IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 97-CA-00115 COA

WENDEE GAIL WORTMAN CARTER **APPELLANT**

v.

BILLY MICHAEL CARTER **APPELLEE**

DATE OF JUDGMENT:	12/30/96
TRIAL JUDGE:	HON. WILLIAM JOSEPH LUTZ
COURT FROM WHICH APPEALED:	MADISON COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	TRACY L. MORRIS
ATTORNEYS FOR APPELLEE:	JAMES D. BELL EDUARDO ALBERTO FLECHAS
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	APPELLEE AWARDED CUSTODY OF MINOR CHILD
DISPOSITION:	AFFIRMED - 9/29/98
MOTION FOR REHEARING FILED:	10/27/98
CERTIORARI FILED:	
MANDATE ISSUED:	

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

McMILLIN, P.J., FOR THE COURT:

¶1. This case is before the court on an appeal by Wendee Carter. She seeks to reverse two rulings issued in the Chancery Court of Madison County. The first ruling denied her petition for contempt brought against her former husband, Billy Carter, for failure to pay child support. The second ruling amended the original judgment of divorce to change custody of the two minor children of the parties from Mrs. Carter to Mr. Carter. We affirm the chancellor.

I.

Preliminary Jurisdictional Question

¶2. Mr. Carter raises the issue of whether this Court has jurisdiction to consider the chancellor's

ruling on the contempt aspects. He claims that this issue was decided separately by the chancellor and there was not a timely notice of appeal from the order ruling on non-payment of child support.

¶3. Mr. Carter filed a motion seeking a modification of custody of the children on April 4, 1996. Mrs. Carter filed her motion for contempt for non-payment of child support on April 12. On April 19, she filed a separate written response to Mr. Carter's motion to change custody. The chancellor ruled on the contempt motion, denying relief, by order entered on August 30. The chancellor subsequently ruled on the custody modification by order entered on December 30. Mrs. Carter filed her notice of appeal on January 6, 1997.

¶4. It is axiomatic that only final orders are appealable. ***Grey v. Grey,*** **638 So. 2d 488, 492 (Miss. 1994).** In the context of cases involving questions of family law, the issue of finality for purposes of appeal is somewhat unique since the chancery court retains jurisdiction of such matters as periodic alimony, child support, and child custody. It is possible that, over the course of an extended number of years, the court may be called upon to resolve any number of disputes, yet all of those disputes arise in the same proceeding. In some instances, there may arise legitimate questions of when a particular ruling is final for purposes of appeal. Under our current rules of procedure, it is envisioned that these recurring disputes, including contempt and custody modification proceedings, will be brought to the court's attention "by complaint or petition only . . . ." M.R.C.P. 81 cmt. Though both parties in this case persist in calling their pleadings "motions," the comment specifically states that "[i] nitiating Rule 81(d) actions by "motion" is not intended." **M.R.C.P. 81 cmt.**

¶5. In order to determine the finality of the chancellor's ruling on the contempt matter, we must discover how these competing pleadings were treated procedurally. The chancellor correctly elected to treat the pleadings as what they actually represented, rather than to accept the incorrect nomenclature provided by the parties. ***Bruce v. Bruce,*** **587 So. 2d 898, 904 (Miss. 1991).** It is obvious that Mr. Carter's pleading seeking modification of custody must be seen as either a complaint or petition under Rule 81. The question then arises as to whether to treat Mrs. Carter's subsequent motion for contempt as a counterclaim or as a separate Rule 81 complaint or petition commencing a separate proceeding. We observe that the chancellor elected to treat the contempt motion as a counterclaim even though Mrs. Carter did not identify it as one. In his order dealing with the contempt issue, the chancellor stated as follows:

> Billy Michael Carter (Mike) filed a *petition* to modify custody. Wendee Gail Wortman Carter (Wendee) his former wife who has primary custody of their minor children answered *and counterclaimed* to cite Mike in contempt for failure to pay child support. (emphasis supplied).

