

IN THE COURT OF APPEALS 09/03/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00953 COA

MARTHA HIGDON

APPELLANT

v.

MICHAEL HIGDON

APPELLEE

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

TRIAL JUDGE: HON. STUART ROBINSON

COURT FROM WHICH APPEALED: HINDS COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

DARLENE D. BALLARD

ATTORNEY FOR APPELLEE:

STEPHEN L. BEACH, III

NATURE OF THE CASE: DOMESTIC RELATIONS

TRIAL COURT DISPOSITION: CHANCELLOR HELD CERTAIN PROVISIONS OF DIVORCE
DECREE VAGUE AND MADE MODIFICATIONS THERETO. ALSO HELD THAT MICHAEL
HIGDON WAS NOT IN CONTEMPT AND AWARDED ONLY PARTIAL ATTORNEY'S FEES
TO MARTHA HIGDON.

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

McMILLIN, J., FOR THE COURT:

This is a domestic relations case. In the case we are asked to reverse a number of rulings made by the chancellor in a proceeding seeking, on the one hand, to enforce financial commitments of the former husband under an earlier divorce judgment, and on the other, to modify other provisions of the earlier judgment relating to the former husband's support obligations and visitation rights concerning the minor child of the parties. We conclude that all save one of the rulings made by the chancellor fall within the broad scope of discretion afforded him in such matters. Having so found, we affirm the chancellor except as to the issue of a temporary annual reduction in child support during the summer, and on that issue, we reverse and render. We also, *sua sponte*, slightly amend the chancellor's order in the matter of calculation of child support to remove the possibility of future misunderstanding.

I.

Facts

Michael Higdon and Martha Higdon were divorced on the ground of irreconcilable differences in the Chancery Court of Hinds County. An agreement executed between the parties entitled "Child Custody and Property Settlement Agreement" was incorporated into the final judgment of divorce. The agreement granted joint legal custody of the parties' child to Mrs. Higdon and prescribed a schedule for visitation for Mr. Higdon that contained what could be termed as typical provisions. They included visitation on two weekends of every month, two weeks in the summer and additional times during traditional holiday periods.

Periodic child support was to be determined by a formula based upon a percentage of Mr. Higdon's earnings but with a minimum amount due of \$650.00 per month. The agreement called for monthly adjustments of the amount due, should the agreed percentage result in a higher monthly obligation.

In addition, Mr. Higdon agreed to assume responsibility for all "reasonable and necessary" health care related expenses for the child not covered by health insurance. Mr. Higdon also committed himself to pay for the child's car insurance, reserving to himself the right to "decide how much coverage and what kind of coverage will be had"

The agreement was signed by both parties on December 28, 1993. For reasons that do not appear in the record, the judgment of divorce was not entered until March 2, 1994. By that time, Mr. Higdon had already relocated his residence from Hinds County to the state of Florida, as is recited in the judgment itself. Shortly after the divorce, the daughter wrecked the automobile she had been driving, and it was declared a total loss. Mrs. Higdon purchased a replacement automobile for the child, and insurance costs for that vehicle were higher than had previously been paid by Mr. Higdon. The record is not clear on the matter; however, it appears that a part of this higher premium may have been due to the fact that the replacement policy provided different coverage than the original policy. In any event, Mr. Higdon, at the time of the hearing, had refused to contribute toward the cost of providing insurance on the replacement vehicle, claiming that his obligation to provide insurance was limited to the vehicle driven by the daughter at the time of the divorce. The chancellor ordered Mr. Higdon to contribute a fixed amount of \$33.42 per month toward the minor's automobile insurance.

As we have observed, this proceeding was commenced by Mrs. Higdon. She filed a pleading seeking

to have Mr. Higdon adjudicated in contempt for his willful failure to abide by certain terms of the agreement. Specifically, Mrs. Higdon complained that Mr. Higdon was not providing the monthly accounting of his earnings for computation of any amounts he might owe for child support in excess of the floor amount of \$650.00. Additionally, she claimed that Mr. Higdon was refusing to reimburse her for certain medical expenses incurred on behalf of the child. Although not specifically raised in the pleadings, the chancellor also resolved a dispute between the parties as to the proper interpretation of Mr. Higdon's responsibilities concerning insurance for the daughter's vehicle.

