IN THE COURT OF APPEALS 11/12/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00087 COA

MICHAEL LEWIS STRIDER, AS FATHER AND NEXT FRIEND OF MICHAEL COLBY JACKSON

APPELLANT

v.

APRIL MARIE JACKSON, INDIVIDUALLY, AND GWIN JACKSON, JR. AND JOY JACKSON, AS NATURAL GUARDIANS OF APRIL MARIE JACKSON

APPELLEES

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: CHANCERY COURT OF COAHOMA COUNTY

ATTORNEYS FOR APPELLANT:

DAVID L. WALKER

JOHN D. WEDDLE

ATTORNEY FOR APPELLEES:

CHARLES E. WEBSTER

NATURE OF THE CASE: PATERNITY: CHILD SUPPORT

TRIAL COURT DISPOSITION: CHILD SUPPORT AWARDED; ATTORNEY'S FEES AWARDED; REIMBURSEMENT FOR PRENATAL EXPENSES AWARDED

BEFORE BRIDGES, P.J., COLEMAN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Michael L. Strider sought to determine paternity and a name change in the Chancery Court of Coahoma County. April M. Jackson counterclaimed to determine child support and seeking reimbursement for monies expended on prenatal expenses. Jackson admitted that Strider is the father of her child. The chancellor denied Strider's request for a name change; ordered him to pay Jackson

$2,768.15 to reimburse her for prenatal and medical expenses; ordered him to pay $450 per month in child support; ordered him to provide medical insurance for the child and to pay all nonreimbursed medical expenses; ordered him to maintain a minimum of $100,000 of life insurance for himself with the child as the sole beneficiary; and ordered him to contribute $3,000 toward Jackson's attorney's fees. Feeling aggrieved, Strider appeals to this Court assigning the following issues: (1) the chancellor erred in awarding April Jackson excessive child support payments; (2) the chancellor erred in awarding April Jackson excessive attorney's fees; and (3) the chancellor's award of prenatal and medical expenses of the April Jackson and minor child was excessive. Finding error, we reverse and remand in part and affirm in part.

STATEMENT OF THE FACTS

April Jackson is the mother of the child. She was fourteen years old at the time the child was conceived and sixteen years old at the time of the trial. Jackson was taking literacy classes to prepare for her GED. Jackson also worked afternoons at her attorney's law offices earning minimum wage and drawing approximately $50.00 per week.

Michael Strider admits he is the father of the child. He was twenty years old at the time the child was conceived and twenty-two at the time of trial. Strider was employed at Delta Wire where he earned a salary, production bonuses, and overtime. Strider also worked part-time at Infolab as a receiving clerk. Strider's average monthly income was $1,611.21 (this figure includes production bonuses, overtime, vacation pay, and wages from both jobs). Strider is provided health insurance through his job at Delta Wire and can add the child for $14.00 a week. Through his part-time employment with Infolab, Strider already maintained life insurance in the amount of $100,000 with the child as beneficiary for a cost of $36.37 per pay period.

STANDARD OF REVIEW

A decision of the chancellor in a paternity action brought during the putative father's lifetime will be reversed on appeal only if it is manifestly wrong. *Ivy. v State Dep't of Pub. Welfare*, 449 So. 2d 779, 783 (Miss. 1984) (citations omitted).

ARGUMENT AND DISCUSSION OF THE LAW

I. THE CHANCELLOR ERRED IN AWARDING APRIL JACKSON EXCESSIVE CHILD SUPPORT PAYMENTS.

Strider argues that the chancellor erred in awarding child support in excess of the statutory guidelines because he failed to make a specific finding as to the father's income. While the chancellor states that

he is deviating from the guidelines due to the age of the immediate parties and the disparity of wage earning between the parties, Strider argues that this was after the chancellor stated that his determination was made with consideration of the guidelines set forth in section 43-19-101 of the Code. The chancellor's award constitutes 27.9 % of Strider's average monthly income of $1,611.21. When considering that a considerable portion of Strider's income was based on fluctuating overtime and a second job, he argues that the chancellor should have made an award of less than the $450.00 actually awarded. Strider considers this to be punishment of the noncustodial parent.