¶6. We are of the opinion that the chancellor was acting within his discretion when he recast the pleadings in this manner. Because the chancellor elected to treat Mrs. Carter's separate pleading as a counterclaim, it is clear under our procedural rules that the order disposing of the counterclaim did not have the requisite finality to make it appealable. M.R.C.P. 54(b). Thus, until all aspects of the proceeding were resolved, there was no right to appeal. The final resolution of all issues then pending before the chancellor did not occur until December 30, 1996. Mrs. Carter filed her appeal notice within thirty days from that date. This vested jurisdiction in this Court to consider all matters ruled on by the chancellor, including specifically, the issue of contempt.

¶7. By our holding, we do not mean to suggest that every post-divorce petition or complaint filed while some other claim advanced by the other party remains unresolved *must* be treated as a counterclaim. We only hold that the chancellor may, in the exercise of the discretion afforded to the trial courts to manage their own dockets, affirmatively elect to treat it as such. It may be that, in some circumstances, the first matter will have progressed so far toward final resolution that to permit the defending party to delay the finality of the court's decision by simply filing a new claim would be inequitable. In such case, the chancellor may, in the exercise of discretion, elect to treat this subsequent pleading as a separate proceeding. We only sound a note of caution that, in instances where there may be some question on the proper treatment of the second claim, the chancellor should speak on the record with some measure of certainty as how the competing pleadings are being handled procedurally. In the absence of a clear statement from the chancellor, counsel for the aggrieved litigant should be wary of relying on the result in this case as a basis to permit the appeal period to expire from an order that may, or may not, ultimately prove to be interlocutory in character.

¶8. Having determined that, in this instance, we have jurisdiction to reach the merits of both aspects of this appeal, we will now proceed to do so, touching first on the issue of child custody.

III.

Modification of Child Custody

¶9. The chancellor modified the court's earlier award of custody, which gave Mrs. Carter primary custody of the two minor children. The two children of the marriage, a boy and a girl, were eight and six years of age, respectively, at the time of the modification hearing. There was a substantial amount of evidence presented regarding the care the children had received since the divorce that indicated that the children's physical needs were not being properly looked after. Teachers for both children reported the children repeatedly coming to school in an unclean and unkempt condition, sometimes to the extent that they had noticeable body odors. These teachers also reported repeated instances where the children did not appear to be appropriately dressed, to include lack of underwear or dressed too lightly to protect them from inclement weather. Mrs. Carter claimed that lack of sufficient resources caused her to have to wash clothing in the bathtub and that this explained why the children's clothing may not have always been clean.

¶10. There was evidence presented that tended to show that the children were not being subjected to appropriate discipline, and that this was causing the children to have behavioral problems at school. Mrs. Carter had subsequently remarried and there was evidence that her second husband was a photographer who engaged in photographing female nudes and that the children had, either purposely or through laxity in precautions, been exposed to photographic material having a sexual content inappropriate for younger children.

¶11. Mrs. Carter was unemployed and stayed at home as the caregiver for these two children as well as two younger children born to her subsequent marriage.

¶12. There was substantial evidence that the conditions of Mrs. Carter's home were below acceptable standards for basic cleanliness, and that the children had been subjected to five separate changes of residence in a space of approximately two years.

¶13. The proof showed, on the other hand, that Mr. Carter lived in a home that he owned and that had recreational facilities available for the children. At least one expert in the area of family social work who had participated in evaluations of the children testified that there was an observable difference in the demeanor of the children depending on whether they were brought in by their father or mother. She said that the children were well-behaved and observed proper limits in their behavior when in the company of their father, but behaved inappropriately and were disruptive and unruly in the company of their mother.

¶14. There was, unquestionably, competing evidence presented to the chancellor that tended to contradict those matters set out above. Mrs. Carter claimed that many of the comments of the children made to investigating social workers had been programmed into them by Mr. Carter's mother and did not reflect the truth. There was even testimony from one investigating social worker that expressed the opinion that the daughter had been subjected to sexual abuse at the hands of Mr. Carter.