Mr. Higdon, as a part of his written response to Mrs. Higdon's contempt motion, filed his own motion seeking certain modifications of the original agreement. His original response was amended to (1) seek a significant increase in visitation during the periods the daughter was not in school; (2) require Mrs. Higdon to contribute toward the transportation costs for the daughter's visitation periods in Florida; (3) reduce child support during the summer visitation period; and (4) seek certain other relief not pertinent to this appeal.

The chancellor, after a hearing on both motions, declined to conclude that Mr. Higdon was in willful contempt, although he did find that certain amounts owed by Mr. Higdon under the divorce were not paid by him until after the commencement of the contempt proceeding and he, therefore, awarded Mrs. Higdon \$350.00 in partial satisfaction of her requested attorney's fees in excess of \$1,100.00. He also ordered Mr. Higdon to pay some additional medical bills for the child related to dermatological care provided to the child, but relieved Mr. Higdon of any future obligation regarding the purchase of birth control pills for the daughter. The chancellor modified visitation to provide Mr. Higdon with six weeks summer visitation and every Spring Holiday period. He ordered Mrs. Higdon to be responsible for one-half of all transportation costs for the visitation periods and ordered that Mr. Higdon's child support obligations be reduced by one-half for the six week summer period, whether or not the child actually visited with Mr. Higdon during the period.

Mrs. Higdon perfected this appeal seeking review of these determinations by the chancellor.

II.

Scope of Review

Unless this Court can discover an erroneous application of the law or a manifest abuse of discretion in the chancellor's ruling, we are not permitted to disturb a chancellor's resolution of a contested matter such as this. *Ethridge v. Ethridge*, 648 So. 2d 1143, 1145-46 (Miss. 1995) (citing *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993)); *Herrington v. Herrington*, 660 So. 2d 215, 217 (Miss. 1994) (citations omitted). We do not sit as a reviewing body for the purpose of determining if, given the opportunity, we would have decided the issues differently. *Richardson v. Riley*, 355 So. 2d 667, 668-69 (Miss. 1978) (citations omitted). Keeping in mind that limited mandate, we have considered the various issues raised in Mrs. Higdon's appeal.

III.

Modification of Visitation

There is little guidance available in prior supreme court decisions regarding the law on modification of visitation as opposed to modification of custody. We are instructed that the same stringent criteria for a change of custody, *i.e.*, proof of a material change in circumstance adverse to the best interest of the child, do not apply to visitation modification. *Cox v. Moulds*, 490 So. 2d 866, 869 (Miss. 1986). Nevertheless, we can gather very little additional guidance from the *Cox* case, because it dealt with the limited issue of a decree that granted visitation "at any and all reasonable times" in a situation where the parties subsequently presented the court with their inability to agree on what was reasonable. *Id.* at 868. *Cox* stands for the limited proposition that, in such a situation, the noncustodial parent is entitled "to have custody provisions made specific rather than flexible and attendantly vague." *Id.* at 869. Specifically, the rule announced in *Cox* was:

All that need be shown is that there is a prior decree providing for reasonable visitation rights which isn't working and that it is in the best interests of the children as fostering a positive and harmonious relationship between them and their divorced parents to have custody provisions made specific rather than flexible and attendantly vague.

Id. at 869.

In the later case of *Clark v. Myrick*, the supreme court appeared to disregard somewhat the rather limited application of the rule announced in *Cox* by permitting a different meaning to be applied to the phrase "reasonable visitation rights." *Clark v. Myrick*, 523 So. 2d 79, 82 (Miss. 1988). In *Clark*, the supreme court announced what it concluded to be the logical reverse of the *Cox* rule. The court said that, to defeat an attempt to change custody, "all that need be shown is that there *is* a prior decree providing for reasonable visitation rights which *is working* and which is in the best interest of the child." *Id.* at 83 (emphasis supplied). However, in *Clark* the previous visitation schedule had been very specific as to visitation. Thus, the court was not dealing with the issue of defining for the parties the previously undefined "reasonable visitation rights" as in *Cox*. Rather, the court was passing on the question of whether the previously agreed upon specific schedule (a) was "reasonable," (b) was "working," and (c) was "in the best interest of the child." *Id.* at 83.

