

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00944 COA

STACY BURKE

APPELLANT

v.

JEFFREY KNIGHT

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. PAT H. WATTS, JR.

COURT FROM WHICH APPEALED: JACKSON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

C. CHARLES BORDIS IV

ATTORNEY FOR APPELLEE:

REBECCA C. TAYLOR

NATURE OF THE CASE: DOMESTIC - MODIFICATION

TRIAL COURT DISPOSITION: FATHER FOUND TO BE IN ARREARS IN PAYMENT OF CHILD SUPPORT; REDUCTION OF CHILD SUPPORT OBLIGATION; AWARD OF ATTORNEY'S FEES.

MANDATE ISSUED: 6/10/97

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

BRIDGES, C.J., FOR THE COURT:

Stacy Burke and Jeffrey Knight were divorced on August 10, 1990. The divorce decree was modified

on May 2, 1995. From this modification Stacy appeals arguing (1) that it was error to allow a credit against vested child support, (2) that it was error to modify the previous child support amount, and (3) that the court erred in failing to award the entire amount of attorney's fees requested.

Finding merit in issues (1) and (2), we reverse and remand this case.

## FACTS

Stacy and Jeffrey were divorced on August 10, 1990, in Louisiana. The divorce was preceded by a consent judgment mirroring most of the terms of the divorce. Joint custody of the two minor children was granted with the children's domicile being with Stacy. Jeffrey was ordered to pay \$328.00 per month in child support. He was unemployed at the time of the divorce. Subsequent to the divorce, Jeffrey became employed and continued fairly consistent employment until the time of trial. After the divorce, Stacy moved to Jackson County, Mississippi, and Jeffrey moved to Louisiana where he married, had another child, and divorced again.

Between the years of 1991 and 1995, Jeffrey failed to pay much of his child support to Stacy. By 1995, Jeffrey had amassed an arrearage of at least \$3,707.02 in child support payments. In 1993, Stacy filed a Complaint for Modification, Change of Custody and Contempt. Stacy also sought to have the Jackson County Chancery Court domesticate the Louisiana Judgments. Jeffrey counter-claimed for modification seeking a reduction in child support. Since the original divorce, Jeffrey has had various jobs such as security guard, offshore rig worker, National Guardsman, and employee of a hardware store. He also has spent significant amounts relative to his income maintaining cows. Jeffrey's income varied during the years in question including amounts in the neighborhood of \$14,000.00 and \$19,000.00.

At the trial of the Modification, the court found Jeffrey to be in arrears in the amount of \$3,707.02. The court further allowed Jeffrey to deduct \$300.00 from the arrearage of child support to pay expenses he had incurred coming to visit his children. Prior to the trial of the Modification, Stacy and Jeffrey entered into a stipulation regarding the custody and care of the children. Jeffrey's child support payments were reduced to \$175.00 per month with an additional \$50.00 added to each payment to chip away at the arrearage. Stacy was awarded attorney's fees in the amount of \$500.00. After considering a post judgment motion, the court awarded Stacy interest on the child support arrearage.

## STANDARD OF REVIEW

"Our scope of review in domestic relations matters is limited under the familiar rule that this Court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard." *Johnson v. Johnson*, 650 So. 2d 1281, 1285 (Miss. 1994) (citing *McEwen v. McEwen*, 631 So. 2d 821, 823 (Miss. 1994)). Keeping in mind the aforementioned standard, we shall discuss each issue in turn.

## ARGUMENT AND DISCUSSION OF LAW

## I. WHETHER THE COURT ERRED IN ALLOWING A CREDIT AGAINST ALREADY VESTED CHILD SUPPORT PAYMENTS.

The divorce decree in this case required Jeffrey to pay Stacy \$328.00 per month in child support. By the time of trial, Jeffrey had fallen into arrears on these payments and owed around \$3,707.02 in back child support payments. Jeffrey did not dispute this amount. In his ruling, the chancellor allowed Jeffrey a \$300.00 credit against the arrearage for trips he had made to Mississippi to see his children.

We find this to be error.

Mississippi law is clear that parents have a duty to support their minor children. *Hailey v. Holden*, 457 So. 2d 947, 950 (Miss. 1984); Miss. Code Ann. 93-5-23 (1972). Additionally, the Mississippi Supreme Court has repeatedly held that child support is awarded for the benefit and protection of the child, and that such benefits belong to the child. *Varner v. Varner*, 588 So. 2d 428, 432 (Miss. 1991) (citing *Lawrence v. Lawrence*, 574 So. 2d 1376, 1381 (Miss. 1991); *Cumberland v. Cumberland*, 564 So. 2d 839, 847 (Miss. 1990); *Nichols v. Tedder*, 547 So. 2d 766, 781 (Miss. 1989); *Alexander v. Alexander*, 494 So. 2d 365, 368 (Miss. 1986)).