The guidelines provide that Strider should pay fourteen percent of his adjusted gross income. Miss. Code Ann. § 43-19-101(1) (1972). A review of the record reveals that Strider worked two jobs, and his income was demonstrated to the chancellor through payroll records from his employers. His average monthly income including wages from both jobs, production bonuses, overtime, and

vacation pay was $1,611.21. In fact, the parties stipulated to the correctness of this amount. While appreciating that the guidelines are in fact guidelines and not mandates, we must also consider the percentage of Strider's income which the child support award reflects -- 27.9%. This is almost twice the statutory guidelines without regard to the other expenses that Strider is obligated to pay--specifically medical insurance at a cost of $14.00 per week; life insurance at a cost of $36.37 per pay period; and all nonreimbursed medical expenses. Collectively, the reality of these awards lead to a percentage of Strider's income in excess of 27.9%.

Additionally, the record contains an itemization of expenses which was submitted by Jackson to aid the chancellor in his determination of the amount of funds necessary to support the child. This document reflects that Jackson spent on average $434.67 per month on the child. A careful review of the document coupled with the testimony of Mrs. Joy Jackson (April's mother and grandmother of the child), reveals that the listed expenditures include one-fourth of the house note; one-fourth of the water and lights; one-fourth of the gas; and one-fourth of the household's groceries. The reliability of these figures as necessary to support the child is questionable. We are not attempting to presume that the expenses of providing a home, utilities, and groceries are not necessary to raising a child. However, apportioning one-fourth of the expenditures *of the household* (which also contains two adults and a teenager) for the support of a young child is suspect. Another troubling expenditure is "clothing" which averages $119.54 per month while recognizing that this figure does not include diapers which are listed separately.

We recognize that the chancellor has the ability to go outside the statutory guidelines when the situation so necessitates. When the chancellor determines that such a deviation is necessary he must make "a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case . . . ." Miss. Code. Ann. § 43-19-101(2) (1972). In the present case the chancellor attempted to explain his departure from the guidelines in stating:

> In considering all relative factors, and further in consideration of the child support guidelines as established in Miss. Code Ann. 1972 Section 43-19-101 (Rev. 1993) the Court finds that Strider shall pay unto Ms. Jackson a child support obligation in the amount of $450 per month . . . this Court recognizes that the amount stated is in excess of the guidelines. However, the particular facts of this case, the age of the immediate parties and the wide disparity of wage earning capacity which presently exist [sic] between the

parties authorizes a departure from the stated guidelines.

However, we find that the amount of deviation, specifically, the amount of the child support award, to be error.

As to Strider's argument challenging the inclusion of his overtime and his part-time work in calculating his income, the statute requires that "all potential sources" of income be considered in determining adjusted gross income. Miss. Code Ann. § 43-19-101(3)(a) (1972). The chancellor correctly included Strider's additional income from overtime and his part-time employment.

We conclude that the chancellor committed manifest error in ordering Strider to pay Jackson $450.00 a month for child support in light of his other obligations for the support of the child and considering Jackson's actual expenditures for the support of the child. In light of the foregoing discussion, we are compelled to reverse and remand the issue of the amount of child support to be redetermined by the chancellor. We specifically instruct the chancellor that he make specific findings pursuant to sections 43-19-101(3) and 43-19-103.

II. THE CHANCELLOR ERRED IN AWARDING APRIL JACKSON EXCESSIVE ATTORNEY'S FEES.

The chancellor ordered Strider to pay $3,000 toward Jackson's attorney's fees, $500 toward Jackson's former attorney's fees, and $2,500 toward her present attorney's fees. In his appeal, Strider argues that the chancellor erred in awarding attorney's fees and expenses to Jackson. Strider specifically argues that the award was excessive, and that the chancellor abused his discretion in making such an award. Strider argues that the limited issues before the court were support, visitation, and name change which lack novelty and difficulty. Strider also argues that Jackson's parents' (the child's grandparents) ability to pay should have been considered in light of the fact that they were also parties to the action.

Never does Strider deny Jackson's inability to pay her attorney's fees. Instead, he first attacks the reasonableness of the amount of the award, and second, he complains that Jackson's parents are able to pay their daughter's attorney's fees to defend the action he, the Appellant, brought against their daughter.

The authority of the trial court to tax court costs and the mother's attorney's fees to the father comes from section 93-9-45. *See also Clark v. Whiten*, 508 So. 2d 1105, 1108 (Miss. 1987). The reasonableness of attorney's fees in a paternity action is left to the sound discretion of the chancellor. *See Hull v. Townsend*, 186 So. 2d 478, 480 (Miss. 1966). When attorney's fees are awarded, the costs assessed must be reasonable and necessary, and the mother must prove her entitlement to the award. *See Clark v. Whiten*, 508 So. 2d 1105, 1108 (Miss. 1987). The traditional factors considered in awarding attorney's fees are set out in *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982). 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 action, the testimony revealed that the contract price for Jackson's attorney's services was $100 per hour. A local attorney, Richard. B. Lewis, testified that the local customary hourly rate for litigation ranged from $100-$125 per hour. Jackson introduced itemized statements of time and expenses from the two attorneys retained to represent her in the present cause. The attorneys did not represent her at the same time, but worked subsequent to one another. Clearly, Jackson demonstrated the reasonableness of her attorney's fees.