Apparently, the supreme court was saying in *Clark* that a determination by the chancellor, based upon credible evidence, that an existing visitation schedule failed to measure up on the basis of these three criteria would provide justification for a modification of visitation. Given the fact that "[t]he chancellor has broad discretion when determining appropriate visitation," and that "[w]hen the chancellor determines visitation, he must keep the best interest of the child as his paramount concern, " we have determined to assess the chancellor's visitation modification on the basis discussed. *Harrington v. Harrington*, 648 So. 2d 543, 545 (Miss. 1994).

The only evidence bearing on the question of whether the previous schedule was working was Mr. Higdon's testimony that two weeks in the summer proved too short a time, and that, though the parties had, by agreement, extended the period during the previous summer, it was stressful on the

daughter to have to call her mother and ask for permission to stay longer. Were we dealing with an issue that did not so vitally affect the welfare of a minor child, the obvious response to Mr. Higdon's complaint would be to point out that he agreed to the schedule at a time when he had already removed his residence to a distance of over 700 miles from his daughter. Thus, it seems obvious that Mr. Higdon knew quite well at the time the divorce became final that his every-other-weekend visitation schedule was, as a practical matter, unworkable. This inability to exercise weekend visitation seems to be the primary consideration that makes the two-week summer visitation facially inadequate in view of the legally-recognized "need to maintain a healthy, loving relationship between the non-custodial parent and his child." *Id.* at 545. Mr. Higdon's acquiescence in the entry of the decree under the circumstances appears to have been an act of expediency to ensure that the divorce was finalized without further difficulty, since it was within his power, once he relocated to Florida and realized that the proposed schedule was unworkable, to withdraw his consent to the terms of the December agreement.

However, it would not appear that Mrs. Higdon is above criticism on this same score. Both parties were certainly aware in March 1994 that the visitation schedule agreed upon the previous December was unworkable as a practical matter, yet both affirmatively represented to the court that the terms were workable and in the best interest of the child. It is difficult to conceive how either party could, in good conscience, have actually believed this to be the case.

Thus, it cannot be doubted the chancellor was faced with a visitation schedule that was not "working" within the meaning of *Clark v. Myrick*. See *Clark*, 523 So. 2d at 83. It is simply impractical to suppose that the parties really anticipated that Mr. Higdon would make a fourteen-hundred mile round trip twice a month for weekend visitation, and any plan that called for such frequent travel of that distance by the child would be patently contrary to her best interest.

This Court is of the opinion that a change of residence by the non-custodial parent which renders a prior visitation schedule unworkable is sufficient basis for the chancellor to modify visitation in the best interest of the child under the rule of the *Cox* case. *Cox*, 490 So. 2d at 869. The issue facing the court, then, is the effect on this general proposition of our conclusion that the parties (particularly the complaining party) knew, or should have known, at the time the judgment was entered that the requested visitation schedule was inadequate. Again, were it not for considerations of the best interest of the child, it would seem that the answer would be that our chancery court system does not exist to relieve people from the consequences of a bad bargain, absent a showing of overreaching, undue influence, duress, fraud or some other generally recognized equitable consideration.

However, since the "polestar" consideration (as it should be) is the "best interest of the child," *Ash v. Ash*, 622 So. 2d 1264, 1266 (Miss. 1993) (citations omitted), we conclude that it was within the equitable power of the court to consider and modify a patently unworkable visitation schedule to one more in keeping with the equitable principles governing such matters even in the face of the fact that the problems were largely of the parties' own making. On that basis, we do not find that the terms of the modified visitation schedule are so unreasonable as to constitute an abuse of discretion, and we, therefore, affirm the chancellor on this point.

