

IN THE COURT OF APPEALS 11/28/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01070 COA

KERBY CLAYBORN

APPELLANT

v.

PEARLIE CLAYBORN MOTON

APPELLEE

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

TRIAL JUDGE: HON. DON GRIST

COURT FROM WHICH APPEALED: MARSHALL COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

HELEN KENNEDY ROBINSON

ATTORNEY FOR APPELLEE:

ANTHONY L. FARESE

NATURE OF THE CASE: DOMESTIC

TRIAL COURT DISPOSITION: APPELLANT FOUND IN CONTEMPT AND ORDERED TO
PAY PAST DUE CHILD SUPPORT AND IF HE FAILS TO PAY THAT HE BE
INCARCERATED.

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

THOMAS, P.J., FOR THE COURT:

Kerby Clayborn and Pearlie Clayborn Moton were granted a divorce on the ground of irreconcilable differences in 1989. In the Final Decree of Divorce, Kerby was ordered to pay the sum of \$125.00 a month in child support. In 1994, Pearlie filed a Petition for Citation For Contempt alleging that Kerby was arrear in paying his child support. Kerby filed his answer raising as an affirmative defense his inability to pay. After a full hearing, the chancery court held that; (1) Kerby was in wilful contempt of court, (2) that he be divested of title to one acre of land to cover the arrearage, and (3) that his failure to pay future child support by the ninth of each month would result in his incarceration. Feeling aggrieved by the chancellor's ruling, Kerby appeals to this Court assigning one issue. This Court finds that this issue is well taken, and the chancellor's order is affirmed in part, reversed in part.

FACTS

Kerby is afflicted with Sickle Cell Anemia. He has drawn Title II disability and SSI since he was 18 years old. Since 1979, he has held only one brief job. He claims that because of his sickness he is physically unable to work. The total income he receives is \$501.00 from Title II disability and SSI, plus \$60.00 in food stamps. He also receives sporadic assistance from the local Catholic Church.

Kerby's trailer payment is \$204.00 per month. He pays his brother \$10.00 per month for allowing him to keep his trailer on his property. He also has to occasionally pay someone to take him to the hospital. Kerby claims that after he pays his bills, including phone and utilities, he has no money left and must borrow money from his family to buy food.

Kerby and his ex-wife, Pearlie Clayborn Moton, were granted a divorce in 1989. In the final divorce decree Kerby was ordered to pay \$125.00 per month in child support, which he claims that he is unable to pay.

In 1994, Pearlie filed for a Petition For Citation For Contempt alleging that Kerby was in willful contempt for failing to pay the child support as ordered by the court. Kerby answered this petition by raising as an affirmative defense his inability to pay. The chancellor found him in willful contempt and further found that if he failed to pay child support by the ninth of the month the clerk of the court would call the sheriff and have him incarcerated.

LAW

I. WHETHER THE CHANCERY COURT COMMITTED REVERSIBLE ERROR IN ORDERING KERBY'S INCARCERATION:

(A) WITHOUT BENEFIT OF A HEARING;

(B) UPON NOTIFICATION BY THE CLERK OR OTHERS; AND,

(C) FOR NON-PAYMENT OR LATE PAYMENT OF FUTURE SUPPORT PAYMENTS, WHICH HE IS YET TO BE FOUND IN CONTEMPT.

Kerby has two basic arguments in this case. First, that his inability to pay child support is a defense to an order of contempt. Second, that the chancellor was in error in ordering that he be arrested by the sheriff if he does not pay his child support on time.

As to his first argument, Kerby does not argue that his child support payments should have been reduced nor does he argue that the chancellor was in error in finding that he owed child support. He does, however, argue that the chancellor was in error in finding him in contempt of court.

Kerby asserts that he should not have been held in contempt of court for failure to pay child support because he is physically unable to pay. He correctly asserts that this inability to pay is a defense to a judgment of contempt. *Riser v. Peterson*, 566 So. 2d 210, 211 (Miss. 1990). However, the chancellor made a finding that he was able to pay child support. A chancellor's findings will not be disturbed unless he made a clearly erroneous finding or if he applied an erroneous legal standard. *Mount v. Mount*, 624 So. 2d 1001, 1004 (Miss. 1993). While Kerby's tale is tragic, the chancellor after hearing all of the evidence found that he was able to pay his child support, but was simply unwilling to do so. We cannot say that the chancellor's findings were clearly erroneous.

In *Thurman v. Thurman*, 559 So. 2d 1014, 1016 (Miss. 1990), our supreme court stated that:

Where a party is unable to comply with a divorce decree, he should with reasonable promptitude, make the fact known to the court by proper petition and have the decree modified or suspended, and not wait until he has been cited for contempt. If a party fails to take this course of action, he will in response to the citation for contempt be required to make out a clear case of liability.

In this case, Kerby waited until contempt charges were brought before he claimed that he was unable to pay. He should not have waited almost five years before doing this.

Kerby's next point is that the chancellor was in error in ordering that he be incarcerated for *future* non-payment of child support by notification of the court clerk without the benefit of a hearing. In the case of *Martin v. Martin*, 254 So. 2d 530, 533 (Miss. 1971) our supreme court found that:

However, it was not proper for the court to provide that upon his failure to pay any installment, upon certificate of the chancery clerk that he had failed to do so, the sheriff was authorized to pick him up and hold him in jail until he complied. The court by this means, authorized the revocation of the stay of execution by someone other than the court. If a stay is to be granted only the court can revoke such stay and not the sheriff or the chancery clerk. The rule is that once the stay has been granted, the appellant is entitled to be heard by the court before the stay is vacated.

The chancellor was in error in ordering that Kerby be incarcerated for failure to make future payments without being heard by the court. Once the chancellor has stayed an order of contempt, the stay cannot be lifted by anyone other than the court. To do otherwise is error.

CONCLUSION

The chancellor's finding that Kerby was in contempt of court, that he owed back child support, and that he be divested of title to one acre of land is affirmed. We do not rule on the issue of whether

there has been a substantial change in circumstances which justify a reduction in child support because that issue was not raised by Kerby and was therefore waived. Finally, we must

reverse the chancellor's order finding that Kerby be incarcerated by the sheriff upon notification of the clerk of the court that he has failed to make future payments.

THE JUDGMENT OF THE CHANCERY COURT OF MARSHALL COUNTY IS AFFIRMED IN PART REVERSED IN PART. COSTS OF APPEAL ARE TAXED EQUALLY TO BOTH PARTIES.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.