These obligations to the child "vest in the child as they accrue, and *no court may thereafter modify or forgive them if they be not paid.*" *Varner*, 588 So. 2d at 432 (emphasis added) (citing *Premeaux v. Smith*, 569 So. 2d 681, 685 (Miss. 1990); *Thurman v. Thurman*, 559 So. 2d 1014, 1016-17 (Miss. 1990); *Cumberland*, 564 So. 2d at 847; *Brand v. Brand*, 482 So. 2d 236, 237 (Miss. 1986); *Hailey v. Holden*, 457 So. 2d 947, 951 (Miss. 1984); *Hambrick v. Prestwood*, 382 So. 2d 474, 476 (Miss. 1980)). Clearly the \$300.00 had vested in and belonged to the children. We find that the chancellor erred by giving it to Jeffrey. We reverse and render with respect to this issue.

## II. WHETHER THE COURT ERRED IN MODIFYING THE AMOUNT OF CHILD SUPPORT DUE EACH MONTH.

In his counter-claim for modification, Jeffrey sought to modify the divorce decree by lowering the amount he owed to Stacy each month for the support of his two children. The chancellor granted his request and lowered his monthly child support payment from \$328.00 to \$175.00 per month plus an additional \$50.00 per month to go toward the arrearage.

It is well settled that a "[m]odification of child support may be warranted only where there is a showing of an after-arising material change in circumstances regarding one or more of the interested parties, i.e., the father, mother, or child." *Setser v. Piazza*, 644 So. 2d 1211, 1215 (citing *Gregg v. Montgomery*, 587 So. 2d 928, 931 (Miss. 1993)). Furthermore, "[t]he change in circumstances must be one that the parties could not have anticipated at the time of the original decree." *Id.* Our review of the record reveals no material changes in the circumstances of any party to the original 1990 divorce decree.

Jeffrey was unemployed at the time of the divorce. He willfully entered into the Consent Judgment, which specified that he was to pay \$328.00 per month to Stacy. This money, at the time, was paid from his unemployment income. He has worked consistently since the divorce, and his current job pays him around \$275.00 per week. Our review of the record reveals no material change in circumstances that would warrant any modification of the original child support. Finding clear error in the chancellor's order, we reverse and render the chancellor's modification of child support. We

further remand the issue of child support for a recalculation of the amount of child support due.

**III. WHETHER THE COURT ERRED IN FAILING TO AWARD STACY THE FULL AMOUNT OF ATTORNEY'S FEES SHE REQUESTED.**

At trial, Stacy was awarded \$500.00 in attorney's fees. Stacy is of the opinion that she should have been awarded much more than that. We find that the award of attorney's fees in this case was proper in light of the fact that the father was held in contempt of court. *Herrington v. Herrington*, 660 So. 2d 215, 218 (Miss. 1994). The award of attorneys fees is generally left to the discretion of the chancellor, and this Court is reluctant to disturb the chancellor's determination. *Sarver v. Sarver*, 687 So. 2d 749, 755 (Miss. 1997). Furthermore, "this Court will not reverse the chancellor on an award of attorney fees unless manifest error is revealed by the record." *Setser v. Piazza*, 644 So. 2d 1211, 1216 (Miss. 1994). Finding no manifest error, we affirm the award of attorneys fees.

2d 215, 218 (Miss. 1994). The award of attorneys fees is generally left to the discretion of the chancellor, and this Court is reluctant to disturb the chancellor's determination. *Sarver v. Sarver*, 687 So. 2d 749, 755 (Miss. 1997). Furthermore, "this Court will not reverse the chancellor on an award of attorney fees unless manifest error is revealed by the record." *Setser v. Piazza*, 644 So. 2d 1211, 1216 (Miss. 1994). Finding no manifest error, we affirm the award of attorneys fees.

**CONCLUSION**

We reverse and render with respect to issues I. and II. Issue III. is affirmed. We order this case remanded, however, for recalculation of the amount of child support plus any interest and statutory penalties due. This recalculation we have referred to should be performed as directed by *Brand v. Brand*, 482 So. 2d 236 (Miss. 1986).

*Brand*, 482 So. 2d 236 (Miss. 1986).

**THE JUDGMENT OF THE JACKSON COUNTY CHANCERY COURT IS AFFIRMED IN PART AND REVERSED AND REMANDED IN PART. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEE.**

**McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**