IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00634 COA

NANCILEE PEAKS ALEXANDER **APPELLANT**

v.

DANIEL WAYNE ALEXANDER **APPELLEE**

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

DATE OF JUDGMENT:	05/21/96
TRIAL JUDGE:	HON. JASON H. FLOYD JR.
COURT FROM WHICH APPEALED:	HARRISON COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	JOSEPH R. MEADOWS
ATTORNEY FOR APPELLEE:	WAYNE HENGEN
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	DOWNWARD MODIFICATION OF CHILD SUPPORT AND ALIMONY PAYMENTS
DISPOSITION:	REVERSED AND RENDERED - 11/18/97
MOTION FOR REHEARING FILED: 12/15/1997	
CERTIORARI FILED:	
MANDATE ISSUED:	

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Nancilee Alexander appeals from a decision of the Chancery Court of Harrison County to grant Danny Alexander's request for modification of child support and alimony. Finding an abuse of discretion on the part of the chancellor in granting such modification, we reverse.

FACTS

Nancilee and Danny Alexander were divorced in February of 1995. Nancilee was given custody of the parties' two children, and Danny was granted visitation. Since the entry of their divorce, Danny has filed three complaints for contempt against Nancilee. The first complaint was settled and an order of dismissal was obtained in April of 1995. A second complaint resulted in a judgment against Nancilee to pay to Danny's father's estate $13,739.50 plus interest. This sum represents Nancilee's portion of a promissory note owed to Danny's father which was executed by both Danny and Nancilee during their marriage. A third complaint for contempt was filed against Nancilee in February

of 1996 alleging that she had failed to comply with the order of the chancery court regarding visitation. Danny contends that Nancilee interfered with his visitation rights with his son by refusing to permit Danny to administer the child's medication. Danny testified that his son suffers from an illness that requires that he be given medication three times a day. Danny testified that Nancilee, instead of giving Danny the medication to administer, insisted on coming to Danny's home three times a day to administer the medication. Danny argues that Nancilee's inflexibility on this matter constantly interfered with any plans that he and his son might have.

Nancilee responded that the reason she would not permit Danny to administer the medication was because he refused to give the medication at the appropriate times. Nancilee testified that her son was hospitalized numerous times for having too much medication in his system and that each time he had been visiting with his father. Nancilee contends that her understanding from her son's doctors was that it was important for the medication to be administered at certain times so that the level of medication in the child's system would be constant at all times. Nancilee stated that Danny admitted to her that he was not giving the child the medication at the exact times prescribed. In response, Danny contends that he contacted his son's doctor and asked if a few hours before or after the prescribed times for administration would make a difference in the child's condition. Danny contends that the doctor told him that it would not. Danny also argues that while his son was hospitalized after Danny's visits with him, there is no medical evidence that his son's problems with the medication level was due to Danny's failure to administer the medication properly. Danny contends that there was a dosage problem and that the doctors have since changed the child's medication. Danny points out that now his son must take two tablets three times a day and that he (Danny) is just as capable as Nancilee of administering the medication.

Danny argues further that Nancilee has interfered with his visitation with his daughter because his daughter often refuses to come visit him. Danny contends that Nancilee is adversely influencing his daughter's decision to visit with him. Nancilee contends that she has not influenced their daughter in any way and that she does not know why the child does not want to visit with Danny.

This third contempt complaint was later amended to include a request for modification of child support and alimony due to a change in circumstances. A hearing on the complaint was held in March of 1996. At the hearing, Danny testified that he had resigned from his $140,000 a year job as chief financial officer of American Medical Response because of stress. Danny testified that the stress was a result of his divorce, the three complaints for contempt he was forced to file against his ex-wife, a criminal case pending at the time of the divorce to which he plead no contest though vehemently denying his guilt, his son's deteriorating medical condition, increased job obligations as well as increased travel on the job that he held at the time of the divorce, and the recent death of his father. Danny testified that the stress had caused his own health to decline to such an extent that he could not function and was currently seeking psychological counseling.

