

IN THE COURT OF APPEALS

7/15/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01208 COA

FLOYD THOMAS KILLEBREW, JR. APPELLANT

v.

DEBRA KILLEBREW APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. SARAH SPRINGER

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT: SUSANNE A MERCHANT

ATTORNEY FOR APPELLEE: CHARLES P. LEGER

NATURE OF THE CASE: DOMESTIC RELATIONS

TRIAL COURT DISPOSITION: AWARD OF ALIMONY TO WIFE AND DECLARATION
THAT OLDEST CHILD IS NOT EMANCIPATED.

MANDATE ISSUED: 8/5/97

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

McMILLIN, P.J., FOR THE COURT:

This appeal arises from certain provisions of a divorce judgment entered in the Lauderdale County Chancery Court dissolving the marriage of Floyd Thomas Killebrew, Jr. and Debra Killebrew. Mr. Killebrew brings this appeal, raising two issues: (a) the chancellor's ruling concerning whether one child was emancipated, and (b) the award of periodic alimony to Mrs. Killebrew. We find these issues to be without merit and affirm the chancellor's judgment, subject to a *sua sponte* amendment that will be discussed later in the text of this opinion.

I.

Facts

The parties were married in Alabama in 1972. They resided there until their separation in 1990, when Mr. Killebrew came to Mississippi. The two children who were born of the marriage continued to reside with Mrs. Killebrew. Mrs. Killebrew sought child support by commencing a Uniform Reciprocal Enforcement of Support Action (URESA) proceeding in Alabama. The State of Alabama referred the case to Mississippi, and a proceeding was brought against Mr. Killebrew in Lauderdale County. Final judgment on the URESA action was entered on January 19, 1995, ordering Mr. Killebrew to pay child support in the amount of \$97.40 per month for the two children.

As will be discussed later, Mr. Killebrew commenced this separate action for divorce in Lauderdale County before the URESA case was resolved. The parties ultimately agreed to consent to a divorce on the grounds of irreconcilable differences. The parties agreed that certain issues would be left to the chancellor to decide. *See* Miss. Code Ann. § 93-5-2 (1972). These issues included: (a) whether the oldest child was emancipated, (b) whether the child support order in the URESA case could be modified in the divorce proceeding, and (c) what amount of periodic alimony, if any, should be granted. The chancellor's ruling on these issues led to this appeal.

II.

Emancipation under URESA

In Mr. Killebrew's first issue, the Court must determine what effect an order for support entered in a URESA proceeding has on the chancery court's jurisdiction to address matters concerning support of minor children in a divorce proceeding -- both as to the level of support and its duration.

As we have observed, Mr. Killebrew filed this divorce action in the same court as a separate cause of action before the URESA proceeding was resolved. As a part of his complaint, he alleged that "he [Mr. Killebrew] submits himself to the jurisdiction of this Court for the purpose of determining child support" This complaint, filed in late December 1994, was not answered by Mrs. Killebrew until April 1995. The reason for this delay does not appear in the file; however, her answer reflects the fact that in the interim period, the URESA action had been prosecuted to conclusion and Mr. Killebrew's support obligation had been set at \$97.40 per month. As a part of her answer to the divorce action, Mrs. Killebrew alleged that the URESA support amount was unconscionably low for two children. She asked the chancellor to make an equitable adjustment in Mr. Killebrew's child support obligation in the divorce proceeding. Mr. Killebrew countered that one of the children had attained the age of nineteen years, was not attending college, and was, thus, emancipated under the laws of the State of Alabama. *See* Ala. Code Ann. § 26-1-1 (1975); *Mansmann v. State ex rel Eiland*, 590 So. 2d 308, 309 (Ala. Civ. App. 1991). Mr. Killebrew contended that since his support obligation had been determined under URESA, the provisions of section 93-11-73 of the Mississippi Code of 1972 would control, and his obligation to provide support to the oldest child had ended. The section states that in a URESA action, "[f]or purpose of determining the age of majority of a child, the laws of the initiating state [Alabama] shall govern." Miss. Code Ann § 93-11-73 (1972).

The chancellor ignored the provisions of section 93-11-73 and determined the question of emancipation under Mississippi law, finding the older child still to be a dependent. However, the chancellor refused Mrs. Killebrew's request to relitigate the proper amount of support, stating:

During the presentation of preliminary matters, the Court ruled that the issue of child support would not be modified in this divorce action as it has already been adjudicated by way of a URESA action, being civil action number 94-1397-S, filed in the chancery court of Lauderdale County. Should the parties seek modification of the child support amount, a modification petition should be filed in that civil action.

