IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01203 COA

ERNEST C. MARTIN, JR.

APPELLANT

v.

ANNA TARCZANIN MARTIN

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. GLENN BARLOW

COURT FROM WHICH APPEALED: JACKSON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

JOSEPH R. MEADOWS

ATTORNEY FOR APPELLEE:

D. SUZANNE BAKER

NATURE OF THE CASE: DOMESTIC RELATIONS

TRIAL COURT DISPOSITION: LOWER COURT DETERMINED NO REDUCTION IN MONTHLY OBLIGATIONS FROM PRIOR DECREE; GRANTED ATTY FEES IN FAVOR OF APPELLEE; RELIEVED APPELLANT DUTY TO PAY FUTURE SCHOOL EXP.

BEFORE MCMILLIN, P.J., BARBER, AND COLEMAN, JJ.

McMILLIN, P. J., FOR THE COURT:

This is an appeal from the Jackson County Chancery Court. That court denied Ernest Martin's request for a reduction in his monthly child support and alimony obligations, but relieved him of his obligation to provide private school tuition for his three minor children. The court also found Mr. Martin in contempt for failure to pay medical and school expenses and ordered him to pay attorney's fees to Mrs. Martin in the amount of $1,500.00. Mr. Martin takes issue with the ruling of the lower court, assigning as error the following: (1) the lower court erred in refusing to reduce support payments for the minor children as provided in the guidelines in section 43-19-101 of the Mississippi Code; (2) the lower court erred in failing to reduce spousal support; (3) the lower court erred in awarding a judgment against Mr. Martin for past due school expenses in the amount of $14,525.85 plus interest; and (4) the lower court erred in awarding attorney's fees of $1,500.00 to Mrs. Martin.

After review of the record and relevant authority, we find that the lower court did not err in its findings. We, therefore, affirm the judgment of the lower court.

I.

Facts

Ernest Martin and Anna Martin were granted a divorce in October 1990 on the ground of irreconcilable differences. As a part of the proceeding, the chancellor approved a property settlement and child custody and support agreement entered into by the parties. The agreement provided that Mrs. Martin would have primary custody of the children and obligated Mr. Martin to provide various items of support to his children and former wife. At the time of the divorce, Mr. Martin was employed by an insurance company and had gross earnings in excess of $75,000 per year.

Shortly after the divorce, Mr. Martin was terminated from his employment, but under the terms of his separation, he was permitted to continue to service his existing accounts for two years to provide him with income during his transition to other employment. In December 1992, Mr. Martin sought relief from his various support obligations on the basis of the material decrease in his income. That proceeding was resolved by agreement between the parties which provided a reduction of child support and alimony, required Mrs. Martin to assume certain debts that were previously Mr. Martin's responsibility, and permitted Mr. Martin to refinance the debt on the former marital home in order to reduce the monthly mortgage obligation which he was required to pay.

A second proceeding seeking further reductions in his obligations was commenced by Mr. Martin in August 1993. This appeal was perfected from the chancellor's decision resulting from that proceeding.

II.

Failure to Reduce Child Support Payments

The chancellor declined to reduce child support on the basis that Mr. Martin had failed to prove that

there had been a material change in circumstance not reasonably foreseeable at the time of the original adjudication that would warrant modification. *See, e.g., Tingle v. Tingle,* 573 So. 2d 1389, 1391 (Miss. 1990); *Morris v. Morris*, 541 So. 2d 1040, 1043 (Miss. 1989). In this case, the issue was not whether there was a change of circumstance from the original divorce, but from the previous modification order entered in December 1992. The chancellor determined that, at the time that order was entered, it was within Mr. Martin's knowledge that his work-out relationship with his former employer was drawing to an end. Therefore, his subsequent reduction in income, though perhaps substantial, was not unforeseen, according to the chancellor's reasoning. *Tingle,* 573 So. 2d at 1391; *Morris,* 541 So. 2d at 1043.

The chancellor is given broad discretion in making the determination of whether a litigant has met the burden to obtain a modification of a prior judgment, and this Court may reverse only upon a conclusion that there has been an abuse of discretion, manifest error, or the application of an erroneous legal standard. *Adams v. Adams*, 591 So. 2d 431, 434 (Miss. 1991).