¶15. On this conflicting evidence, the chancellor rejected any conclusion that Mr. Carter had subjected his children to sexual abuse. He further found that the children were not receiving adequate physical care in terms of cleanliness and proper clothing while in their mother's care. He concluded that, on balance, the proof showed that the best interest of the children would be served by their being transferred to the primary care of their father.

¶16. The resolution of disputed questions of fact is a matter entrusted to the sound discretion of the chancellor. ***Murphy v. Murphy,*** **631 So. 2d 812, 815 (Miss. 1994).** On appeal, we are limited to searching for an abuse of that discretion; otherwise, our duty is to affirm the chancellor. ***Id.*** Our job is not to reweigh the evidence to see if, confronted with the same conflicting evidence, we might decide the case differently. Rather, if we determine that there is substantial evidence in the record to support the findings of the chancellor, we ought properly to affirm.

¶17. The chancellor, by his presence in the courtroom, is best equipped to listen to the witnesses, observe their demeanor, and determine the credibility of the witnesses and what weight ought to be ascribed to the evidence given by those witnesses. ***Id.*** It is necessarily the case that, when conflicting testimony on the same issue is presented, the chancellor sitting as trier of fact must determine which version he finds more credible. ***Id.***

¶18. As to matters of law, however, a different standard applies. In that case, our review is *de novo,* and if we determine that the chancellor applied an incorrect legal standard, we must reverse. ***Morreale v. Morreale,*** **646 So. 2d 1264, 1267 (Miss. 1994).**

¶19. Both questions present themselves in this appeal. Mrs. Carter claims that the chancellor failed to apply the correct legal standard, citing authority that, in order to effect a change of custody, there must be a showing of a material change in circumstance in the situation of the custodial parent that is detrimental to the best interest of the children. ***Ash v. Ash,*** **622 So. 2d 1264, 1265-66 (Miss. 1993)**. Mrs. Carter claims that, instead of searching for a post-divorce detrimental change, the chancellor simply retried the issue of custody. In view of the chancellor's determination that the children's physical and emotional needs were not being properly met by the mother, her argument on this point amounts, in effect, to a claim that, so long as the neglect of the children has been continuous since the earlier grant of custody, the chancellor is without authority to intervene. We do not consider this to

be the law. The Mississippi Supreme Court, in the 1996 case of *Riley v. Doerner*, in apparent recognition that such a technical application of the rule regarding change of custody could lead to nonsensical results, said:

> In earlier opinions on this subject, we have held that a change in the circumstances of the non-custodial parent does not, by itself, merit a modification of custody. (citations omitted). We adhere to that holding today. However, we further hold that when the environment provided by the custodial parent is found to be adverse to the child's best interest, *and* that the circumstances of the non-custodial parent have changed such that he or she is able to provide an environment more suitable than that of the custodial parent, the chancellor may modify custody accordingly.

***Riley v. Doerner,* 677 So. 2d 740, 744 (Miss. 1996).**

¶20. The chancellor in this case included findings that the home situation of Mr. Carter had improved since the divorce in terms of its physical attributes as well as the stability of the home life to which the children would be exposed and the ability of Mr. Carter to provide the day-to-day care the children required.

¶21. There was substantial evidence, though hotly disputed, to support the chancellor's conclusion that the test of *Riley v. Doerner* had been met and that the "polestar consideration" of the best interest of the children would be served by ordering a change in custody. We cannot conclude that the chancellor was manifestly wrong in so finding, and we, therefore, affirm.

IV.

Contempt for Non-payment of Child Support

¶22. The original judgment provided that Mr. Carter was to pay "monthly child support in a sum equivalent to twenty percent (20%) of his adjusted gross income, and that pursuant to statute, an Order for Withholding shall immediately issue to the Plaintiff's employer directing that said child support be immediately withheld on a monthly basis."