Danny indicated to the chancery court that he had accepted a job in Georgia as the chief financial officer for Central Ambulance Company. Danny's starting salary with Central Ambulance Company is $40,000 per year with the possibility of a fifteen percent increase after four months. Following a hearing on Danny's request for modification, the chancery court modified the previous divorce judgment as it pertains to child support and alimony. The alimony and support awards from the original divorce decree are as follows: child support - $833.33 per month plus all insurance,

educational, and uncovered medical expenses; periodic alimony - $500 per month; lump sum alimony - $30,000 paid in $1,000 monthly installments. Danny is also responsible for one-half of the mortgage payment on the marital residence in which his ex-wife and children live--$640 per month. In modifying the alimony and child support awards, the chancellor ordered the following: child support - $500 plus all insurance on the children, one-half of educational expenses, and one-half of all uncovered medical expenses; periodic alimony - $200 per month until such time as the lump sum alimony is paid in full and then the periodic alimony increases to $400 per month. The chancellor based his modification on a monthly adjusted gross income of $2,464.76. It should also be noted that at the time of the modification hearing, Danny had $40,000 in a savings account.

As part of his opinion, the chancellor made numerous findings of fact which included the above problems that Danny contends to have. The chancellor also stated in his opinion that he found that Danny had made a conscious and voluntary decision to lower his income while aware of his financial responsibilities. The chancellor went on to state that he found it suspicious that Danny decided that he needed to lower his stress such a short time after the divorce (thirteen months). Despite these concerns by the court, the chancellor found that Nancilee's refusal to cooperate with the divorce decree had significantly contributed to Danny's stress. As such, the chancellor went on to grant Danny's request for modification stating that there was no evidence that Danny had acted in bad faith in deciding to quit his job and take a lower paying one.[(1)]

Feeling aggrieved, Nancilee filed this appeal citing five specific areas in which the chancery court erred in its ruling:

1. The trial court erred in reducing the amount of the award of child support.

2. The trial court erred in requiring that the payment of all uncovered medical expenses of the minor child will be shared.

3. The trial court erred in requiring the defendant to pay one-half of the cost of education of the minor children, including tuition and books.

4. The trial court erred in reducing the amount of periodic alimony.

5. The trial court erred in ruling that there had been a material and substantial change in the circumstances of Danny, though of his own making, to warrant the above referenced changes.

ANALYSIS

I. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THERE HAD BEEN A MATERIAL AND SUBSTANTIAL CHANGE IN DANNY'S CIRCUMSTANCES SO AS TO WARRANT A MODIFICATION OF CHILD SUPPORT AND ALIMONY.

While Nancilee assigns error to five specific rulings by the chancery court, we find that the above stated issue is dispositive of this case and we will address it accordingly.

The fundamental standard of review in all appeals from our state's chancery courts is well-established and oft-quoted:

> This Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. ***Bell v. Parker,* 563 So.2d 594, 596-97 (Miss.1990).** ***See also Ferguson v. Ferguson*, 639 So.2d 921 (Miss.1994); *Faries v. Faries,* 607 So.2d 1204, 1208 (Miss.1992).**
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> In other words, "[o]n appeal [we are] required to respect the findings of fact made by a chancellor supported by credible evidence and not manifestly wrong." *Newsom v. Newsom*, 557 So.2d 511, 514 (Miss.1990). ***See also Dillon v. Dillon,* 498 So.2d 328, 329 (Miss.1986).** This is particularly true in the areas of divorce, alimony and child support. ***Tilley v. Tilley,* 610 So.2d 348, 351 (Miss.1992); *Nichols v. Tedder,* 547 So.2d 766, 781 (Miss.1989).** The word "manifest", as defined in this context, means "unmistakable, clear, plain, or indisputable." **Black's Law Dictionary 963 (6th ed. 1990).**

***Magee v. Magee,* 661 So. 2d 1117, 1122 (Miss. 1995).**

Modification of divorce decrees is governed by Miss. Code Ann. § 93-5-23 (Supp. 1996). Furthermore, in determining whether modification is warranted, the chancellor must consider whether there has been a material change in circumstances of one of the parties. ***Tingle v. Tingle,* 573 So. 2d 1389, 1391 (Miss. 1990).** "The material or substantial change is relative only to the after-arising circumstances of the parties to the original decree. This change, moreover, must also be one that could not have been anticipated by the parties at the time of the original decree." ***Id.*** (citations omitted).