We conclude that the trial judge was correct when she determined the duration of Mr. Killebrew's support obligation for his children under Mississippi law. Section 93-11-7 of the Mississippi Code, a part of URESA, provides that "[t]he remedies herein provided are in addition to and not in substitution for any other remedies." Miss. Code Ann. § 93-11-7 (1972). URESA is primarily an enforcement remedy designed to assist custodial parents in enforcing support obligations when the non-paying parent is in another jurisdiction and the custodial parent lacks the resources to enforce the obligation through other traditional, but more cumbersome, means. The act itself provides that an order of support entered under URESA does "not supersede any previous order of support" and only

requires that any payments enforced in the URESA action be dually credited, both against the URESA order and such other support order as may exist. *See* Miss. Code Ann. § 93-11-55 (1972). Our supreme court has noted that a support order under URESA entered in another state as the result of a proceeding to enforce a Mississippi support order may not alter the parent's obligation under the prior support order, even where the URESA order is for a lesser amount. *Howard v. Howard*, 191 So. 2d 528, 531 (Miss. 1966).

We, therefore, conclude that the URESA action was not a bar to Mrs. Killebrew's right to have Mr. Killebrew's obligation to support his children adjudicated by more traditional means, which includes a proceeding for divorce. In fact, it was Mr. Killebrew himself who chose the forum to litigate child support when he filed his complaint for divorce in Lauderdale County Chancery Court. Mrs. Killebrew, apparently a life-long resident of the State of Alabama, nevertheless personally appeared through her answer and counterclaim and submitted herself to the jurisdiction of the Mississippi chancery court to act on the matter of the dissolution of the divorce and all matters related to that divorce. (She did, in her answer, reserve her right not to have child custody adjudicated in Mississippi; however, custody does not appear to have been in dispute, and this reservation is not relevant to our decision.)

The parties thus submitted themselves to the jurisdiction of the State of Mississippi to determine all pertinent issues according to Mississippi law. Included, of necessity, among those issues was the duration of Mr. Killebrew's obligation to support his children. Though the age of emancipation may be nineteen in Alabama, the fact remains that in Mississippi, the obligation for support may, upon a proper showing, continue until the child attains the age of twenty-one years. *Arthur v. Arthur*, 691 So. 2d 997, 1001 (Miss. 1997). The Lauderdale County chancellor, in determining Mr. Killebrew's support obligation, was no more bound by principles of Alabama law in this proceeding than she would have been by the laws of that state relating to the grounds upon which the divorce itself could be granted.

Nevertheless, the conclusion we have reached, when considered with the chancellor's ruling regarding future modification of child support amounts, does pose something of a dilemma that this Court elects to remedy on its own motion. A URESA action is intended to be merely an ancillary means to enforce support obligations properly determined by some other method. It would seem that the URESA proceeding is, therefore, an inappropriate forum to adjudicate substantive matters relating to support obligations when another, more suitable, proceeding is available. In this instance, the divorce proceeding presents a more suitable forum to explore and adjudicate the underlying obligations of the parties on matters of support. By way of example, it would appear that Mr. Killebrew is correct that once an Alabama child attains the age of nineteen years and there has been no adjudication pertaining to post-majority college expenses, the child has reached majority under Alabama law. Thus, a responding state would, at that point, lose jurisdiction to enforce further support in a URESA action. *See* Miss. Code Ann. § 93-11-73 (1972). However, it must be remembered that a URESA action is merely an enforcement remedy, and the fact that a URESA action can no longer be maintained does nothing to alter or terminate any underlying obligation of support that may exist independent of the provisions of URESA. The provisions of section 93-11-73 merely remove one method of enforcement that would otherwise be available against the non-performing parent.

This Court, therefore, concludes that the chancellor erred when she divided the issue of child support

into two elements, retaining the issue of when the children are emancipated in the divorce proceeding, but leaving questions regarding the amount of support in the URESA action -- a proceeding not particularly suited for resolving substantive issues of support obligations except in those instances when another, more suitable forum is unavailable.

Mrs. Killebrew did not perfect a cross-appeal from the chancellor's ruling that future adjustments in support levels would have to be brought in the URESA proceeding; however, we conclude that this bifurcation of issues relating to support is unworkable and ought to be corrected under our authority to correct plain errors. *See* M.R.A.P. 28(a)(3); *Chamblee v. Chamblee*, 637 So. 2d 850, 866 (Miss. 1994).

