction in child support or alimony based on an inability to pay. *Id.*; *see also Varner*, 666 So. 2d at 496 (finding of contempt is not proper where party filed for modification of child support and alimony). Therefore a party that promptly files for a modification requesting a reduction of support due to inability to pay is still liable for child-support payments that vest from the time of filing to the time of judgment. However if that party unilaterally reduces periodic alimony payments during that same time period, he or she may still be liable for the full amount due depending on approval of the court. In any event, a petitioner who independently requests a reduction of support based on inability to pay by filing a modification cannot be held in contempt of court.

In the present case, Chancellor Ross did not approve Joseph's reduction of alimony and educational trust fund payments to Eleanor, and apparently included the vested child-support payments as well in arriving at a delinquency amount of $22,500.00. Joseph presented no evidence at the hearing of his present inability to pay, but rather only questioned what amounts were due in each category of arrearage. Moreover, his petition for modification requested: (1) that custody of their children be changed to him; (2) that Eleanor pay *him* child support; (3) that his support payments be terminated; (4) that Eleanor be judged in contempt for interfering with his visitation rights; and (5) that Eleanor be granted visitation rights. His petition did not request a reduction in the amounts *he* paid to Eleanor based on his inability to pay. We believe that the chancellor based his decision that Joseph was in willful contempt of court on substantial credible evidence and was not manifestly wrong. The chancellor properly determined that Joseph was in contempt based on the evidence presented. Moreover, he was well within his discretion to disapprove of Joseph's unilateral reduction of alimony and educational trust fund payments from the time of the filing of his petition for modification, regardless of the requests within the petition itself or the failure to argue an inability to pay.

> Joseph finally argues that no evidence existed to show what specific amounts had not been paid for each category of child support, alimony, and the educational trust fund. However, Eleanor stated at the hearing that she had evidence of the payments that Joseph did make. She testified that categorizing each payment would have been difficult but still possible. The evidence of payments clearly existed, but Joseph chose not to have Eleanor break down the arrearages and further chose not to do the same himself. We find no error in the chancery court's judgment regarding this issue. V. DID THE CHANCERY COURT ERR IN AWARDING ATTORNEYS' FEES?

Joseph finally contends that the chancery court erred in awarding attorneys' fees. He believes that the evidence failed to meet the standard that such work be reasonably required and necessary under the criteria set forth in *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982). He also argues that the court should have required proof of fees incurred in the contempt issue separate from the

modification issue.

The Mississippi Supreme Court has recognized that the issue of determining attorneys' fees in divorce cases is within the discretion of the chancellor and must be supported by the evidence. *McKee*, 418 So. 2d at 767 (citation omitted). The fee should be based upon: (1) the relative financial abilities of each party; (2) the skill and standing of the attorney; (3) the nature of the case; (4) the novelty and difficulty of the issues; (5) the degree of responsibility in managing the case; (6) the labor and time required; (7) the usual and customary charges in the community; and (8) the preclusion of other employment by the attorney due to acceptance of the case. *Id*. The fee must be fair and just, and the legal work must be determined to be reasonably required and necessary. *Id*. Sufficient evidence must exist to accurately assess a proper fee. *Id*.

In the present case, the chancellor asked Eleanor's counsel for a statement of fees. Counsel replied that he did not have an itemization, but that he had spent fifteen hours on the case including his trip to the July 12 hearing in Clarksdale. The chancellor then awarded $2,000.00 to Eleanor for attorneys' fees. The only evidence presented regarding fees consisted of counsel's verbal testimony of spending fifteen hours on Eleanor's case. We find that Eleanor failed to present sufficient evidence concerning the *McKee* factors to justify her $2,000.00 award for attorneys' fees. Additionally, Joseph failed to cite authority justifying determining separate fees for the contempt issue and the modification issue, and we see no reason in so doing. We therefore reverse and remand this case on the limited issue of attorneys' fees so that the chancery court can properly determine that amount based upon the *McKee* criteria.

CONCLUSION

We affirm the judgment of the chancery court in all respects, except on the issue of attorneys' fees which we reverse and remand. The chancery court shall determine attorneys' fees consistent with the factors set forth in *McKee v. McKee*.

THE JUDGMENT OF THE CHANCERY COURT OF LEFLORE COUNTY IS AFFIRMED IN PART, AND REVERSED AND REMANDED IN PART. FOUR-FIFTHS OF THE COST OF THIS APPEAL ARE TAXED TO THE APPELLANT AND ONE-FIFTH OF THE COST OF THIS APPEAL IS TAXED TO THE APPELLEE.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR. FRAISER, C.J., NOT PARTICIPATING.