IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00482 COA

JANICE ANN CARTER FRANKLIN

APPELLANT

v.

RICHARD ADRION FRANKLIN

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. MELVIN McCLURE, JR.

COURT FROM WHICH APPEALED: GRENADA COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANTS:

MITCHELL M. LUNDY, SR.

ATTORNEY FOR APPELLEE:

JAMES P. VANCE

NATURE OF THE CASE: MODIFICATION OF CHILD SUPPORT; ATTORNEYS FEES

TRIAL COURT DISPOSITION: REDUCTION OF APPELLEE'S MONTHLY CHILD SUPPORT OBLIGATION; DENIAL OF ATTORNEYS FEES FOR APPELLANT

BEFORE THOMAS, P.J., COLEMAN, AND McMILLIN, JJ.

COLEMAN, J., FOR THE COURT:

Richard Adrion Franklin petitioned the chancery court to modify his monthly child support obligation. The chancellor (1) ordered the reduction in child support from $300.00 to $225.00 per month and (2) refused to award Janice Franklin an attorney's fee. On appeal, Janice seeks to reverse both of the chancellor's decisions. We affirm.

I. Facts

Janice Ann Carter Franklin and Richard Adrion Franklin married on June 2, 1984, in Grenada County. This was a second marriage for both parties. While no children were born to their marriage, Mrs. Franklin had one daughter, Tapestry, by a prior marriage. Tapestry was born on February 20, 1977. Mr Franklin adopted Tapestry when she was seven years old. Mr. Franklin had another daughter, Charie, by a prior wife. Charie moved in with her father in December of 1994, after he and Ms. Franklin had divorced. Mr. Franklin joined the Navy in August, 1980, and accumulated about 16 ½ years of service which could be credited toward his retirement from the Navy.

The Grenada County Chancery Court granted the Franklins a divorce on the ground of irreconcilable differences by a final decree of divorce entered on December 10, 1993. In accordance with the terms of the Franklins' agreement, the decree awarded custody of Tapestry to Ms. Franklin and required that Mr. Franklin pay $300.00 per month in child support. When Mr. Franklin retired from the Navy in December, 1994, his Navy retirement was approximately $800 per month, and he earned approximately $300 per month working in a hospital as a nurse's aid in the hospital's surgery suite. Thus he received income of approximately $1,100 per month after he retired from the Navy. Before his retirement from the Navy, Mr. Franklin had earned a monthly income of approximately $2,800 per month.

Mr. Franklin was given the option of taking early retirement, which according to his position was not available at the time of his divorce. Mr. Franklin further states that had he not taken this "early" retirement, he could have ultimately been discharged and lost all of his benefits.

II. Litigation

On January 18, 1995, Mr. Franklin filed in the chancery court a pleading entitled "Complaint to Modify Divorce" in which he alleged that because of his retirement from the Navy, his income had been reduced from $2,800 per month to $800 per month. Mr. Franklin asserted a second reason to reduce the amount of his child support, namely that Tapestry, who was then seventeen years old, refused to visit and spend time with him. The chancellor conducted a hearing on Mr. Franklin's complaint, and at its conclusion, he rendered his opinion from the bench. The chancellor found that the reduction in Mr. Franklin's income which followed his retirement from the Navy constituted a material change of circumstances which occurred after the Franklins' divorce which could not have been reasonably anticipated. He accordingly reduced Mr. Franklin's child support obligation from $300.00 per month to $225.00 per month, and he denied Ms. Franklin's request for her attorney's fee. This appeal followed.

B. Issues and the Law

In her brief, Ms. Franklin presents these two issues for this Court's consideration and resolution:

1. Whether the trial court erred in finding that Richard Franklin's, the Appellee, retirement from the Navy could not have been reasonably anticipated at the time of the divorce, and that the same constituted such a material change in circumstances as to justify a modification and reduction of the child support payment?

2. Whether the trial court erred in refusing and failing to award attorney's fees to Appellant, Ann Franklin?

Section 93-5-23 of the Mississippi Code of 1972 governs the modification of divorce decrees. It reads in part:

> 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 the care, custody and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife or the husband, or any allowance to be made to her or him, and shall, if need be, require bond, sureties or other guarantee for the payment so allowed. Orders touching on custody of the children of the marriage may be made in accordance with the provisions of Section 93-5-24. 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 (1994).

