

IN THE COURT OF APPEALS 10/17/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01156 COA

JAMES E. GERMANY

APPELLANT/CROSS-APPELLEE

v.

DONNA SIMMONS GERMANY

APPELLEE/CROSS-APPELLANT

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

TRIAL JUDGE: HON. ROGER C. CLAPP

COURT FROM WHICH APPEALED: CHANCERY COURT OF RANKIN COUNTY

ATTORNEY FOR APPELLANT:

J. HAL ROSS

ATTORNEYS FOR APPELLEE:

SAMUEL T. POLK, III

S. DENNIS JOINER

NATURE OF THE CASE: DOMESTIC RELATIONS - CHILD CUSTODY

TRIAL COURT DISPOSITION: CONTEMPT MOTION DENIED; MODIFICATION OF
CUSTODY DENIED; MODIFICATION OF VISITATION ORDERED; ATTORNEY'S FEES
DENIED.

BEFORE THOMAS, P.J., COLEMAN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This cause was heard by the Rankin County Chancery Court on September 29, 1994, on a contempt motion filed by Donna Simmons Germany against her former husband, James E. Germany, for violation of the child custody and child support provisions of their divorce judgment. Also before the court was James' motion for modification by which he was seeking an award of the custody of the two minor children, child support and attorney's fees. An order of modification was entered providing for joint legal custody of the children with paramount physical custody with Donna during the school year and with James during the months of June and July. Other modifications relating to visitation were also ordered. The contempt motion was denied. Attorney's fees were not awarded to either party. From this order, James appeals presenting the following issues: (1) Was the change in custody for twenty months by agreement a "material change"?; (2) What placement of custody was in the best interest of the children and were the *Albright* factors properly applied by the court?; and (3) Whether the lower court erred by refusing to enforce the provisions of the extrajudicial agreement entered into by the parties which was intended to effect a change in custody of the minor children? In her cross-appeal, Donna assigns as error the following additional issue: (4) Whether the lower court erred by giving James full credit against child support accrued during the twenty (20) month period of time the children were in his physical custody without requiring any evidence of actual support by the noncustodial parent? Finding no error, we affirm.

STATEMENT OF THE FACTS

Donna Simmons Germany and James E. Germany were married May 5, 1979, and the marriage produced two children, Chad E. Germany, born February 14, 1980, and Brad S. Germany, born May 7, 1981. The couple obtained an irreconcilable differences divorce on December 27, 1987. Under the terms of the Property Settlement and Custody Agreement, Donna was granted custody of the two children. The Property Settlement Agreement also contained a clause which read:

10. Husband and wife agree that the provisions of this agreement shall not be modified or changed except by mutual consent and agreement of the parties, hereto, and shall be expressed in writing, or by this Court which renders a Final Judgment of Divorce, which incorporates this agreement therein.

On November 27, 1992, Donna and James executed a document titled "Agreed Order of Modification of Final Judgment of Divorce" (hereinafter "Agreed Modification") which provided that James was to have exclusive custody of the two children and that James' child support obligation ceased as of December 1, 1992. The document also outlined Donna's visitation rights, provided that Donna would be responsible for all transportation for such visitation, and that Donna was to have the children as a tax deduction for 1992 with James having the tax deduction for years thereafter. This document was executed and notarized in Adams County, Mississippi, but was never filed with the Rankin County Chancery Court. For some twenty (20) months Donna and James abided by the terms of the "Agreed Modification" document. During the summer of 1994, Donna discovered that the document had not been filed or presented to the Rankin County Chancery Court. Donna then filed a contempt action claiming that James was in contempt of the original Property Settlement Agreement

in that he had not paid child support for some twenty (20) months and he had failed to return the children from their summer visitation with him.

A contempt hearing was held on September 29, 1994, where the court determined that the "Agreed Modification" document was not effective because it had not been properly filed with the court and signed by the Chancellor. The court further held that James was not in contempt of the original decree, giving him credit for the child support during the period of time the children were living with him and finding that he was only a few days late in returning the children to Donna which did not rise to the level of contempt. In addition, the court found that there had been no "material change" in circumstances since the original decree and that the custody of the children should remain with Donna, but did provide for changes in the visitation.