¶23. In charging Mr. Carter with contempt for nonpayment of child support, Mrs. Carter conceded that she was receiving the twenty percent from Mr. Carter's salary from his principal place of employment. (She originally charged that the employer was paying Mr. Carter partly in cash to avoid the full impact of the judgment, but that question was not preserved for review on appeal.) Mrs. Carter's claim for contempt lies in the fact that she accused Mr. Carter of having a long-standing second source of income from running a newspaper delivery route that he ignored in computing his support obligation. Her claim was that, under the terms of the judgment, she should have been receiving twenty percent of Mr. Carter's net income from this second undertaking in addition to the withholding from his wages from his principal job.

¶24. The chancellor resolved the issue by finding that the income from the paper route actually belonged to Mr. Carter's mother. Evidence showed that the newspaper's records listed Mr. Carter as the contract carrier and that he performed substantial services in delivering the papers; however, it was undisputed that Mr. Carter's mother also did some of the work and apparently retained all the

funds derived from the operation. Mr. Carter's mother claimed that Mr. Carter did not receive any payment for his work on the paper route because she felt she had repaid him by providing housekeeping-type services to Mr. Carter on a regular basis. Nevertheless, Mr. Carter's mother admitted to paying Mr. Carter's house mortgage note in an amount of approximately $1,600 per month. The chancellor found as a matter of fact that this payment of the house note was simply a gift.

¶25. Though we find it highly problematic that this arrangement is anything other than a scheme to conceal a fairly substantial source of income available to Mr. Carter, we reluctantly affirm the chancellor's decision to deny Mrs. Carter relief, though we do so for reasons other than a finding that Mr. Carter was not sharing in the profits of the newspaper delivery operation.

¶26. We conclude, on our own motion, that the chancellor's open-ended order that twenty percent of Mr. Carter's adjusted gross income be set apart as child support was unenforceable. In *Morris v. Stacy,* the supreme court found that a provision ordering the husband to pay ten percent of his adjusted gross income exceeding $50,000 as child support was improper. ***Morris v. Stacy,* 641 So. 2d 1194, 1202 (Miss. 1994).** The court said that this free-floating amount, subject to infinite variation, could not be classed as an escalation clause because it was in no way tied to the four factors set out in ***Tedford v. Dempsey,* 437 So. 2d 410, 418-19 (Miss. 1983).** We find the same reasoning applies to the chancellor's award in this case. From the day the judgment was issued, child support was subject to wide swings that depended solely on the father's income at any particular point in time. Thus, a substantial increase in earnings would translate automatically to a substantial increase in child support without any consideration of the changing needs of the children or the separate ability of the mother to provide her fair share of the children's support, both factors being essential to a fair and equitable adjudication of the proper level of support. ***Morris,* 641 So. 2d at 1201.** At the other extreme, the noncustodial parent could, unilaterally, reduce his child support obligation to nothing by simply ceasing to be gainfully employed. Such uncertainty in regard to the noncustodial parent's obligations simply cannot be tolerated. In the case of *Wing v. Wing,* the supreme court quoted with approval from a treatise on child support to the effect that "an increase in the [non-custodial] parent's income does not necessarily entitle the child to more support; nor does an income decrease necessarily signal inability to pay, as when the obligated parent has assets." ***Wing v. Wing,* 549 So. 2d 944, 947 (Miss. 1989)** (citing H. Krause, Child Support In America -The Legal Perspective 24 (1981)).

¶27. We hold that a child support award must be in a definite amount based upon the chancellor's considered judgment as to all those necessary factors that go into the determination. This does not mean that the original definite amount may not be made the subject of a binding escalation clause that meets the requirements of the *Tedford v. Dempsey* decision. However, there must be a base determination from which to begin, and the potential for variation must be based upon considerations extending beyond the unknowable future variations in the paying parent's income. An award of child support determined only as a percentage of whatever the obligated parent's adjusted gross income happens to be at any particular moment does not provide the necessary certainty by which the custodial parent can plan for the ongoing care of the children. Neither does it provide a reliable benchmark by which the chancellor can subsequently enforce the legal support obligations of the noncustodial parent when that matter comes into dispute.

