IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-01128 COA

ERNEST ROY LANDERS **APPELLANT**

v.

KATHY LOTT LANDERS **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	08/26/96
TRIAL JUDGE:	HON. VICKI R. BARNES
COURT FROM WHICH APPEALED:	WARREN COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT:	E. MICHAEL MARKS
	S. DENNIS JOINER
ATTORNEY FOR APPELLEE:	R. LOUIS FIELD
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	DENIAL OF MOTION TO RECONSIDER AS UNTIMELY FILED, DENIAL OF MOTION FOR EXTRAORDINARY RELIEF, AND DENIAL OF MOTION TO MODIFY
DISPOSITION:	AFFIRMED - 10/7/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/28/97

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

THOMAS, P.J., FOR THE COURT:

Earnest Roy Landers appeals the Warren County Chancery Court's denial of his motion for extraordinary relief or motion to modify its former judgment of divorce, raising the following issues as error:

I. DID THE CHANCELLOR ERR IN NOT ALLOWING APPELLANT'S MOTION TO RECONSIDER (OR OPEN)?

II. DID THE CHANCELLOR ERR IN DENYING THE APPELLANT'S MOTION TO MODIFY OR FOR EXTRAORDINARY RELIEF?

Finding no error, we affirm.

FACTS

The Warren County Chancery Court granted Kathy Lott Landers and Ernest Roy Landers a final divorce on October 31, 1995. The chancellor awarded Kathy the full custody of the minor child, and she ordered Roy to pay $435 a month for child support and $465 in periodic alimony until October 15, 1996, at which time the alimony award automatically decreased to $265 per month.

A writ of garnishment was issued on November 28, 1995, against Roy for unpaid alimony and child support. Roy filed a petition for modification of the former decree and for contempt, and Kathy filed an answer and counterclaim for contempt. Roy filed an answer to the counterclaim. A hearing was held on these petitions on February 22, 1996. The chancellor handed down her order on February 27, 1996 which denied Roy's petition finding that there was insufficient proof of a material change in circumstance. The order awarded Kathy $635.20 unpaid child support, $1,860 unpaid alimony, $112 unpaid medical expenses, and $1,000 legal fees on the final decree plus $450 for legal fees on the petition.

On May 8, 1996, Roy filed a motion to reconsider or alternatively, motion for extraordinary relief to conform order of February 27, 1996, and motion for modification of former judgment of divorce. A hearing was held on August 15, 1996.

At the time of the divorce on October 1995, Roy was employed, and had been the previous sixteen years, by Marathon Letourneau in Vicksburg, Mississippi as a welder. After the divorce, they promoted Roy to fitter. In 1995, Roy's tax returns reflected that his gross wages were $44,956, which were the result of working regular hours at the Vicksburg facility and his taking advantage of working trips to other areas at increased rates of pay. Roy's gross pay for 1996 through July 28, 1996, was $19,672.96. Roy contends that this represents a 45% decrease in gross earnings. Kathy states that Roy's decrease in pay was a direct result of him not taking advantage of the offsite trips. During cross-examination, Roy stated once that he could take advantage of these trips and then later stated that the company did not offer the offsite trips as often.

After Roy's divorce from Kathy and prior to the modification hearing, he started living with a woman who had two children, ages fourteen and sixteen. Roy and Renee were married prior to the modification hearing on August 15, 1996. He testified that Renee is ill and unable to work, but she does receive money from the Social Security Administration. Roy testified that he uses her food stamps to help buy groceries.

About a month before the hearing, Roy purchased a new mobile home, with the help of money lent to him by Renee's mother and the money received from the sale of his old mobile home. Roy testified that the purchase of the mobile home resulted in increased monthly expenses including a $280 monthly note, $101 monthly maintenance and $310 monthly electricity bill, $65 monthly water and sewer, and a $100 monthly gas bill. This results in a monthly outlay of $1050 compared with his former monthly expenses of about $160 a month, prior to the purchase of the mobile home.

Roy and Kathy had a 1995 pick-up truck that was jointly titled in their names. The monthly note on this truck was $350. This truck was subsequently repossessed. Thereafter, Roy purchased a new pick-up truck valued at $30,000, with the monthly payment of $492. The monthly insurance is $131 on this vehicle.

The chancellor denied Roy's motion to reconsider as not being timely and denied Roy's motion to reopen the February 27, 1996 judgment. The chancellor considered the motion to modify and the motion for extraordinary relief and found the testimony similar to the February 27, 1996 hearing, however; the court noted certain circumstances had changed, one being that Roy had remarried. The chancellor found the evidence insufficient to grant the motion to modify and for extraordinary relief.

ANALYSIS

I.

DID THE CHANCELLOR ERR IN NOT ALLOWING APPELLANT'S MOTION TO RECONSIDER (OR OPEN)?