STANDARD OF REVIEW

The standard of review as to modification of child custody is that "[a] chancellor's finding of fact on such a matter will not be set aside or disturbed on appeal unless the finding is manifestly wrong, or is not supported by substantial credible evidence." *Polk v. Polk*, 589 So. 2d 123, 129 (Miss. 1991).

ARGUMENT AND DISCUSSION OF LAW

I. WAS THE CHANGE IN CUSTODY FOR TWENTY MONTHS BY AGREEMENT A "MATERIAL CHANGE"?

The Mississippi Supreme Court has stated that it will not consider issues on appeal with no citation of authority. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1282 (Miss. 1993) (citations omitted); *Estate of Mason v. Fort*, 616 So. 2d 322, 327 (Miss. 1993) (citations omitted); *Smith v. Dorsey*, 599 So. 2d 529, 532 (Miss. 1992) (citations omitted). This court will likewise not consider issues without citation of authority. Here James fails to provide any authority or citation, therefore, this issue is not properly before this court. However, were this issue properly before this Court, we would necessarily find that the chancellor properly found that no material change in circumstances had occurred which adversely affected the children. The Mississippi Supreme Court faced a very similar situation in *Arnold v. Conwill*, 562 So. 2d 97 (Miss. 1990). In *Arnold*, the mother, who was originally granted custody of the child, contacted the father and requested that he keep the child while she settled her living quarters situation and found employment. *Id.* at 98. For sixteen (16) months the child lived with the father. *Id.* The mother's situation stabilized and she resumed full time custody of the child. *Id.* at 98-99. The father then sought a modification of the custody decree alleging that the fact that the child had lived with him for the sixteen months and been in his continuous care during that time, constituted a material change in circumstances which justified a modification of the custody decree. *Id.* at 99. The Mississippi Supreme Court determined that such a situation did not reflect a material change in circumstances which adversely affected the child and denied the requested modification. *Id.* at 100. In the present case, the chancellor correctly found that a material change in circumstance which adversely affected his two minor children had not been shown by James.

II. WHAT PLACEMENT OF CUSTODY WAS IN THE BEST INTEREST OF THE CHILDREN AND WERE THE *ALBRIGHT* FACTORS PROPERLY APPLIED BY

THE COURT?

Here, James argues that the chancellor correctly relied upon the *Albright* factors, but that the result should have been in his favor in that a modification of the custody decree should have been entered granting him custody of the two minor children. *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). The law with regard to modifications of child custody is very clear. The Mississippi Supreme Court has outlined two basic prerequisites:

First, the moving party must prove by a preponderance of the evidence that, since entry of the judgment or decree sought to be modified, there has been a material change in circumstances which adversely affects the welfare of the child. Second, if such an adverse change has been shown, the moving party must show by like evidence that the best interest of the child requires the change of custody.

Ash v. Ash, 622 So. 2d 1264, 1265-66 (Miss. 1993) (citing *Pace v. Owens*, 511 So. 2d 489, 490 (Miss. 1987)). The chancellor found that there was not a material change in circumstances which adversely affected the children so as to warrant a change in custody. The chancellor then went on to modify the original decree as to visitation to accommodate the children and their desire to spend more time with their father. We cannot say on the record before us that the chancellor was manifestly in error. James failed to meet his burden and the chancellor correctly found that no change in custody was warranted.

III. WHETHER THE LOWER COURT ERRED BY REFUSING TO ENFORCE THE PROVISIONS OF THE EXTRAJUDICIAL AGREEMENT ENTERED INTO BY THE PARTIES WHICH WAS INTENDED TO EFFECT A CHANGE IN CUSTODY OF THE MINOR CHILDREN?