We find no merit in Strider's second argument that Jackson's parents (the grandparents of the child) were parties to the action, and that there was no demonstration of their inability to pay Jackson's attorney's fees. The parents are under no duty to pay Jackson's attorney's fees any more than they are under a duty to support Strider's illegitimate child. Strider's argument that the grandparents were parties and therefore liable for payment of attorney's fees is baseless because they were involved simply because Jackson was a minor, and her parents were required to respond as her natural guardians.

Strider does not appeal Jackson's inability to pay her attorney's fees. Therefore, in discussing Jackson's inability to pay her own attorney's fees, the dissenting opinion misses the boat. The cases cited by the dissent are good law, but do not support its claim that they require "magic words" being either "I cannot pay" by Jackson, or "I find she cannot pay" by the chancellor. What the Mississippi Supreme Court cases state is that if *the record fails to reflect* that the party receiving the award, in this case April Jackson, is unable to pay, then an award of attorney's fees by the chancellor is an abuse of

discretion. *See Daigle v. Daigle*, 626 So. 2d 140, 147 (Miss. 1993); *Benson v. Benson*, 608 So. 2d 709, 712 (Miss. 1992); *Jones v. Starr*, 586 So. 2d 788, 792 (Miss. 1991); *Powers v. Powers*, 568 So. 2d 255, 259 (Miss. 1990); *Cheatham v. Cheatham*, 537 So. 2d 435, 440 (Miss. 1988); *Duvall v. Duvall*, 81 So. 2d 695, 696 (Miss. 1955). In the present case, Jackson testified that she had $18 in her checking account, $72 in her savings account, and that she did not have any assets. The record is clear that Jackson made a meager salary of $50 a week while attending classes to earn her GED. Indisputably, Jackson demonstrated that she was unable to pay her attorney's fees. Furthermore, the chancellor stated *on the record* with our emphasis added:

> This Court has reviewed the itemized bill submitted by counsel for Jackson and has considered the testimony offered with regard to the customary rates charge in this locale. *The Court is also mindful of the parties respective ability to pay and takes that in to consideration in assessing the fees awarded herein.* Jackson utilized the services of two attorneys. One attorney, Honorable Kent Haney initially responded to the pleadings and filed the original counterclaim on behalf of Jackson. The next attorney, Honorable Charles E. Webster, pursued those matters to conclusion. The two attorneys did not work together on behalf of Jackson but rather worked for Ms. Jackson at different times during the litigation. The Court finds no double billing. *Based on all of the above*, Strider shall be required to contribute to the attorney's fees and cost incurred by Jackson. As concerns Jackson's previous attorney, Strider shall make a contribution of $500. As concerns

> Jackson's current attorney, the Court finds and hereby orders that Strider contribute the sum of $2,500. These amounts shall constitute an additional judgment and shall be subject to enrollment just as the previous support payments.

While the chancellor did not make a specific finding that Jackson was "unable to pay" her attorney's fees, the record and the chancellor's subsequent award of partial attorney's fees to Jackson lead to the conclusion that the chancellor resolved the issue in favor of Jackson and in the manner in line with his decree. *See Love v. Barnett*, 611 So. 2d 205, 207 (Miss. 1992) ("[a]s to issues of fact where no specific findings have been articulated by the chancellor, this Court proceeds upon the 'assumption that the chancellor resolved all such fact issues in favor of appellee,' or as a minimum,

in a manner which would be in line with the decree."); *Gates v. Gates*, 616 So. 2d 888, 890 (Miss. 1993) ("all reasonable presumptions are in favor of the validity of the trial proceedings and judgment thereon, and it is our duty to affirm in the absence of some showing that the trial court erred").

In the present case, the record is replete with testimony about this teenage mother's lack of financial ability to pay. There was ample evidence from which to conclude that she could not pay her attorney's fees. In fact, the only income she had came from her attorney who had given her a part-time job. For the dissent to conclude that an award of attorney's fees to this Appellee is an abuse of the chancellor's discretion is unfounded and contrary to the clear evidence in this case, particularly when the Appellant did not even raise this specific issue on appeal. We find that there is no manifest error and that the chancellor acted within his discretion in awarding Jackson $3,000 in partial payment of her attorney's fees.

