IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01259 COA

CLEVELAND EDWARD ADAMS

APPELLANT

v.

SANDRA H. ADAMS

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. WILLIAM L. STEWART

COURT FROM WHICH APPEALED: HARRISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

WOODROW W. PRINGLE III

ATTORNEY FOR APPELLEE:

THOMAS WRIGHT TEEL

NATURE OF THE CASE: DOMESTIC - CHILD SUPPORT

TRIAL COURT DISPOSITION: COURT FOUND THAT CHILD SUPPORT SHOULD BE INCREASED FROM $150 TO $294/MO.; $106/MO. TOWARD ARREARAGE; AWARD OF ATTY. FEES; DENIAL OF BLOOD TEST REQUEST

BEFORE THOMAS, P.J., DIAZ, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Sandra Adams filed contempt charges against Cleveland Adams for past due child support. Thereafter, Cleveland filed a motion to enforce an earlier Order of the court requiring that a blood/paternity test be performed on the child. The chancellor found that there had been a substantial material change in circumstances warranting an increase in child support payments. He also ordered Cleveland to pay past due child support and attorney's fees, and, he denied Cleveland's motion for a blood/paternity test. Cleveland appeals. We affirm, except that we remand for the chancellor to readdress under the appropriate statute the increase in child support amounts.

FACTS

Cleveland and Sandra Adams were married in 1980. The couple separated, and Sandra filed for divorce in 1985. Sandra had a child on April 12, 1986. Thereafter, Cleveland filed his own complaint for divorce in July of 1986. Believing the child was not his, Cleveland filed a motion requesting that a blood/paternity test be performed on the child. This motion was filed on September 2, 1986. A court order dated September 5, 1986 granted the request, but the order was never acted upon. The couple was finally granted an irreconcilable divorce on April 21, 1987. The 1987 divorce judgment indicated that there was one child born to the marriage. Cleveland signed the divorce agreement and judgment in March of 1987. Cleveland paid child support from May until June of 1987. In 1994, Sandra filed a motion for contempt requesting that Cleveland be compelled to pay past due child support. Thereafter, Cleveland filed a motion requesting the court to enforce the September 5, 1986 order for a blood/paternity test claiming that neither party knew of the order until 1993, and there was, therefore, mutual mistake warranting relief from the final judgment of divorce. After a hearing on Cleveland's motion, the court denied it. The chancery court also determined that Cleveland was in arrears in child support in the amount of $16,157.08; that the amount of monthly child support should be increased from $150 per month to $294 per month; that Cleveland should pay $106 per month toward arrearage until the past due amount is paid in full; and Cleveland should pay $500 toward Sandra's attorney fees.

DISCUSSION

Cleveland alleges three points of error: (1) that the chancellor erred in not enforcing the September 5, 1986 order requiring the parties and the minor to submit to blood/paternity testing; (2) that the chancellor erred in increasing the amount of child support; and (3) that the attorney's fees awarded to Sandra were not proper in that Sandra had sufficient means to pay her own fees.

The Mississippi supreme court has stated that "contempt matters are committed to the substantial discretion of the trial court which, by institutional circumstance and both temporal and visual proximity, is infinitely more competent to decide the matter than are we." *Cumberland v. Cumberland*, 564 So. 2d 839, 845 (Miss. 1990). *see Milam v. Milam*, 509 So. 2d 864, 866 (Miss. 1987); *Walters v. Walters*, 383 So. 2d 827, 829 (Miss. 1980); *see also Morreale v. Morreale*, 646 So. 2d 1264, 1267 (Miss. 1994). Furthermore, "[t]his court will not disturb a chancellor's findings where there exists substantial evidence in the record to support his judgment." *Id.* at 1266.

1. Was the September 5, 1986 Order for Blood/Paternity Test Properly Denied?

Cleveland argues that the chancery court erred in denying his motion for blood/paternity test pursuant to the September 5, 1986 order of the court. He argues that although a final judgement of divorce dated April 21, 1987 declared that the child was his and required him to support the child, this judgment and his signature on the agreement was based on mutual mistake and should, therefore, not preclude the enforcement of the September 1986 order. He contends that because neither he nor Sandra knew that the court had ordered the blood/paternity test, "the testing should have been ordered during the hearing conducted June 24, 1994." To support his argument, Cleveland cites Rule 60(b)(2) which allows final judgments, orders, or proceedings to be set aside upon a finding of accident or mutual mistake.

