

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CA-02258-COA

LAURIN JONES KAY

APPELLANT

v.

GREGOR THOMAS KAY

APPELLEE

DATE OF JUDGMENT: 11/02/2007
TRIAL JUDGE: HON. JAMES H.C. THOMAS JR.
COURT FROM WHICH APPEALED: LAMAR COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT: L. ANNE JACKSON HODUM
ATTORNEY FOR APPELLEE: ALEXANDER IGNATIEV
NATURE OF THE CASE: CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION: DIVORCE GRANTED ON THE GROUND
OF UNCONDONED ADULTERY AND
HUSBAND ORDERED TO PAY CHILD
SUPPORT
DISPOSITION: AFFIRMED IN PART AND REVERSED
AND REMANDED IN PART – 06/30/2009
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE KING, C.J., IRVING AND ROBERTS, JJ.

IRVING, J., FOR THE COURT:

¶1. The Lamar County Chancery Court granted Laurin Jones Kay a divorce from Gregor Thomas Kay (Greg) on the ground of uncondoned adultery. The chancellor divided the marital estate and ordered Greg to pay child support for their two children. Feeling aggrieved, Laurin appeals and asserts: (1) that the chancellor erred in deviating from the statutory child support guidelines, (2) that the chancellor erred in ordering her to pay twenty

percent of Greg's student loan debt, (3) that the chancellor erred in not ordering that the debt on a vehicle purchased during the marriage be paid with proceeds from the sale of the marital home, and (4) that the chancellor erred in declining to award her alimony.

¶2. We find, as we explain below, that the chancellor failed to factor in all of Greg's income when ordering him to pay \$650 per month in child support. We also conclude that the chancellor failed to determine Greg's gross or adjusted gross income. Therefore, we reverse the chancellor's order requiring Greg to make monthly child support payments of \$650 and remand the case for further proceedings consistent with this opinion.

FACTS

¶3. Laurin and Greg were married on October 3, 1992, and separated on December 6, 2006. They have two children, Hardin Thomas Kay, born on August 6, 2001, and Keller Grant Kay, born on December 20, 2006. On April 20, 2007, Laurin filed a complaint for divorce on the ground of adultery or, alternatively, irreconcilable differences. She sought full legal and physical custody of the children and asked that Greg be awarded reasonable visitation. She also requested that Greg be ordered to pay child support and alimony.

¶4. Greg filed an answer and counterclaim wherein he alleged that he was entitled to a divorce on the ground of habitual cruel and inhuman treatment or, alternatively, irreconcilable differences. Greg sought joint legal and physical custody of the children or, alternatively, temporary care, custody, and control of the children with reasonable visitation awarded to Laurin. Further, he requested that Laurin be ordered to pay child support.

¶5. The Lamar County Chancery Court heard the case on October 11, 2007. Greg

admitted that he had been unfaithful to Laurin with several different women and that he was living with his paramour at the time of the hearing.

¶6. As for his employment, Greg testified that he has been employed as an assistant professor at the University of Southern Mississippi for the previous five years. Greg stated that he works full-time during the nine-month school year and earns \$45,000 per year. He also stated that, in addition to his regular employment, he has taught summer school every year since he has been employed with the university. Greg's 8.05 financial disclosure form¹ reflects that he earns \$3,750 per month in gross income, pursuant to his nine-month contract. Greg testified that he received \$4,500 in overload pay and \$5,000 in grant money in 2007.

¶7. On cross-examination, Greg explained why his 2006 income tax return showed that he earned a gross income of \$47,653.05 and a net income of \$35,299.78. Greg stated that his overload pay was factored into that figure.

¶8. Following the hearing, the chancellor granted Laurin a divorce on the ground of uncondoned adultery. The chancellor then awarded the parties joint legal custody of the children, with Laurin receiving primary physical custody and Greg receiving reasonable visitation. Further, the chancellor ordered Greg to pay \$650 per month in child support, concluding that his net take home pay was approximately \$3,200. The chancellor also ordered that the marital home be sold and that the first \$2,500 of the proceeds be applied toward Laurin's attorney's fees and that the next \$2,000 be used by Laurin for relocation

¹ Rule 8.05 of the Uniform Chancery Court Rules requires parties in cases involving domestic economic issues or property division to submit a financial disclosure statement.

expenses. Then, the chancellor ordered that the next portion of the proceeds be used to pay joint marital bills that the parties had accumulated. Laurin was also awarded exclusive use and benefit of the home until it was sold. Greg was ordered to assume responsibility for eighty percent of a debt to Sallie Mae that he had incurred in student loans, while Laurin was ordered to pay twenty percent of the debt or \$100 per month as long as the debt is being paid in installment payments. The chancellor denied Laurin's request for alimony.

