

IN THE COURT OF APPEALS 12/12/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00952 COA

COLLEEN O'MARA McDONALD FLOYD

APPELLANT

v.

MICHAEL T. McDONALD

APPELLEE

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

TRIAL JUDGE: HON. JOHN C. ROSS, JR.

COURT FROM WHICH APPEALED: MONROE COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT:

ROBERT H. FAULKS

DAVID T. WILSON, JR.

ATTORNEY FOR APPELLEE:

MICHAEL MALSKI

NATURE OF THE CASE: CHILD SUPPORT

TRIAL COURT DISPOSITION: APPELLANT'S PETITION FOR INCREASED CHILD
SUPPORT AND MOTION FOR ATTORNEY'S FEES DENIED

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

COLEMAN, J., FOR THE COURT:

This is an appeal from a judgment of the Monroe County Chancery Court in which that court denied both the mother's petition for an increase in the amount of child support to be paid by the father and her motion for the award of an attorney's fee. The mother appeals to seek reversal of this judgment. We affirm the denial of the increase in child support, but we reverse and remand the denial of attorney's fees to the mother.

I. Facts

Colleen O'Mara McDonald Floyd (mother) and Dr. Michael T. McDonald (father) were married on June 14, 1970. In 1972, Dr. McDonald began his practice of general dentistry in Amory. To their marriage were born two children, Marcus T. McDonald on May 25, 1975, and Mitchell O'Mara McDonald on September 6, 1977. On January 24, 1979, the Monroe County Chancery Court granted the McDonalds a divorce on the grounds of irreconcilable differences. The final decree of divorce ratified and confirmed the provisions of the McDonalds' Separation, Support and Custody Agreement dated November 9, 1978, and the Amendment to Separation, Support and Custody Agreement acknowledged by the McDonalds on January 23, 1979.

In their Separation, Support and Custody Agreement the McDonalds agreed that the mother would have the primary custody of their two children and that the father would (1) pay child support to her at the rate of \$250.00 per child per month, (2) maintain hospital and medical coverage for the children, (3) provide for or arrange for all dental services, and (4) pay all expenses incurred for their college education, including tuition, fees, costs of necessary books, laboratory fees and student assessments. The Separation, Support and Custody Agreement also provided that the father would be entitled to claim both children as exemptions on his federal and state income tax returns. The father agreed to pay the mother alimony at the rate of \$250.00 per month. The amendment to this agreement provided that the father would pay child support in two (2) equal installments of \$250.00 each on the fifteenth and last day of each month.

When the divorce was granted on January 24, 1979, the mother was a housewife with no other full-time job. The McDonalds' son Marcus was three years old, and their son Mitchell was one year old.

II. Litigation

On November 23, 1994, Colleen O'Mara McDonald Floyd filed a Petition for Modification in which she alleged that "Inflation, advances in the age of the minor children, their additional needs and Husband's substantial increase in income all constitute a material change in circumstances entitling Petitioner to an increase in child support payments from [father] to an amount equal to twenty-five percent (25%) of Respondent's adjusted gross income." Before the court heard this Petition, but after the father had responded to the mother's preliminary requests for discovery, the mother filed another Petition for Modification of Child Support Payments and for Other Relief, in which she alleged that

there had been "a material change of facts and circumstances since the rendition of the Final Decree of January 24, 1979, including but not limited to, the increased needs and expenses caused by the advanced age and maturity of the parties' sons Marcus T. McDonald and Mitchell O'Mara McDonald, inflation and the rising cost of support in the fifteen (15) years since the rendition of the Final Decree, the attendance of the parties' son Marcus T. McDonald at college, the relative financial condition and earning capacity of the parties, the enactment of the Child Support Guidelines, and such other relevant facts and circumstances as will be shown at a hearing hereof."

In her second petition, the mother prayed that the court would "order a proper increase in child support for both of the parties' sons," would order the father "to purchase an automobile, tag, and automobile insurance for his son Mitchell O'Mara McDonald," would order "the allocation of the dependency exemption for federal and state income tax purposes for the parties' sons to Colleen O'Mara McDonald Floyd," and would grant reasonable attorney's fees and court costs, and such other relief as the court might determine to be just.