In his motion requesting the court to enforce the September 5, 1986 order, Cleveland contends that he was told by his previous attorney that his September 2, 1986 motion requesting the blood/paternity test had been denied and that he relied upon his attorney's representation that such was the case. However, in the seven or eight years it took Cleveland to find out about the September 5 order, he never requested the court to reconsider the blood/paternity issue. The order was issued almost eight months before the final divorce was granted. The same judge who issued the blood/paternity order, granted the irreconcilable differences divorce decree.

Rule 60(b) requires that the mistake "be cited within six months of the judgment." M.R.C.P. 60(b). The mistake claimed by Cleveland was not cited within the requisite six months but was brought to the court's attention eight years after the Order was actually issued. In ruling on Cleveland's motion to enforce the September 5 order, the chancellor, in referring to the signed irreconcilable differences divorce order and the property settlement agreement, stated:

> I'm going to rule, then, that [Cleveland] has no cause of action at this time because that's a completed contract. If you have a matter of contract, you make all your terms in that contract and it's wound up in it. He had the ability, prior to that time, to fully explore and inquire. Having had that order from Judge Morris, there was certainly some question about it; and then having a subsequent order by Judge Morris, I am going to take that court order as it stands. . . We have to assume that the lawyers did their duties and that Judge Morris did his duty, and that's what I'm going to do because if we open that door we'll be opening Pandora's Box for everybody who gets hit with a contempt citation to come in and say, "That wasn't my baby."

We agree with the chancellor's finding. The parties signed the documents referring to the child as Cleveland's and Sandra's. Whether a blood test should have been ordered, Cleveland waived that issue when he consented to the agreed final judgment. If paternity were sufficiently contested to him, he could have refused to consent to judgment and appealed from what he allegedly believed was a refusal to order a test.

The supreme court has stated that "[a] final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies, and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand, and cause of action." *Golden v. Golden*, 151 So. 2d 598, 599 (Miss. 1963). Moreover, "newly discovered evidence is that which could not have been discovered by the exercise of due diligence either before or at the time of trial."

In re Hill, 460 So. 2d 792, 797 (Miss. 1984). Cleveland and his counsel had access to the records. Regardless of the surprise Cleveland now says he experienced in discovering his request for a blood/paternity test had been granted, such serendipity does not create a legal right. We agree with the chancellor that this issue expired six months after the agreed judgment in which Cleveland admitted to paternity.

2. Was the Amount of Child Support Properly Increased?

The Mississippi supreme court has stated that "[d]ecisions regarding modification of child support are within the discretion of the chancellor, and this Court will reverse only where there is manifest error in findings of fact, or an abuse of discretion." *Powell v. Powell*, 644 So. 2d 269, 275 (Miss. 1994). "The party seeking modification must show a material change of circumstances of the father, mother, or children arising subsequent to the original decree." *Id.*

Section 43-19-101 sets out the guidelines for calculating child support. *See* Miss. Code Ann. § 43-19-101 (1972). However, our supreme court has stated that these guidelines "must not control the Chancellor's award of child support." *Thurman v. Thurman*, 559 So. 2d 1014, 1017 (Miss. 1990). Cleveland argues that the chancellor misapplied section 43-19-101 in increasing his child support obligations from $150 per month to $294. He contends that the "guidelines provide that in the event two children are the subject of litigation, the Court should determine that child support should be paid in the amount of 20% of the net income." We disagree with Cleveland's interpretation of that statute. The relevant parts of the statute read:

> (1) The following child support award guidelines shall be a rebuttable presumption in all judicial or administrative proceedings regarding the awarding or modifying of child support awards in this state: [the statute then proceeds to detail a percentage of adjusted gross income to be paid, depending on the number of children. 14% is the proper percentage for one child];
>
> . . . .
>
> (d) If the absent parent is also the parent of another child or other children residing with him, then *the court may* subtract an amount that it deems appropriate to account for the needs of said child or children; . . .

Miss. Code Ann. § 43-19-101 (1972) (emphasis added).