¶9. Shortly thereafter, Laurin filed a motion to reconsider wherein she requested that the chancellor reconsider his final judgment because she argued inter alia: (1) that the chancellor failed to include her vehicle, a 2005 Chevrolet Equinox, in the final judgment even though the parties had stipulated that all of the marital debt, with the exception of the Sallie Mae loan was to be paid from the proceeds of the sale of the marital home; (2) that the chancellor should reconsider his denial of alimony, because a financial disparity exists between the parties; (3) that the chancellor deviated from the child support guidelines without providing a detailed, written explanation for doing so; and (4) that the chancellor should reconsider his ruling ordering Laurin to pay a portion of Greg's student loan debt.

¶10. On December 19, 2007, the chancellor entered a judgment on Laurin's motion. The chancellor first addressed Laurin's argument as it related to the Chevrolet Equinox by stating that "[i]f the debt to Regions Bank for [Laurin's] vehicle, the Chevy Equinox, is a joint marital debt it will be paid from the proceeds of the home sale; if in the name of [Laurin] alone, she shall underwrite payment thereof." The chancellor went on to find that the evidence revealed that some of the proceeds from Greg's student loan were used to support

the family and denied further consideration of the matter. As for alimony, the chancellor denied Laurin's request that he reconsider his decision declining to award her alimony. Finally, the chancellor denied deviating from the child support guidelines and stated that based on the evidence before him, the support that he ordered was based on Greg's income. It is from this decision that Laurin now appeals.

ANALYSIS AND DISCUSSION OF THE ISSUES

1. Child Support

¶11. It is well settled that an appellate court's "review in domestic relations matters is limited by our familiar substantial evidence/manifest error rule." *Parker v. Parker*, 641 So. 2d 1133, 1137 (Miss. 1994) (citing *Stevison v. Woods*, 560 So. 2d 176, 180 (Miss. 1990)). "[An appellate court] will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Watson v. Watson*, 724 So. 2d 350, 354 (¶16) (Miss. 1998) (quoting *Bell v. Parker*, 563 So. 2d 594, 596-97 (Miss. 1990)).

¶12. Laurin first argues that the chancellor erred in deviating from the statutorily imposed child support guidelines without providing justification for doing so. The chancellor made the following finding as it relates to Greg's income for child support purposes:

Defendant's net take home pay is calculated to be approximately \$3,200.00 including his nine[-]month employment pay and summer wages. (Exhibit 6 at trial). He shall pay child support of \$650.00 each month to Plaintiff beginning November 1, 2007, to be paid through the office of the Chancery Clerk of Lamar County, Mississippi, and keep the children covered with dental insurance. Plaintiff shall continue to keep them covered with medical insurance; the parties shall equally pay any uninsured medical or dental

expenses of the children.

¶13. As evidenced above, the chancellor ordered Greg to pay \$650 per month in child support based on Greg's 2006 W-2 without considering either Greg's testimony regarding his 2007 income or Greg's 2007 payroll check stubs that were admitted into evidence. Also, the chancellor did not determine Greg's gross or adjusted gross income.

¶14. As previously noted, Greg earns a salary of \$45,000 from his employment with the University of Southern Mississippi for the nine-month school year, which is paid over twelve months. Also, a review of Greg's payroll check stub for July 2007 indicates that he was paid \$3,057.16 each month for three months for teaching summer school. Nevertheless, the chancellor determined that Greg earned \$2,653.05 in summer wages. He reached this figure by subtracting Greg's gross income (\$47,653.05), as reflected on his 2006 W-2, from his salary of \$45,000.

¶15. Greg's payroll check stub also reflects that his year-to-date salary in regular pay as of July 31, 2007, was \$38,944.34. Thus, as of July 31, 2007, Greg received \$3,944.34 above his regular pay because based on a pay rate of \$5,000 per month, he would have only received \$35,000 up to that point.

¶16. After reviewing Greg's testimony and the exhibits admitted at trial, we conclude that Greg's gross income for 2007 may be as high as \$63,171.48. We arrive at this figure because in 2007, Greg received the following: \$9,171.48 for teaching summer school for three months, \$9,000 in overload pay for the fall and spring semesters, and a \$45,000 salary. Greg

also stated that he received a \$5,000 grant.² When these figures, excluding the grant money, are factored into Greg's gross income, his adjusted gross income is increased significantly to \$63,171.48.³

¶17. The chancellor based his order of child support on Greg's adjusted gross income as determined from his 2006 W-2. However, because we conclude that Greg's gross income for 2007 may be significantly higher than that contemplated by the chancellor, we reverse the chancellor's decision ordering Greg to pay \$650 per month in child support and remand this case to the chancery court for a proper determination of Greg's adjusted gross income. Then, the chancellor should order child support based on that figure.