The chancellor began a hearing on the mother's petitions on May 27, 1994, recessed the hearing at the end of that day, and then resumed and finished the hearing on June 24, 1994. At the conclusion of the hearing, the chancellor advised the parents that he would take the matter under advisement because he needed an opportunity to review the pleadings and the notes. He rendered an Opinion and Judgment of the Court dated August 30, 1994, which was then entered on September 8, 1994. In that Opinion and Judgment he made the following findings and adjudications:

The proof fails to show that there has been such a material change in circumstances [as those in the cases which the chancellor previously cited in his opinion]. Some fifteen years have passed since the former decree. The children are older and one is in college. Their expenses have increased as no doubt have the expenses of Michael T. McDonald. These changes, however, are clearly offset by the substantial decrease in Michael T. McDonald's income. In 1979, the year of the divorce, Michael T. McDonald's income was \$47,249.47. In 1993, Michael T. McDonald's income had decreased to \$32,066.88. Plausible reasons were given to the Court for this decrease.

Accordingly, the request by Colleen O'Mara McDonald Floyd for an increase in child support is denied. Finding no justification to grant an increase in child support, the Court also concludes that there is no justification in modifying the prior agreement of the parties with regard to its tax exemption provisions.

Colleen O'Mara McDonald Floyd had an adjusted gross income in 1993 of \$28,618.00. In view of her income and in view of her failure to prove a material change of circumstances, Colleen O'Mara McDonald Floyd's request for attorney's fees is denied.

With respect to college expenses of the oldest child of the parties, the attorney for Colleen

O'Mara McDonald Floyd shall within fifteen days of the date of this Judgment advise the attorney for Michael T. McDonald of the remaining balance of the college expenses. Within fifteen days thereafter, Michael T. McDonald shall pay the amount owed to Colleen O'Mara McDonald Floyd.

All other relief requested by either party is denied.

In her appeal from this Opinion and Judgment the mother seeks to reverse the chancellor's denial of the increase in child support and mother's attorney's fees.

III. Issues and the Law

We quote from appellant Colleen O'Mara McDonald Floyd's brief to state the two issues which she urges this court to resolve in her favor:

1. Whether there has been a material change in circumstances regarding one or more of the interested parties since the 1979 decree. The chancellor should have granted Mrs. Floyd's petition for increased child support and other relief.

2. Whether the chancellor should have awarded reasonable attorney's fees on Mrs. Floyd's petition for increased child support and other relief.

A. Standard of Review

Findings of facts will be affirmed where there is substantial evidence in the record to support the chancellor's findings, and absent manifest error, this Court will not reverse. *Gebetsberger v. East*, 627 So. 2d 823, 826 (Miss. 1993); *Bank of Mississippi v. Hollingsworth*, 609 So. 2d 422, 424 (Miss. 1992) (citations omitted). Where the chancellor does not render specific findings of fact, this Court proceeds, as does the Mississippi Supreme Court, "upon the 'assumption that the chancellor resolved all such fact issues in favor of the appellee', . . . or as a minimum, in a manner which would be in line with the decree." *Love v. Barnett*, 611 So. 2d 205, 207 (Miss. 1992) (citations omitted). In addition, if the chancellor traveled the wrong route but reached the right result as to the law and facts, this Court again follows the Mississippi Supreme Court rule and will affirm the chancellor. *Id.* at 207.

In matters of child support, the Mississippi Supreme Court provided this additional guidance in the case of *Gillespie v. Gillespie*, 594 So. 2d 620 (Miss. 1992):

We note at the outset that an award of child support is a matter within the discretion of

the chancellor and we will not reverse that determination unless the chancellor was manifestly wrong in his finding of fact or manifestly abused his discretion. *Powers v. Powers*, 568 So. 2d 255, 257 (Miss. 1990). The process of weighing evidence and arriving at an award of child support is essentially an exercise in fact-finding, which customarily significantly restrains this Court's review. *Cupit v. Cupit*, 559 So. 2d 1035, 1036-37 (Miss. 1990).