In the present case, Nancilee argues that Danny failed to prove that a material change in circumstances had occurred since the divorce decree that could not have been reasonably anticipated especially since Danny had the same job prior to the divorce. Nancilee argues that Danny's testimony regarding stress as it related to his need to obtain counseling and to resign from his job was unsubstantiated. Furthermore, Nancilee argues, the court stated in its opinion that Danny's decision to quit his job was conscious and voluntary and that the court found it suspicious that Danny's need to lower his stress by lowering his income came such a short time after his divorce (thirteen months). Nancilee argues that the trial court erred in giving Danny the benefit of the doubt as to whether the stress leading to his new employment should have been anticipated. Nancilee argues that the trial court's own opinion shows that there was evidence of bad faith surrounding Danny's actions. Nancilee contends that Danny's situation was of his own making and that the chancellor abused his discretion in ignoring the obvious evidence of bad faith and permitting modification of the alimony and child support awards.

Danny argues that in considering whether to modify a divorce judgment, the court must consider two main elements: (1) whether there has been any act of bad faith on the part of the petitioning party, ***see Varner v. Varner,* 666 So. 2d 493, 497 (Miss. 1995)** ("The law is well-settled that, if an obligor, acting in bad faith, voluntarily worsens his financial position so that he cannot meet his obligations, he cannot obtain a modification of support. Bad faith has generally been defined as an obligor's action to reduce income or assets for the purpose of jeopardizing the interests of his children.") (citations omitted), and (2) whether the events leading to the alleged change in circumstances could have been anticipated. ***See Tingle,* 573 So. 2d at 1391-93** (finding that Mr. Tingle's decision to quit his job and go back to school was an anticipated event). Danny argues that the evidence of the stress leading to

his resignation was unrefuted and that the court could find no bad faith on his part. Danny points out that he petitioned for modification immediately after resigning from his job and prior to finding new employment. Danny argues that during the interim between jobs he kept up with all of his obligations to his ex-wife and children. Danny also points out that the $40,000 that he will be earning at his new job is more in line with the amount of money he was earning during the majority of his marriage. Danny contends that the increase in salary to $140,000 came at the end of his marriage.

As to the element of whether his change in circumstances could have been anticipated, Danny argues that the sudden death of his father, Nancilee's refusal to cooperate with the divorce decree leading to the filing of three contempt actions, and the health problems of his son could not have been anticipated. Danny contends that the problems stated above along with several other stressful events led to his own decline in health and the only way he could alleviate some of the stress was to change jobs. Danny argues that it was not error for the chancellor to rule as he did nor was the chancellor's decision an abuse of discretion.

While we sympathize with Danny's plight and understand that financially, his circumstances have changed, we do not find that Danny's actions justify a modification in child support and alimony. Danny maintains that his stress was brought on, in part, by a criminal conviction and increased job demands. However, we note that the criminal charge was pending at the time of his divorce thus he must have known that the charge would be disposed of in the future. We are hard-pressed to find that the criminal conviction was not, at least, somewhat anticipated. After all, Danny did plead no contest to the charge. He also testified that Nancilee had nothing to do with the criminal charge. As to the increased job demands, we must agree with Nancilee that this too could have been anticipated as he did occupy the same position prior to the divorce. It would seem logical that a job paying $140,000 a year would carry with it certain demands that may at times be stressful.

Danny also complains of the stress he has endured due to the uncooperative nature of his ex-wife, death of his father, and medical needs of his son, but he offers no proof that this stress impacted his ability to perform his $140,000 a year job. There is no evidence in the record, other than Danny's own declarations, to indicate that the stress was such that he had absolutely no choice but to take the route of quitting his job and seeking a less stressful one. Absent such evidence, we cannot in good conscience find that Danny's actions were anything more than self-serving acts taken at the expense of his children. Although we recognize that the supreme court has not indicated that a voluntary reduction in income can never justify a modification of support, ***Tingle*, 573 So. 2d at 1393** (Blass, J. specially concurring), we do not believe the case *sub judice* falls in a category that permits modification based on a voluntary reduction in income.