> III. THE CHANCELLOR'S AWARD OF PRENATAL AND MEDICAL EXPENSES OF APRIL JACKSON AND MINOR CHILD WAS EXCESSIVE.

The chancellor awarded Jackson $2,768.15 for expenses incurred due to the pregnancy of Jackson pursuant to section 93-9-7. Strider argues that there is no statutory support for such an award.

He also argues that he was not consulted or informed of the expenses, and that this award was also awarded to punish him.

Section 93-9-7 of the Mississippi Code provides:

> The father of a child which is or may be born out of lawful matrimony is liable to the same extent as the father of a child born of lawful matrimony, whether or not the child is born alive, *for the reasonable expense of the mother's pregnancy and confinement*, and for the education, necessary support and maintenance, and medical and funeral expenses of the child. A child born out of lawful matrimony also includes a child born to a married woman by a man other than her lawful husband.

Miss. Code Ann. § 93-9-7 (1972) (emphasis added). The statute does not limit such expenditures to medical expenses. Jackson presented a detailed itemization of expenses that she incurred as a result of the pregnancy. These expenses included both medical and non-medical expenditures. We employ our familiar standard and determine that the chancellor did not commit manifest error in awarding Jackson $2,768.15 toward her prenatal expenses which were documented in the record.

THE JUDGMENT OF THE CHANCERY COURT OF COAHOMA COUNTY IS REVERSED AND REMANDED AS TO THE AMOUNT OF CHILD SUPPORT, AFFIRMED AS TO THE AWARD FOR REIMBURSEMENT OF MEDICAL EXPENSES, AND AFFIRMED AS TO ATTORNEY'S FEES. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR. BRIDGES, P.J., CONCURS IN PART AND DISSENTS IN PART JOINED BY FRAISER, C.J., AND THOMAS, P.J.

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BRIDGES, P.J., CONCURRING IN PART, DISSENTING IN PART:

While I concur with the majority's opinion regarding issues I and III, I respectfully dissent from the majority's decision regarding issue II. The law regarding the award of attorney's fees is clear in Mississippi. 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) (emphasis added)*; Martin v. Martin*, 566 So. 2d 704, 707 (Miss. 1990). 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)*; McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982).

Because Jackson did not testify that she was unable to pay her attorney's fees, and the chancellor did not make an on-the-record specific finding that Jackson was unable to pay, his award of attorney's fees constitutes an abuse of discretion. Without any demonstration of this inability to pay, there can be no justification of an award of attorney's fees. In light of the above facts and law, I would find that the chancellor erred in awarding attorney's fees to Jackson, and therefore, reverse and render.

The burden of ambiguity on this issue that this Court has borne since its inception can be attributed to the age old dispute between the "letter" and the "spirit" of the law. The majority has once again evoked the "spirit" of the law with regard to the issue of attorney's fees. This spirit continues to haunt the pages of this Court's opinions.

It appears to this writer that when an award of attorney's fees is not supported by either a statement of inability to pay those fees by the party seeking them or a specific finding by the chancellor that the party is unable to pay, the majority would encourage this Court to dig through the record to find evidence of inability to pay. While this course of action may seem to some, especially the party seeking attorney's fees and their attorneys, to be a worthwhile endeavor, to others, including this writer, it is a great waste of this Court's time and resources *in light of the clear precedent set forth by the supreme court* in cases such as *Rogers*. The court in *Rogers* pronounced that "a *party* seeking attorney's fees must *clearly demonstrate the inability to pay the fees*", and *not* that a party seeking attorney's fees should be sure to get into the record evidence of their unsatisfactory or unstable general financial situation for this Court to later magically convert into a comment or finding on the specific inability to pay attorney's fees. *Rogers*, 662 So. 2d at 1116.

The burden should be on the party seeking the award of attorney's fees to clearly demonstrate the inability to pay, not on this Court, on appeal, to make findings that the inability to pay had been shown. By proceeding this way, perhaps this Court can avoid engaging in less than sound jurisprudence. As is probably clear, the purpose of this dissent is to encourage the majority to set forth a clear, workable precedent that rests neatly within the confines of the "roadmap" of law that the supreme court has laid out for us.

FRAISER, C.J., AND THOMAS, P.J., JOIN THIS SEPARATE WRITTEN OPINION.