A. Standard of Review

We consider these issues harmoniously with the appropriate standard of review. *Tilley v. Tilley*, 610 So. 2d 348 (Miss. 1992) recites the fundamental standard of review in all appeals from our state's chancery courts: "[u]nder the standard of review utilized to review a chancery court's findings of fact, particularly in the areas of divorce, alimony and child support, this Court will not overturn the court on appeal unless its findings were manifestly wrong." *Id.* at 351. "[F]indings of fact made by a chancellor may not be set aside or disturbed on appeal unless manifestly wrong." *Cheek v. Ricker*, 431 So. 2d 1139, 1143 (Miss. 1983). We accordingly approach our analysis and resolution of Appellant's two issues from the perspective of whether the chancellor was manifestly wrong in his findings.

First Issue:

> 1. Whether the trial court erred in finding that Richard Franklin's, the Appellee, retirement from the Navy could not have been reasonably anticipated at the time of the divorce, and that the same constituted such a material change in circumstances as to justify a modification and reduction of the child support payment?

Ms. Franklin first contends that the chancellor committed manifest error by reducing Mr. Franklin's child support obligation and argues that Mr. Franklin's retirement could have been reasonably anticipated as "it is perfectly obvious that no one stays in the service for life." While Ms. Franklin states that Mr. Franklin's actions "do constitute a material change in circumstances, they were the result of Mr. Franklin's own choice and with full knowledge of the consequences." Ms. Franklin further argues that Mr. Franklin should not benefit at the expense of Tapestry.

Mr. Franklin counters this argument by unequivocally stating that his decision regarding retirement and corresponding change in his income were not anticipated at the time the original decree was entered. In his testimony during the hearing, Mr. Franklin described his "early" retirement from the United States Navy as follows:

> In July of last year [1994] the Navy had a reduction in force, and they came up with the early retirement program for fifteen or more years in service, and I elected at that time to apply for the early retirement, and I applied in August and was accepted in December -- retired in December -- early retirement. It was based on, like I said, the force reduction. I was told that if not enough people applied for the program that they would start selecting people, and they would be discharged from the military . . . . If I had been discharged from the military, I would have lost all benefits including my retirement pay.

We note that the Navy's reduction in force occurred in July, 1994 about seven months after the Franklins were divorced. Mr. Franklin testified that it was the Navy's reduction in force that ultimately prompted his retirement. Ms. Franklin offered no proof that in December, 1993, her former husband knew, or ought to have known, that the Navy would effect a reduction in force seven months later. The Franklins stipulated at trial that Mr. Franklin was not eligible to retire when they obtained their divorce on December 10, 1993. Mrs. Franklin denied that her former husband's retirement was motivated by the Navy's reduction in force.

Mr. Franklin testified that he drew $790.00 per month in retirement pay from the Navy and that he earned approximately $300 per month working as a nursing aide in the emergency room at Saint Claire Medical Center. Mr. Franklin stated that he had been working there for two weeks. Mr. Franklin had applied to enroll in a nursing program which he had been scheduled to start that fall. He testified that he was working in the hospital for the experience and to become more familiar with the nursing field.

The chancellor determined that the changes in Mr. Franklin's career could not have been reasonably anticipated in December, 1993, when the Franklins were divorced. The chancellor made the following findings in the final decree:

> The court finds the retirement from the Navy of the plaintiff, Richard Adrion Franklin, was not reasonably anticipated at the time of the divorce on December 10, 1993, and that there is a material change in circumstances sufficient to justify the modification. Therefore, the Court finds that the amount of child support be and is hereby modified to the sum of $225.00 per month.

To effect a modification of child support, Mr. Franklin had the burden of showing a material change in his circumstances as a result of events which arose after the entry of the original decree. *See Morris v. Morris*, 541 So. 2d 1040, 1042-43 (Miss. 1989). The chancellor determined that Mr. Franklin shouldered his burden because he demonstrated that his income had been reduced as a result of his leaving the Navy and that he was enrolling in a nursing program as a new career. Neither of these circumstances existed when the chancellor entered the original divorce decree on December 10, 1993.