In his brief, James presents the argument that the "Agreed Modification" should have been enforced by the chancellor. As with the issue outlined in Part I, James fails to cite any authority for this issue and we will not consider it on appeal. *See Armstrong v. Armstrong*, 618 So. 2d 1278, 1282 (Miss. 1993) (citations omitted); *Estate of Mason v. Fort*, 616 So. 2d 322, 327 (Miss. 1993) (citations omitted); *Smith v. Dorsey*, 599 So. 2d 529, 532 (Miss. 1992) (citations omitted). However, were this issue properly before this Court, the law is clear in regard to modifications of child custody and child support obligations. The Mississippi Supreme Court has stated, "[a]ny agreement between the parties affecting the custody and future support of the child must have the approval of the court." *Reno v. Reno*, 253 Miss. 465, 176 So. 2d 58, 62 (1965); *see Rutledge v. Rutledge*, 487 So. 2d 218, 220 (Miss. 1986).

Furthermore, the court has recognized:

'[S]ince no person can have any property right or proprietary interest in a child, or in its care, custody and training . . . any contract made by a parent, by which the care, custody or training is permanently transferred to a third person, is absolutely void as being against public policy.' It should therefore naturally follow, that this rule also applies to agreements in which one parent contracts away his or her custodial rights to the other parent. This

Court had made clear its position on a parent's right to extinguish by contract the custodial rights to his or her child: *Walker v. Williams*, 214 Miss. 34, 58 So. 2d 79 (1952), wherein the Court stated: '[A] parent of a child cannot irrevocably surrender the right to its custody by a contract in that behalf, even if the same had been made at a time when the parent was not in great distress and was a free agent, such a contract being void as against public policy.'

McKee v. Flynt, 630 So. 2d 44, 50-51 (Miss. 1993) (citations omitted).

In the present case, the "Agreed Modification" was never submitted to the court for approval, thus the chancellor was not bound by its contents. Likewise, the agreement could not have been considered under contract principles in that such a contract is void as against public policy. *Id.* Thus, the chancellor was left with the original decree. After finding that no material change in circumstances which adversely affected the children had occurred, the chancellor properly determined that a modification in custody was not warranted. This issue is without merit.

IV. WHETHER THE LOWER COURT ERRED BY GIVING JAMES FULL CREDIT AGAINST CHILD SUPPORT ACCRUED DURING THE TWENTY (20) MONTH PERIOD OF TIME THE CHILDREN WERE IN HIS PHYSICAL CUSTODY WITHOUT REQUIRING ANY EVIDENCE OF ACTUAL SUPPORT BY THE NONCUSTODIAL PARENT?

Donna argues that the lower court erred in awarding James credit against child support payments during the twenty (20) month period of time in which the children resided with James. The case of *Alexander v. Alexander*, 494 So. 2d 365 (Miss. 1986) is similar to the present case. In *Alexander*, the Mississippi Supreme Court found that the father was entitled to credit for the twenty (20) month period in which the father had actual physical custody of the child. *Id.* at 368. During the entire period for which Mrs. Alexander was claiming support was due, Mr. Alexander had the child in his custody, supported the child and paid the child the \$200.00 a month child support provided by the decree. *Id.* While the present case does not show that James paid the child support to his children (as was the case in *Alexander*), it is clear that James did provide the support of the children during the twenty (20) month period in which they were in his custody. Moreover, it is clear from the record that Donna did not contribute to their support during this period. As in *Alexander*, the situation presented would result in unjust enrichment if James were required to pay Donna the \$300.00 for each of the twenty (20) months during which the children were in his physical custody. The court stated, "[e]quity and good conscience forbid a windfall to a parent that did not object to a custody change and in fact simply because the other parent did not notify the court of the change either." *Id.* Here, we have a situation in which the parties were operating under a signed custody modification agreement. While the agreement was never filed with the court and thus, was not binding upon the court, the fact remains that as in *Alexander*, Donna acted in compliance with the out of court arrangement. The chancery court is a court of equity and the chancellor in the present case acted according to equitable principles in giving James the credit he was due. Thus, this issue is without merit.

Finding no reversible error, we affirm the judgment of the chancellor.

THE JUDGMENT OF THE CHANCERY COURT OF RANKIN COUNTY IS AFFIRMED AND THE RELIEF SOUGHT ON CROSS-APPEAL IS DENIED. APPELLANT IS TAXED WITH THE COSTS OF THIS APPEAL.

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