Roy argues that the chancellor erred in denying his motion to reconsider. As authority for this argument he cites *Burkett v. Burkett*, 537 So. 2d 443, 445 (Miss. 1989). In *Burkett*, the Court allowed the reopening of a judgment of past due support seven months and eight days after the entry of default under Rule 60(b)(6) of the Mississippi Rules of Civil Procedure. Rule 60(b)(6) states that a motion shall be made within a reasonable time. Roy argues that the chancellor erred in denying his motion to reopen, since the motion was filed within two and one-half months of the February 27, 1996 judgment.

Kathy argues that the record makes apparent that the chancellor entertained all relevant evidence offered by Roy, dating from the original decree entered in this case in October 1995 and as a practical matter the chancellor did allow Roy to reopen his case. We agree. Although the chancellor stated that she would not reopen Roy's case, she in fact did reopen and reconsider. Therefore, this argument has no merit.

II.

DID THE CHANCELLOR ERR IN DENYING THE APPELLANT'S MOTION TO MODIFY OR FOR EXTRAORDINARY RELIEF?

Roy argues that the chancellor should have granted him relief from the court's original order dated October 29, 1995 because he cannot pay support, alimony, and garnishments, and still maintain himself.

The standard of review is limited in domestic relations cases where the chancery court has decided upon terms of alimony; the determination will not be altered on appeal unless it is found to be against the overwhelming weight of the evidence or manifestly in error. *Crowe v. Crowe*, 641 So. 2d 1100, 1102 (Miss. 1994); *Tilley v. Tilley*, 610 So. 2d 348, 351 (Miss. 1992). "[T]he amount of an alimony award is a matter largely within the discretion of the chancery court because of its peculiar opportunity to sense the equities of the situation before it." *Wood v. Wood*, 495 So. 2d 503, 506 (Miss. 1986). We afford the chancellor wide discretion in alimony cases, and this discretion will not

be reversed on appeal unless the chancellor was manifestly in error in her finding of fact and abused her discretion. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993).

Periodic alimony terminates upon the death of the paying or receiving spouse or the remarriage of the receiving spouse. *Armstrong*, 618 So. 2d at 1281. Periodic alimony may be modified by either increasing, decreasing, or terminating the award in the event of a material change of circumstances. *Id.*; *Hubbard v. Hubbard*, 656 So. 2d 124, 129 (Miss. 1995); *Shearer v. Shearer*, 540 So. 2d 9, 12 (Miss. 1989). "The change must occur as a result of after-arising circumstances of the parties not reasonably anticipated at the time of the agreement." *Varner v. Varner*, 666 So. 2d 493, 497 (Miss. 1995); *Tingle v. Tingle*, 573 So. 2d 1389, 1391 (Miss. 1990). Circumstantial changes occurring within a short time from the original decree are changes which may be reasonably anticipated and do not therefore justify modification. *Morris v. Morris*, 541 So. 2d 1040, 1043 (Miss. 1989).

In *Morris*, the Mississippi Supreme Court observed that when a reduction in support obligations was sought three months after the decree was entered, the change in circumstances reasonably could have been anticipated. *Morris*, 541 So. 2d at 1043. In *Tingle*, the Mississippi Supreme Court reversed the chancellor's modification of a child support agreement where the husband voluntarily left his job to return to school because the record indicated this reasonably could have been anticipated at the time the decree was entered. *Tingle*, 573 So. 2d at 1393.

There is little doubt that Roy's 1996 earnings fell below that of his 1995 earnings. A comparison of Roy's 1995 tax return shows gross earnings of about $45,000 with his projected 1996 earnings of $34,000. However, as pointed out by Kathy, Roy's diminished earnings may be the direct result of Roy not taking advantage of trips, which increased his income in 1995. During her cross-examination of Roy the following took place:

Question: Let me ask you one thing, back in 1995 when you did make these trips, were the trips guaranteed?

Answer: No, they weren't guaranteed. They are never guaranteed.

Question: So the availability of trips--the terms for making those trips is the same now as it has been in the past; is that right?

Answer: For years and years, yeah.

Question: Nothing has changed; is that right?

Answer: Yeah, nothing has changed.

Roy also argues that the chancellor's award coupled with his increased living expenses does not allow him sufficient money to lead any life with a decent standard of living. The increased expenses are directly related to the purchase of a new mobile home, his remarriage, and the purchase of a new

truck. Here the chancellor properly found that there had been no material change in circumstances. Roy's income decrease was related to his decision not to take trips offered at work; a voluntary move which caused him to give up his supplemental income. Also, he could have reasonably anticipated his increase in personal expenses when the original decree was entered. He was living with Renee, his new wife, on February 27, 1996, four months after the original divorce. Viewing the circumstances as a whole, we cannot conclude the chancellor was manifestly in error.

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

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