Ms. Franklin argues that three Mississippi Supreme Court cases support her argument on this issue. They are: *Morris v. Morris*, 541 So. 2d 1040 (Miss. 1989); *Shipley v. Ferguson*, 638 So. 2d 1295 (Miss. 1994); and *Tingle v. Tingle*, 573 So. 2d 1389 (Miss. 1990). In the first case, *Morris v. Morris*, the father had lost his job with Pennzoil, for which he received severance pay of $1,740.00 per month from August 1, 1986 until January 16, 1987. *Id.* at 1041. In February of 1987, Mr. Morris began working for a take-home salary of $972.00 per month. The chancery court granted the Morrises their divorce on November 17, 1986. *Id.* In accordance with their agreement and amended agreement, Mr. Morris agreed to pay Mrs. Morris child support for three children at the rate of $950 per month. *Id.* Beginning in February, 1987, Mr. Morris' monthly take home salary exceeded the amount of his monthly child support payment by only $22.00.

Nevertheless, the Mississippi Supreme Court found that as of the date of the Morrises' divorce, November 17, 1986, Mr. Morris should have anticipated the change in his financial circumstances after January 16, 1987, and it therefore held him to his original commitment of paying child support for his three children at the original rate of $950.00 per month. *Id.* at 1043. The supreme court concluded that the trial court was "not manifestly in error, but it was correct when it found that there had been no material or substantial change in Mr. Morris' financial situation which would warrant modification of the [agreement]." *Id.*

In *Shipley v. Ferguson*, 638 So. 2d 1295 (Miss. 1994), the father was living with his parents when the divorce was granted, but he moved away from his parents' home after the divorce. The father claimed that after he moved from his parents' home, his expenses had so increased that he was entitled to a reduction in the amount of his child support. The chancellor found that there had been no material change in circumstances, but he reduced the amount of the father's child support payments anyway. The Mississippi Supreme Court wrote a majority and two dissenting opinions, the effect of which was to reverse the chancellor. The majority found that "[a]t the time [the father] moved in with his parents, he should have reasonably expected that in the future he would once again have to incur some type of rent or living expenses." *Id.* at 1299.

In *Tingle v. Tingle*, the divorced father quit his job and enrolled in a course of computer study at a state university. *Tingle*, 573 So. 2d at 1390. The Mississippi Supreme Court held that "under the

facts of the case at bar, the unilateral acts of the appellee do not justify a reduction in his child support obligation." *Id.* at 1393. As Ms. Franklin argues, the gist of all three of these cases was that the father either quit his job, the source of his income, or ought to have anticipated the subsequent material change in his circumstances; but the supreme court denied him a reduction in the amount of child support which the divorce decree required him to pay. She argues, therefore, that since Mr. Franklin voluntarily retired earlier than he might otherwise have been expected to retire, the chancellor erred by reducing the amount of her former husband's child support even if the drastic reduction in Mr. Franklin's income might have been deemed a material change of circumstances wrought by that retirement. None of these three cases relate to an intervening, unanticipated event like the Navy's reduction in force, which Mr. Franklin testified motivated him to seek the early retirement. About Mr. Franklin's retirement, the chancellor opined:

> I think what we have here is a fact situation on whether there should be a reduction in the child support at this time based on the change in Mr. Franklin's income. I think it's a close fact situation based on whether this retirement was reasonably foreseeable at the time of the irreconcilable differences divorce in December 1993. As I said, I think that's a close fact situation based on the facts that I've heard here today.
>
> If this was a regular retirement situation where he completed 20 or 25 years or whatever the regular retirement age is in the military, I think it would be clearly foreseeable. I think there are some factors both ways on this. I think that he, from the law as I understand it and from the testimony that I have heard here, has probably known for a while that the Vietnam GI Bill would play out at the end of this century. I don't know whether he knew that in December of '93 or not, but if you take four years off of the end of the century, you get down to pretty much next semester. I'm going to hold that this early retirement was not reasonably foreseeable at the time of the granting of the divorce in December of '93, and I am going to consider at least a partial reduction in this child support.