Mrs. Higdon also claims it to be an abuse of discretion for the chancellor to order her to pay one-half the costs of travel for the child's visitation with her father. The original agreement was silent on this

issue, probably because it was entered into at a time when both parents were residing in the same city, and the costs involved were not a legitimate consideration, even though by the time the matter was presented to the chancellor, there had been a substantial change in the situation. Nevertheless, travel expenses can be a legitimate concern in the matter of visitation where cost is a significant factor. In such case, an equitable apportionment of the cost of exercising visitation is as much an element of a reasonable visitation schedule as the apportionment of time. Visitation for the non-custodial parent should not be seen as a privilege for which that parent must pay or forfeit. Rather, the implementation of an equitable visitation schedule is the joint obligation of both parents, the purpose of which is to provide, insofar as circumstances permit, the fostering of a normal parent-child relationship with both parents. We do not find the chancellor's apportionment of this cost to be so unconscionably oppressive to Mrs. Higdon as to warrant our interference. We, therefore, affirm the chancellor on this point.

A different matter arises, however, when we consider the issue of the chancellor's modification of child support to provide a reduction in Mr. Higdon's obligation by one-half for six weeks of every summer, whether or not the child actually visits with him for that length of time. Unlike our conclusions as to modification of visitation, the law is quite clear that child support obligations can only be modified upon a showing of a substantial change in circumstance affecting either (a) the legitimate needs of the child or (b) the financial ability of the parent. *See, e.g., Morris v. Stacy*, 641 So. 2d 1194, 1197 (Miss. 1994); *Gregg v. Montgomery*, 587 So. 2d 928, 933-34 (Miss. 1991) (citations omitted); *Adams v. Adams*, 467 So. 2d 211, 214-15 (Miss. 1985). We are of the opinion that, at the threshold, the imposition of the reduction without consideration as to whether the visitation period is actually exercised or not is a manifest abuse of discretion. This constitutes an arbitrary reduction in previously adjudicated support without any assurance that the contemplated change in the financial circumstances of the parties will occur where the only possible change is that during such visitation, Mr. Higdon would be providing all of the day-to-day expenses for the child. Moving beyond that consideration, however, we do not think that this abuse is curable by amending the chancellor's order to require the reduction only in the event the visitation is actually exercised. We simply do not conclude that this modification in visitation constitutes a material change in circumstance that would justify a change of an award of child support patterned essentially after the statutory guidelines of section 43-19-101 of the Mississippi Code. *See* Miss Code Ann. § 43-19-101 (1972). Child support is intended to assist in making provisions for the child beyond simply the furnishing of daily meals and similar incidental regularly recurring expenses. That child support will be maintained at the same level during the summer does not, by any stretch, constitute a windfall for the custodial parent. The law is clear that such payments are received by the custodial parent solely in trust for the benefit of the child. *Varner v. Varner*, 588 So. 2d 428, 432 (Miss. 1991) (citations omitted). Thus, any savings attributable to the fact that the child is temporarily taking her meals and getting her recreational expenses elsewhere should properly mean only that this temporary saving will be available to provide some other reasonable and proper need of the child. It must also be remembered that, by virtue of Mr. Higdon's move to Florida, he has, as a practical matter, forfeited something on the order of twenty-six weekend visitation periods during which Mrs. Higdon could have reasonably expected some relief from her obligation to provide the daily incidental expenses of the child. Thus, any financial benefit to Mrs. Higdon by this change in summer visitation has been essentially offset by the corresponding increase in her support obligation during the remainder of the year. There being, therefore, no substantial change in circumstance entitling Mr. Higdon to relief, the

granting of such relief was, in our opinion, an abuse of discretion warranting the intervention of this Court. The provision of the chancellor's order that child support be reduced by one-half for six weeks each summer is reversed and rendered.

IV.