¶18. The dissent, contending that there is substantial evidence that Greg's income for 2007 is an anomaly, believes we err in reversing the chancellor on this issue. We find the dissent's position perplexing, as the dissent does not take issue with the figures used by the chancellor to compute the amount of child support that Greg should pay. As stated, the chancellor utilized Greg's W-2 for 2006. It is undisputed that the 2006 W-2 includes wages earned for teaching summer school, yet the dissent suggests that this category of income should not be included in computing Greg's adjusted gross income for child support purposes because it is uncertain "how much income Greg will receive from teaching summer classes"

² There was no testimony about how the grant money was to be used. Further, Greg stated that he did not expect to receive any grant money for 2008.

³ Greg testified that although he had taught summer school every year, his summer employment with the university is dependent upon whether the classes reach capacity.

in the future. It is also undisputed that exhibit 7, which was introduced into evidence by Laurin, indicates that Greg would receive three payments of \$3,057.16 for teaching summer school in 2007. This data alone indicates that Greg would earn \$54,000 for the year 2007, without including any amount for overload pay. If the chancellor utilized Greg's summer school earnings for 2006, we see no logical reason why they should not be used for 2007. After all, Greg testified that he had taught summer school every year since he had been teaching at the university, that being five years.

¶19. The dissent also takes issue with our finding that the chancellor should consider Greg's overload earnings for 2007. The dissent supports its position with Greg's testimony that 2007 was the first time that he received overload pay and that he received the pay only because he had to perform double duty because of a shortage of teachers. The dissent further cites Greg's testimony that "his department was planning to hire a new faculty member, and when this new member was hired, there would not be any need to work overload, and thus, the overload payments would cease." However, the dissent overlooks further relevant testimony that Greg gave regarding the subject of overload pay. We quote the following from the direct examination of Greg by Laurin's counsel:

Q. Can you tell me what an overload indicates or what that means with respect to your income?

A. Sure. It's when faculty are asked to work above and beyond their normal load. A normal load is 100 percent time basically, and overload is 125 percent time.

Q. Is that something you get every year?

A. No. This is the first year that I've gotten that. We just lost a faculty member. We had four, and now we have three trying to cover the work load of four.

Q. Does that mean you're going to get a raise soon? You're going to be taking a new position or move up?

A. I won't be getting a raise unless the State decides that. I did get a position within the -- there's three recreation faculty. *I'm now the recreation coordinator, and you get an additional release for that, is what they call it. That's basically the amount of the overload.*

Based on Greg's testimony quoted above, it is clear that, in his new position as coordinator, he will receive the monetary equivalent of the amount that he received for overload pay. There is no indication that his new position as coordinator is temporary. Therefore, we see no reason why the amount of this additional salary should not be considered in figuring the proper amount of child support that Greg should pay.

2. Division of Marital Estate

(a) Student Loan Debt

¶20. Laurin also asserts that the chancellor erred in ordering her to pay twenty percent of Greg's student loan debt. The chancellor determined that Greg's student loan debt is marital property after finding that "some of the student loan proceeds were expended for family needs." Greg testified that approximately ninety percent of his student loan debt was accumulated after he and Laurin married. According to Greg, on occasion, they used some of the money for daily living expenses, such as to purchase groceries and gasoline. The chancellor made the factual finding that Greg's student loan debt was marital property, and there is nothing in the record that refutes Greg's testimony that a portion of his student loan

proceeds were used for living expenses during their marriage. Therefore, this factual finding made by the chancellor is supported by substantial evidence. This issue lacks merit.

(b) Chevrolet Equinox

¶21. Laurin also contends that the chancellor erred in failing to order that the debt on the 2005 Chevrolet Equinox be paid off with the proceeds from the sale of the marital home. As noted, the chancellor held in his judgment on Laurin’s motion to reconsider: “If the debt to Regions Bank for Plaintiff’s vehicle, the Chevy Equinox, is a joint marital debt it will be paid from the proceeds of the home sale; if in the name of the Plaintiff alone, she shall underwrite payment thereof.”