Mr. Martin focuses his argument on the proposition that the chancellor erred in not adjusting his child support to fall within the guidelines of section 43-19-101 of the Mississippi Code. *See* Miss. Code Ann. § 43-19-101 (1972). The fact that an existing support order does not comply with the statutory guidelines does not, of itself, establish a material change in circumstance warranting relief. Before the chancellor was required to consider what effect the guidelines had on the existing support award, Mr. Adams had the duty of convincing the chancellor that there had been an unforeseeable material change in his situation. It is at this preliminary threshold that the chancellor determined that Mr. Adams' claim for relief failed. We conclude that to be a decision within the chancellor's range of discretion.

We cannot fail to note, also, that the chancellor did relieve Mr. Adams of any future obligation to provide private school tuition for his three children -- a responsibility that had been his under previous orders of the court. No cross appeal was taken from this determination. Thus, though Mr. Adams may not have obtained relief from his monthly child support obligation, nevertheless, he has obtained rather substantial relief due to his changed financial situation.

III.

Failure to Reduce Spousal Support

Mr. Martin argues that the chancellor abused his discretion when he failed to reduce his monthly spousal support obligation below the amount he agreed to in December 1992. The considerations as to this issue are essentially the same as those relating to child support modification. We cannot determine that the chancellor committed a manifest abuse of discretion in holding that Mr. Martin's reduced income was within his contemplation when he agreed to the December 1992 resolution of the level of spousal support. Since the ensuing reduction in income was within the contemplation of the parties in December 1992, even conceding that the change was large enough to be deemed material, it fails the requirement that the change must be one not anticipated or foreseen. *Tingle,* 573 So. 2d at 1391; *Morris,* 541 So. 2d at 1043.

IV.

Award of School Expenses

Mr. Martin also takes issue with that portion of the chancellor's decision awarding a judgment of $14,525.85, plus interest, in favor of Mrs. Martin for past due school expenses of the minor children. On appeal, this Court is limited in our review of the findings made by the chancellor. "[F]indings of fact made by a chancellor will not be disturbed if this Court finds substantial evidence supporting these factual findings." *Love v. Barnett*, 611 So. 2d 205, 207 (Miss. 1992) (citations omitted). Further, if there is no specific finding with regard to a particular issue, we must assume that the chancellor resolved all issues in favor of the appellee. *Id.*

The original divorce decree ordered Mr. Martin to "pay all reasonable costs of schooling of the minor children . . . including, but not limited to, tuition, books, room and board, and all other expenses related to the secondary and college education of the parties . . . ." At the time of the divorce, all three of the minor children were attending private school, and Mr. Martin continued paying the private school tuition for the 1990-91 and 1991-92 school years. However, he did not reimburse Mrs. Martin for any tuition from 1991-92 to date.

Mrs. Martin presented a claim for $17,325.96, which included tuition for the 1993-94 and 1994-95 school years, as well as $2,800.00 for school-sponsored trips for the children to France and Disney World. The chancellor found Mr. Martin in contempt, though not wilful contempt, for failure to comply with the court's previous order in which he agreed to pay "all reasonable costs of schooling of the minor children . . . including, but not limited to, tuition, books, room and board, and all other reasonable expenses. . . ." The chancellor determined that of the $17,325.96 requested, Mr. Martin was accountable for only $14,525.85 plus interest as the reasonable costs of schooling. In addition, he held that Mr. Martin would be relieved of the responsibility to pay private school tuition in the future.

Based on our limited standard of review, we cannot say that the chancellor manifestly erred in finding the claim for tuition, less the request for reimbursement for three trips, to be a reasonable cost of schooling under the original decree.

V.

Attorney's Fees

Mr. Martin claims error in the chancellor's decision to assess him with attorney's fees in the amount of $1,500.00. He argues that there was no evidence of his former wife's inability to pay, and that this is generally fatal to a claim for attorney's fees in domestic relations litigation.

Inability to pay is not a prerequisite to the award of attorneys fees in pursuing a civil contempt action, whether or not the underlying order sought to be enforced arose in the field of domestic law. *Rogers v. Rogers*, 662 So. 2d 1111, 1116 (Miss. 1995). Neither is such a showing required in order to obtain attorney's fees for successfully resisting a modification petition if the court determines there was no basis to pursue the modification. *Cumberland v. Cumberland*, 564 So. 2d 839, 845 (Miss. 1990). The award of such fees, and the amount allowed, are matters entrusted to the sound discretion of the chancellor. *Rogers*, 662 So. 2d at 1116; *Setser v. Piazza*, 644 So. 2d 1211, 1216 (Miss. 1994). This issue is without merit, and the award of attorney's fees is affirmed.

THE JUDGMENT OF THE JACKSON COUNTY CHANCERY COURT IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. COSTS OF THIS APPEAL ARE ASSESSED TO ERNEST C. MARTIN, JR.

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