The Daughter's Automobile Insurance

As to the automobile insurance, the chancellor took a provision in the previous agreement that was, at best, difficult to understand as to what the parties actually agreed to and placed what he determined to be an equitable interpretation that clearly defined the duties of Mr. Higdon. We conclude that the resolution of this question was within the necessarily wide discretion given to the chancellor in such matters, and we, therefore, decline to disturb his ruling on this point.

V.

The Matter of Mr. Higdon's Contempt

We do not find the chancellor to be manifestly in error when he declined to find Mr. Higdon to be in willful contempt for his failures. Even Mrs. Higdon asserted in her pleadings that the original agreement contained what she termed a "clerical error" when it defined the base figure for calculation of Mr. Higdon's child support obligation to be "net income less taxes" instead of "gross income less taxes." To the extent that the resolution of this problem affected the calculation of Mr. Higdon's obligation, it is difficult to see how, prior to its resolution, Mr. Higdon could have calculated his exact obligation with any degree of certainty. There was no indication in the record that he ever willfully refused to pay the \$650.00 per month base amount.

Also, his obligation under the medical expense provision was limited to "reasonable and necessary" expenses. Mr. Higdon felt that there was a legitimate issue of whether birth control pills and certain acne treatment medicine were "reasonable and necessary" within the intended meaning of the agreement. In point of fact, Mr. Higdon was successful in resisting his obligation to pay for birth control pills for the daughter, and the mere fact that the chancellor determined that the acne treatments were within the scope of Mr. Higdon's obligation does not necessarily establish that Mr. Higdon's position was so arbitrary or unreasonable as to constitute a conscious disregard of his lawful obligation. There is no basis to disturb the chancellor's conclusions on the issue of Mr. Higdon's willful contempt.

VI.

An Additional Consideration

We note that neither party has appealed that part of the chancellor's ruling changing the procedure for an annual computation of child support adjustment. Nevertheless, because our review of the record necessarily required us to consider this aspect of the chancellor's ruling since it affected the issue of Mr. Higdon's contempt, we have observed that a literal reading of the modified method would appear to permit a downward adjustment below the \$650.00 monthly figure if the computation so indicated. This was not within the contemplation of the parties at the time of the divorce, since the original agreement, despite its faults, clearly set a minimum of \$650.00 per month as Mr. Higdon's obligation. We are satisfied that it was not within the chancellor's discretion to remove this floor; otherwise, Mr. Higdon could unilaterally alter, or even terminate, his monthly support obligation by simply ceasing employment. *See, e.g., Parker v. Parker*, 645 So. 2d 1327, 1331 (Miss. 1994). While future reductions in earning may constitute a basis for a downward adjustment in child support, our law requires the chancellor to pass on such a request at the time it becomes a reality. *Steen v. Steen*, 641 So. 2d 1167, 1171 (Miss. 1994) (citations omitted). Therefore, this Court, in the exercise of its equitable power, hereby *sua sponte* amends the chancellor's ruling to clarify the point that, in the event the annual computation contemplated to be made by February 15 results in an indication of an amount less than \$650.00 per month for the previous year, there shall be no reduction in the amount due from Mr. Higdon for that year.

VII.

Conclusion

All aspects of the chancellor's August 22, 1995 order are hereby affirmed except that the provision lowering child support for six weeks during the summer is reversed and rendered, and the method of computation of child support is amended to clarify that the annual calculations under paragraphs six and seven of the order shall, in no event, result in a reduction of Mr. Higdon's obligation below \$650.00 per month.

THE JUDGMENT OF THE CHANCERY COURT OF HINDS COUNTY IS AFFIRMED EXCEPT THAT THE PROVISION REQUIRING A REDUCTION IN CHILD SUPPORT FOR SIX WEEKS EVERY SUMMER IS REVERSED AND RENDERED, AND THE JUDGMENT IS AMENDED TO STATE THAT, IN NO EVENT, SHALL CHILD SUPPORT BE LESS THAN \$650.00 PER MONTH. COSTS OF THIS APPEAL ARE ASSESSED EQUALLY TO THE PARTIES.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. FRAISER, C.J., NOT PARTICIPATING.