¶22. Laurin and Greg provided a report pursuant to *Hemsley v. Hemsley*, 639 So. 2d 909 (Miss. 1994) that was admitted into evidence. In the report, Laurin and Greg stipulated that the Chevrolet Equinox is marital property. Further, there is no dispute that the Chevrolet Equinox was purchased during the marriage. Accordingly, there is nothing for this Court to do because, as stated, the chancellor ordered the debt paid from the proceeds of the sale of the marital home “[i]f the debt to Regions Bank for Plaintiff’s vehicle, the Chevy Equinox, is a joint marital debt”

3. Alimony

¶23. Laurin argues that the chancellor erred in declining to award her alimony. The chancellor addressed Laurin’s request for alimony as follows:

With [Greg’s] support obligation deducted from his net income[,] he will have about \$2,550.00 monthly to live on, plus the bulk of the marital debt to pay as set forth herein. Plaintiff shows a net monthly income of \$1,975.00, which,

with the addition of support due from [Greg], gives her \$2,625.00 each month to live on, giving the Court pause to deny requests for alimony based on the criteria for awarding alimony.

The total marital debt between the parties is \$156,925.64 and consists of (1) \$117,000 to Wells Fargo for the mortgage on the marital home, (2) two BancorpSouth accounts which total \$1,237.45, (3) two Bank of America accounts which total \$23,779.19, (4) \$3,978 to Chase, (5) \$9,021 to Discover, and (6) \$1,910 to Forrest General Hospital. The only real property that the parties own is the marital home, which the chancellor ordered to be sold. The chancellor further ordered the debt to BancorpSouth, Bank of America, Chase, and Discover to be paid from the proceeds of the sale of the marital home. The remaining debt is comprised of Greg's student loan, valued at \$104,980, and the debt to Forrest General Hospital. Finally, the chancellor ordered any remaining proceeds to be equally distributed between the parties.

¶24. The chancellor denied Laurin's request for alimony based on his assessment of her post-divorce monthly income. We find no error with the chancellor's decision, as we also conclude that, based on the evidence, no alimony was warranted. It is well established in Mississippi that "[a]limony should be considered only 'if the situation is such that an equitable division of marital property, considered with each party's nonmarital assets, leaves a deficit for one party.'" *Henderson v. Henderson*, 703 So. 2d 262, 265 (¶18) (Miss. 1997) (quoting *Johnson v. Johnson*, 650 So. 2d 1281, 1287 (Miss. 1994)). Clearly, Laurin is not left with a deficit. This issue lacks merit.

¶25. **THE JUDGMENT OF THE LAMAR COUNTY CHANCERY COURT IS**

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED ONE-HALF TO THE APPELLEE AND ONE-HALF TO THE APPELLANT.

KING, C.J., LEE, P.J., GRIFFIS, BARNES, ISHEE, ROBERTS, CARLTON AND MAXWELL, JJ., CONCUR. MYERS, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION.

MYERS, P.J., CONCURRING IN PART, DISSENTING IN PART:

¶26. While I concur with the majority on the division of Greg and Laurin Kay’s marital estate and the denial of alimony to Laurin, for reasons developed below, I dissent from the majority’s decision to reverse and remand on the amount of child support awarded by the chancellor.

¶27. Mississippi appellate courts are very deferential to a chancellor’s ruling and will disturb his or her findings only if they are manifestly wrong, clearly erroneous, or he or she applied an erroneous legal standard. *Harris v. Harris*, 988 So. 2d 376, 378 (¶8) (Miss. 2008) (citation omitted). It is not the function of this Court to second guess the findings of the chancellor or how he or she arrived at his results, as long as there is sufficient evidence to support his findings. *McSwain v. McSwain*, 943 So. 2d 1288, 1294 (¶22) (Miss. 2006).

¶28. Mississippi Code Annotated section 43-19-101 (Rev. 2004) dictates how to determine the appropriate amount of child support. It states that the amount due should be based upon the non-custodial parent’s adjusted gross income. A parent’s adjusted gross income should encompass “all potential sources that *may reasonably be expected to be available* to the absent parent” Miss. Code Ann. § 43-19-101(3)(a) (emphasis added).

¶29. In *Johnston v. Johnston*, 722 So. 2d 453, 461 (¶22) (Miss. 1998), the supreme court found that a chancellor erred by including extra income from a one-time event in determining the appellant's net monthly income for child support purposes. In *Johnston*, the chancellor included the appellant's income from teaching a one-time part-time college course. *Id.* at 460 (¶¶20-21). The supreme court concluded that the chancellor erred by including this income for purposes of child support because the appellant had "no contract or expectation for this additional employment to continue." *Id.* at 461 (¶22). Similarly, in *Alderson v. Morgan ex rel. Champion*, 739 So. 2d 465, 467-68 (¶¶14-15) (Miss. Ct. App. 1999), this Court concluded that a chancellor correctly included the appellant's annual bonus in his income because the bonus was received on a regular basis.