The standard of review which we previously quoted requires that we affirm the chancellor unless we find from our review of the record that he was "manifestly wrong." Given (1) the stipulation that Mr. Franklin could not retire from the Navy on December 10, 1993, (2) the evidence of the Navy's reduction in force and its possible consequences for Mr. Franklin, at least according to his testimony, and (3) the deadline for completing his nurse's training before the year 2000, we find that the chancellor was not manifestly wrong in reducing the amount of Mr. Franklin's child support payment. We therefore affirm his decision to reduce Mr. Franklin's child support from $300 per month to $225 per month. *See Cheeks v. Herrington*, 523 So. 2d 1033, 1035 (Miss. 1988), (*citing Dillon v. Dillon,* 498 So. 2d 328, 329 (Miss. 1986)).

Second Issue

> 2. Whether the trial court erred in refusing and failing to award attorney's fees to

Appellant, Ann Franklin?

To support her position on this issue, Appellant offers the following quotation which she asserts is from the opinion in *Hammett v. Woods*, 602 So. 2d 825 (Miss. 1992), but which instead is from the opinion in *Gregg v. Montgomery*, 587 So. 2d 928, 934 (Miss. 1991):

> When the husband files a petition against his former wife in which he is unsuccessful he is generally assessed with attorney's fees. This Court has said that when a former husband brings his former wife into Court:
>
> > [s]eeking without justification alteration of his liability to her from a Court decree fixing it, [he] should pay for her attorney's fee. Otherwise, he could sue her so often as to impose an oppressive burden on her allowance in resisting his repeated applications. (citations omitted).

Regardless of the foregoing quotation, the Mississippi Supreme Court affirmed the chancellor's denial of the wife's attorney fee because her representation was by her employer *Id.* The supreme court wrote that it affirmed the chancellor on this issue because the wife was self-supporting. *Id.* However, we do find the following quotation from the *Hammett* opinion:

> Woods initiated this action when Hammett unilaterally reduced his child support payments by fifty percent . . . . The record indicates quite clearly that the parties operated under widely disparate financial circumstances, one of the factors enumerated in *McKee.* Hammett's earnings are more than triple those of Woods and his investments and other resources, far greater. . . . This Court has held that when a party is able to pay attorney's fees, award of attorney's fees is not appropriate. However, where the record shows an inability to pay and a disparity in the relative financial positions of the parties, we find no error.

Hammett, 602 So. 2d at 829-30 (citations omitted).

Generally, unless the party who requests to be awarded an attorney's fee can establish her inability to pay, the trial court ought not award that party an attorney's fee. *Jones v. Starr*, 586 So. 2d 788, 792 (Miss. 1991); *Martin v. Martin*, 566 So. 2d 704, 707 (Miss. 1990). In *Cumberland v. Cumberland*, 564 So. 2d 839, 844 (Miss. 1990), the Mississippi Supreme Court wrote:

> The standards for an award of attorney's fees on a motion to modify a divorce decree are much the same as in an original action. Our law vests the Chancery Court with considerable discretion and the Court's findings on the issue will not be disturbed unless manifestly wrong.

The chancellor considered the financial positions of the parties and ruled that there was insufficient evidence to invoke the *McKee* factors on which to award Ms. Franklin an attorney's fee. After review of the evidence relevant to Ms. Franklin's and Mr. Franklin's financial circumstances, we hold that the chancellor was not manifestly wrong in refusing to award Ms. Franklin the attorney's fee which she requested. Thus, we affirm his refusal to award her an attorney's fee.

IV. Conclusion

From the chancellor's detailed findings of fact contained in his memorandum opinion and decree, all of which we found to have been supported by the evidence which the litigants presented to him, we hold that he correctly resolved both of the issues on which Ms. Franklin seeks to reverse the decree from which she has appealed. We accordingly affirm the decree entered by the chancery court.

THE JUDGMENT OF THE GRENADA COUNTY CHANCERY COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

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