¶28. We face a dilemma in this case as to what remedy is appropriate where the parties have

acquiesced to these terms for an extended period of time. However, we are satisfied that Mr. Carter cannot, as a matter of law, be found to be in contempt of a judgment that is, on its face, unenforceable according to its terms under the *Morris v. Stacy* decision. We find ourselves in a further quandary because of the fact that custody of the children has now been changed to the parent whose prior obligation of support we are called upon to measure and enforce. Child support, though paid to the custodial parent, is in actuality the right of the child. ***Varner v. Varner,* 588 So. 2d 428, 432 (Miss. 1991).** The custodial parent receives the money in trust for the benefit of the child. ***Id.*** Thus, even were we to determine that, in equity, some appropriate retroactive adjustment in Mr. Carter's support obligation ought to be made in order to account for money he received from his mother, that would not resolve the question of whether the retroactive support ought to be paid to Mrs. Carter or by Mr. Carter to himself as the present custodial parent.

¶29. It may be the case that, upon a proper showing, a former custodial parent may show that, because of the failure of the noncustodial parent to meet his support obligation, the custodial parent has expended a disproportionate share of her resources to meet the children's needs. In that case, there is no reason in equity why the chancellor could not award an appropriate part of the arrearage directly to the custodial parent by way of reimbursement even though the child is, for whatever reason, no longer in that parent's custody. ***Vice v. Department of Human Services,* 702 So. 2d 397 (¶21) (Miss. 1997).**

¶30. However, in this case it appears beyond dispute from the proof that, unfortunately, any failure on Mr. Carter's part to pay an equitable share for the support of the children did not cause Mrs. Carter to expend a disproportionate share of her own resources. Rather, it appears that the lack of additional funds simply caused the children to be deprived of certain things normally considered basic to a normal, reasonably comfortable life. This circumstance would not be remedied by now ordering Mr. Carter to now pay Mrs. Carter, by way of a retroactive adjustment in child support, an amount ultimately adjudicated to be equitable on these unique facts. Rather, keeping in mind that the primary interest is the welfare of the children, we conclude that the children's interest is better served by preserving Mr. Carter's assets that might otherwise go to his former wife in anticipation that he will expend those assets to meet the needs of the children. That this resolution of the back child support question appears on its face to work an inequity on Mrs. Carter is evident. However, we find it the result best calculated to advance the well-being of these minor children and it is on that basis that we do so.

¶31. Any relief designed to punish Mr. Carter for his prior failure to pay his fair share of the support of these children or to presently extract funds from him to be paid to Mrs. Carter to satisfy these alleged past shortcomings was denied by the chancellor. Though we do not necessarily agree with his reasoning in doing so, we nevertheless conclude that he reached the correct result. In those situations, our duty is to affirm the chancellor and we do so. ***Love. v. Barnett,* 611 So. 2d 205, 207 (Miss. 1992).**

¶32. **THE JUDGMENT OF THE CHANCERY COURT OF MADISON COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

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

KING, J., CONCURRING:

¶33. While concurring, I write separately to address the issue of delinquent child support.

¶34. The majority holds that while finding Mr. Carter failed to pay child support, it is now inappropriate to require that the back support be paid to Mrs. Carter. That may well be true. However, I do not believe it appropriate to grant a windfall to Mr. Carter by his avoidance of the past due child support.

¶35. I would suggest that it is more appropriate to direct Mr. Carter to pay those sums into a court supervised account for the children, and to specifically require that these funds not be used to supplant Mr. Carter's obligation to support his children.

¶36. It would appear to me that Mr. Carter has perpetrated a fraud upon the court, and unjustly enriched himself at the expense of his children, by claiming he received no income from the newspaper route. To do anything other than require payment of these sums to the children would seem to sanction such an action.

BRIDGES, C.J., COLEMAN AND HERRING, JJ., JOIN THIS SEPARATE OPINION.