¶30. It is evident from these cases that the dispositive issue in determining whether income should be included for purposes of child support is whether that income is anticipated to be received regularly in the future.

¶31. Turning to the case at bar, the chancellor concluded that Greg's net take-home pay was approximately \$3,200 per month. The chancellor reached this number by using Greg's W-2 form, which stated that Greg received \$47,653.05 in 2006 as income. The majority disagrees with the chancellor's findings and concludes that Greg's 2007 income could be as high as \$63,171.48. They arrive at this figure by adding Greg's base salary of \$45,000 to \$9,000 in overload pay for the entire year and \$9,171.48 he would receive in teaching

summer school courses.⁴

¶32. I find substantial evidence that supports that these increases in Greg's income cannot be expected to continue in future years for purposes of determining child support and were not properly considered by the chancellor. A portion of Greg's income is derived from the summer classes that he teaches at the university. Although Greg testified that he had taught classes for the past five summers, he indicated that he was not certain about the future. He testified that summer classes were "hit and miss," and that he only taught summer classes if they had a sufficient number of students enrolled in them. Greg stated that his department and its program were experiencing "very tough times right now," and it was "iffy" that the summer courses would continue. Therefore, it is not certain if, or how many classes, Greg will teach in the coming summers; accordingly, there is uncertainty as to how much income Greg will receive in the future from teaching summer classes.

¶33. The majority states that I suggest Greg's income from teaching summer school should not be included in his income. This is not the case. I would find that the chancellor's finding should be applied, which includes income from Greg teaching summer school. The chancellor based his number on Greg's 2006 W-2 form rather than an extrapolation of Greg's 2007 pay stubs. I believe the chancellor's method to be the more sound approach. Therefore, I find there was insufficient evidence to conclude that the chancellor was manifestly wrong or clearly erroneous in his finding regarding the income Greg would

⁴ Only four months of Greg's pay stubs from 2007 were introduced into evidence, February, March, April, and July.

receive from teaching summer courses in the future.

¶34. Additionally, testimony indicated that Greg's overload pay is not reasonably expected to continue. "Overload" are additional duties taken on by a faculty member that are beyond their normal responsibilities. Greg testified that *for the first time since he began working at the university*, he received an overload payment in 2007. This is because he was overseeing the recreation program at the university. He had to take on this additional duty because the number of faculty members in his department dropped from four to three. Greg stated that his department was planning to hire a new faculty member, and when this new member was hired, there would not be any need to work overload; thus, the overload payments would cease.⁵

Q: Is [overload] available every year?

A: No. We are hoping to hire new faculty because nobody wants to work overloaded. The money is not worth it.

Q: After you hire faculty, there is no need to work overload?

A: Yes.

Q: You would be back to [your customary hours]?

A: Yes.

¶35. The majority states that Greg's new position as recreation coordinator requires that

⁵ I also note that there was no evidence presented that Greg would receive a second overload payment in 2007. The majority assumes that because Greg received an overload payment in the first half of 2007, he will receive an overload payment for the same amount in the second half of 2007.

the amount of overload be added to his salary for determining his income in the future. However, Greg's pay stubs indicate that he was receiving the same salary in 2007 as recreation coordinator as he did in 2006, prior to his promotion. This finding, coupled with Greg's statement that his overload payment would terminate upon new faculty member being hired, supports the chancellor's finding that his future income will be similar to the amount received in 2006.

¶36. Given this testimony, I find sufficient evidence to support the chancellor's findings. While I agree with the majority that Greg's income for 2007 would be higher than his income in 2006, I find substantial evidence that his 2007 income was an anomaly and not indicative of his normal, annual pay. Once the university hired a new faculty member in Greg's department, the number of summer classes he taught would revert back to the same number he taught in previous years and would reduce his summer income. Additionally, because the new faculty member would relieve Greg of his additional duties, his overload pay would cease. By deducting these two additional sources from his income, I find that Greg's salary would be approximately the amount he was paid in 2006. Greg testified to this fact, stating that his income in 2008 would be similar to his income in 2006.

¶37. Additionally, the doors of the court will not shut Laurin out permanently. If Greg continues to receive income similar to his 2007 income, Laurin has the option of petitioning the court for an upward modification in the amount of child support.

¶38. Accordingly, I find that the chancellor's ruling on the amount of child support is supported by substantial evidence and is not manifestly wrong or clearly erroneous.

Therefore, I dissent.