The statute is clear that the chancellor is not compelled to consider the presence of other children living with the paying parent but the chancellor *may* consider other children residing with the absent parent. Therefore, Cleveland's argument that "since he has two (2) children the child support, at most, should have been set at 10% of his net income" is incorrect.

However, the chancellor also erred in holding that he was compelled to increase the child support payments to 14% of the net income. In responding to counsel's argument that the amount of child support should be 10% as opposed to 14%, the chancellor said:

> Well, that will have to be corrected by the legislature. I don't have authority to do that. I've just got to use the 14% because the statute doesn't permit me to do that. . .

The chancellor on the record held that his only option was to use the 14% figure. The statute in fact gives the chancellor the discretion to consider other children in calculating the amount of child support. Furthermore, the Mississippi Supreme Court has stated, "[c]ertainly the guidelines are relevant and may be considered by a chancellor as an aid, but the guidelines may not determine the specific need or the specific support required." *Thurman*, 559 So. 2d at 1017. The chancellor did not necessarily err in ordering 14% of Cleveland's income to be paid in child support, but he did err in holding himself to be without options. Since Cleveland was entitled for the chancellor to consider the fact that Cleveland had another child, we remand this issue to the chancellor for further proceedings.

3. Were Attorney's Fees Properly Granted?

"Attorney fees are not awarded in child support modification cases unless the party requesting fees is financially unable to pay them." *Id.* (citing *Cumberland*, 564 So. 2d at 845). However, "[t]he chancellor may also properly award attorney's fees in contempt cases." *Adams v. Adams*, 591 So. 2d 431, 435 (Miss. 1991). The law vests the chancery court with considerable discretion regarding the court's award of attorney's fees such that the court's findings will not be disturbed unless the record reveals manifest error. *Id.* (citing *Cumberland*, 564 So. 2d at 844); *see also Hammett v. Woods*, 602 So. 2d 825, 829 (Miss. 1992).

In this case, there was a petition for contempt. The chancellor declined to hold the Appellant in contempt, but he found that Cleveland was in arrears on his child support payments in excess of $16, 000. In speaking on the issue of contempt, the chancellor said:

> I'm not going to hold the man in contempt. That is an option of the court, but since they're interested in getting the money collected and not putting him in jail I will not say he is in contempt. Technically, he is in contempt but I'm not going to say it's wilful, deliberate and contumacious contempt.

Thus, Cleveland was found to be "technically" in contempt, although not to be wilful, deliberate and contumacious in his actions. It is because of Cleveland's failure to abide by the terms of the former decree that this case was brought. The supreme court has stated that the "attorney's fee should be assessed against the person violating the decree and surely not against the party seeking to uphold it." *Pearson v. Hatcher*, 279 So. 2d 654, 656 (Miss. 1973); *see also, Adams v. Adams*, 591 So. 2d 431, 435 (Miss. 1991). Despite no finding of contempt, we hold that an award of attorney's fees for failure to make child support payments was proper.

4. Motion for Attorney's Fees for Appeal

Sandra moves this Court to assess reasonable attorney's fees against Cleveland for this appeal, and argues for more than case law usually permits. The usual procedure is to "fix such appellate fee, when allowed, at one-half the fee ordered by the lower court." *Stauffer v. Stauffer*, 379 So. 2d 922, 924 (Miss. 1980). Sandra argues that this amount ($250) would be inadequate to cover the attorney expenses she will incur for this appeal. She asks that this Court allow "reasonable attorney fees." Based on case precedent, we will not award more than one-half of the amount of attorney's fees granted in chancery court, which was $500. Therefore, Sandra's motion for attorney's fees on appeal is sustained for the amount of $250.

THE JUDGMENT OF THE CHANCERY COURT OF HARRISON COUNTY IS AFFIRMED AS TO THE WITHHOLDING ORDER REQUIRING APPELLANT TO PAY $106.00 PER MONTH IN ARREARAGE UNTIL PAST DUE CHILD SUPPORT IS PAID IN FULL; AFFIRMED AS TO AWARD OF ATTORNEY FEES; REMANDED AS TO ISSUE OF MODIFICATION OF CHILD SUPPORT; MOTION FOR ATTORNEY FEES ON APPEAL SUSTAINED FOR THE AMOUNT OF $250. ALL COSTS ASSESSED TO APPELLANT.

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