Neither did Mrs. Killebrew appeal the chancellor's refusal to modify the amount of the monthly obligation. We conclude, however, that questions of the proper amount of support may always be brought to the chancellor's attention by proper petition so that there is no necessity for this Court to address this issue under principles of plain error. This has the effect, for now, of leaving Mr. Killebrew's support obligation set at \$97.40 per month.

This Court therefore adjudicates, *sua sponte*, that the judgment of divorce in this proceeding be amended to provide that Mr. Killebrew shall, until the further order of the Lauderdale County Chancery Court, continue to pay the sum of \$97.40 per month as periodic child support. We further order that all future questions concerning modification of the amount of support, whether based upon a claim of emancipation of one or both of the children of the parties or otherwise, shall be determined in the divorce proceeding and according to the laws of the State of Mississippi. Nothing we have done in this opinion alters any order for support in the URESA action except that, as the statute requires, we note that payments enforced through the URESA action shall be dually credited in the URESA action and against Mr. Killebrew's obligation we have now adjudicated to be due in this proceeding. *See* Miss. Code Ann. § 93-11-55 (1972). We further specifically note that future modifications in the URESA action alone, for whatever reason, shall not affect the accrual of Mr. Killebrew's continuing obligations in this proceeding.

III.

Periodic Alimony

Mr. Killebrew also takes issue with that portion of the chancellor's ruling ordering him to pay periodic alimony in the amount of \$200.00 per month. Mr. Killebrew argues that his former wife has maintained a separate household without alimony for several years since their separation. In addition, he suggests that Mrs. Killebrew is young and able to pursue education and training to allow her to support herself.

The supreme court has set out certain factors to guide chancellors in determining whether periodic alimony is warranted in a particular situation. Those factors include: (1) the income and expenses of the party, (2) the health and earning capacity of the parties, (3) the needs of each, (4) the obligations

and assets of each, (5) the length of the marriage, (6) the presence or absence of minor children in the home which could require child care costs, (7) the age of the parties, (8) the standard of living of the parties, both during marriage and at the time support is determined, (9) the tax consequences of the support order, (10) fault or misconduct, (11) wasteful dissipation of the assets by either party, and (12) any other factor deemed by the court to be "just and equitable" in connection with setting support. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993). In reviewing the chancellor's decision to grant periodic alimony, this Court has limited authority. The chancellor is vested with broad discretion in the award of alimony, and we will not reverse that decision unless convinced that she has abused that discretion. *See Armstrong*, 618 So. 2d at 1280.

In the final judgment, the chancellor found that Mrs. Killebrew, who had been the keeper of the household, had not developed significant skills in the job market during the marriage. As a result, she could only obtain minimum-wage type jobs. She noted Mrs. Killebrew's difficulty finding employment due to neck problems causing numbness and pain from a recent on-the-job injury. The chancellor determined that Mrs. Killebrew's monthly income was approximately \$450.00 every two weeks. Her only other source of income was the \$97.40 which she received in child support from Mr. Killebrew. The proof showed that the oldest daughter, Christy, contributed to the household expenses from her job at a local supermarket; however, there were no long-term prospects that this assistance would continue.

Mr. Killebrew, on the other hand, was the wage-earning partner during the lengthy marriage. At the time of trial, he worked as a self-employed, general contractor with monthly available income of \$1,224.00. The chancellor noted that Mr. Killebrew had minimal living expenses and paid only a small amount in monthly child support. Based on that information, the chancellor determined that the amount of \$200.00 per month was a reasonable amount of periodic alimony.

There was sufficient proof of Mrs. Killebrew's need as well as Mr. Killebrew's ability to pay permanent alimony under the *Armstrong* case. In reviewing the chancellor's decision to award periodic alimony to Mrs. Killebrew, we cannot say that the chancellor manifestly erred. Her failure to comment on the record as to each relevant *Armstrong* factor is not fatal. We, therefore, find the award of \$200.00 per month well within the chancellor's discretion and affirm.

THE JUDGMENT OF THE LAUDERDALE COUNTY CHANCERY COURT IS AFFIRMED EXCEPT THAT THIS COURT SUA SPONTE AMENDS THE JUDGMENT OF DIVORCE TO ORDER APPELLANT TO PAY CHILD SUPPORT IN THE AMOUNT OF \$97.40 PER MONTH UNTIL THE FURTHER ORDER OF THE LAUDERDALE COUNTY CHANCERY COURT OR UNTIL THE EMANCIPATION OF BOTH OF THE MINOR CHILDREN OF THE PARTIES UNDER THE LAWS OF THE STATE OF MISSISSIPPI. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT, FLOYD THOMAS KILLEBREW, JR.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.