Here, Danny placed himself in a less financially secure position and now expects to be protected from the consequences. We do not find such to be equitable to his children or his ex-wife as they had no say in and no control over Danny's sudden decision. The death of Danny's father, while tragic, as well as the medical needs of his son are not the fault of Nancilee, and she and the children should not have to suffer because of Danny's inability to cope. Furthermore, Danny's son was suffering from the same medical problems prior to the divorce; therefore, the fact that there could be complications in the future is not wholly unrealistic. The chancellor in his own opinion expresses his doubts as to the good faith of Danny's drastic actions, and despite such doubts, the chancellor granted the relief for which Danny asked. The chancellor seems to base his decision on the fact that Nancilee has not been as

cooperative as she should have been. However, the unrefuted evidence shows her insistence on the timely administration of her son's medicine was the sole basis for her "uncooperativeness" in regard to their son. In regard to their daughter, there is no proof that Nancilee ever suggested that their daughter not visit Danny. We disagree that Nancilee's uncooperative periods rise to the level necessary to warrant a modification of the divorce decree. We find that the chancellor abused his discretion and therefore the judgment of the chancery court as it pertains to modification of child support and alimony is reversed and rendered.

THE JUDGMENT OF THE CHANCERY COURT OF HARRISON COUNTY IS REVERSED AND RENDERED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEE.

BRIDGES, C.J., DIAZ, HERRING, AND KING, JJ., CONCUR. SOUTHWICK, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY McMILLIN, P.J., COLEMAN AND HINKEBEIN, JJ. THOMAS, P.J., NOT PARTICIPATING.

SOUTHWICK, J., DISSENTING:

Domestic cases are among the most difficult and fact-intensive disputes to come before any court. Perhaps it is for that reason that such broad discretion is given to chancellors. I dissent because to me the majority's opinion is merely a substitution of one view of the facts for the equally supportable view of the chancellor below. That is not our function.

An ex-husband who at the time of divorce was making $140,000 a year seeks to modify his financial obligations as a result of now having a job that pays $40,000 a year. The majority is correct that had Mr. Alexander "acting in bad faith, voluntarily worsen[ed] his financial position so that he cannot meet his obligations, he cannot obtain a modification of support." ***Varner v. Varner*, 666 So. 2d 493, 497 (Miss. 1995)** (quoting *Parker v. Parker*, 645 So. 2d 1327, 1331 (Miss. 1994)). The chancellor found no bad faith and held that the change in jobs was not done to avoid the support obligations. The majority relies on Mrs. Alexander's view that her ex-husband's testimony regarding his stress, counseling and resignation from his job "was unsubstantiated," i.e., uncorroborated. Regardless, it was also unrebutted. The chancellor accepted it.

As the majority also declares, in order to modify the judgment for the reasons Mr. Alexander asserts, it is necessary that the chancellor determine that this change in circumstances could not have been anticipated. Going through the same facts as did the chancellor, the majority points out that some of the events that culminated in Mr. Alexander's decision to take a lower-paying job a year after the divorce were already in motion at the time of the divorce. As the old saying goes, "hindsight is 20/20." The chancellor's conclusion that Mr. Alexander could not reasonably have anticipated all that would occur to him, even if some of the problems were starting to arise, was a fact-finding that was within the chancellor's discretion.

If substantial evidence exists to support a chancellor's fact-findings, "we will not disturb his

conclusions, notwithstanding that we might have found otherwise as an original matter." ***Dunn v. Dunn,* 609 So. 2d 1277, 1284 (Miss. 1992).** With all respect for the majority, I believe that is what has occurred here. I would affirm.

McMILLIN, P.J., COLEMAN, AND HINKEBEIN, JJ., JOIN THIS SEPARATE OPINION.

1. The Chancellor stated as follows:

> The Court has reviewed the controlling authority on support modification and finds no evidence of Danny's bad faith in reducing his income; finds that his income reduction was not simply for the purpose of avoiding his support obligations; and the Court will give Danny the benefit of the doubt as to whether the stress leading to his new employment should have been anticipated.