Gillespie, 594 So. 2d at 622.

Our resolution of the mother's issues must occur harmoniously with this standard of review.

B. First Issue

1. Whether there has been a material change in circumstances regarding one or more of the interested parties since the 1979 decree. The chancellor should have granted Mrs. Floyd's petition for increased child support and other relief.

A parent who seeks a financial modification of a decree providing for child support must demonstrate a material change in the circumstances of one of the parents or of the children for whom the child support is being paid. This material change must have occurred after the decree, which the parent seeks to modify, has been entered. In *McEachern v. McEachern*, 605 So. 2d 809, 813 (Miss. 1992), the Mississippi Supreme Court explained this requirement in this language:

Chancery courts may modify final decrees which pertain to child support. This authority exists by statute as well as by virtue of the inherent power of the chancery court. *Campbell v. Campbell*, 357 So. 2d 129, 130 (Miss. 1978); Mississippi Code Annotated 93-5-23 (Supp. 1991). The burden of proof that must be met by the party seeking a financial modification is to show a material change of circumstances of one or more of the interested parties, whether it be the father, mother, or the child(ren), arising subsequent to the original decree. *Cox v. Moulds*, 490 So. 2d 866, 869 (Miss. 1986); *Adams v. Adams*, 467 So. 2d 211, 214 (Miss. 1985).

We have already noted that the chancellor found that the proof failed to show that there had been a material change in circumstances. To support this finding, he observed that while the expenses of Marcus and Mitchell had increased, the evidence revealed that their father's income had decreased from \$47,249.47 in 1979, the year of the divorce, to \$32,066.88 in 1993, the year before the hearing was conducted. He might also have noted that although the mother was not gainfully employed when the divorce was granted in 1979, she was earning \$16,500 per year as an administrative assistant for a community counseling service in 1994. She also received alimony from her second husband at the rate of \$1,250 per month so that her total gross income for 1994 was \$31,500, or only \$566.88 less

than that of the father's.

We are aware of the mother's argument that the father as sole owner of his professional corporation could regulate the salaries that he paid his present wife for her services to his corporation as dental hygienist and office manager. Thus, the father's present wife earned more from that corporation than did the father as its owner; but the father testified that he paid his present wife for two jobs, dental hygienist and office manager. This Court also notes the pernicious consequence of inflation on the amount of child support which was established in accordance with 1979 values.

The mother also invites our attention to the fact that the father's claiming their two children as dependents for federal and state income tax purposes results in tax savings of \$1,316 on his federal income tax liability and \$150 on his state income tax liability. She then argues that the chancellor ought to have increased the amount of her husband's child support by that amount. However, the father began to realize this "tax saving" with the year 1979, the year the divorce was granted; so we remain unconvinced that this "tax saving" constituted a material change in the father's circumstances which occurred after the chancery court granted the divorce. Instead, this "tax saving" was "something that could have been or should have been reasonably anticipated by the parties to the agreement at the time of the agreement." *Morris v. Morris*, 541 So. 2d 1040, 1043 (Miss. 1989).

Unless the chancellor was manifestly wrong in his finding of fact, or unless he manifestly abused his discretion in denying the wife an increase in the amount of child support which the father was to pay, we ought to affirm his adjudication of this issue in deference to the applicable standard of review to which we previously referred. From our review of the record, we have concluded that there was substantial evidence in the record to support the chancellor's determination of this issue. He did not abuse his discretion in so determining that the mother had failed to show a material change of circumstances sufficient to warrant an increase in the amount of child support which the father ought to pay.

However, before we are at liberty to affirm the chancellor on this issue, we must address the mother's contention that the chancellor erred when he refused to apply the guidelines for determining the amount of child support which Section 43-19-101 of the Mississippi Code of 1972 provides. Pursuant to Mississippi Rule of Appellate Procedure 28(j) the mother has suggested to this court that the quite recent case of *Draper v. Draper*, 658 So. 2d 866 (Miss. 1995), supports her contention that the chancellor erred by not increasing the amount of the father's child support payments as determined by Section 43-19-101 of the Mississippi Code. *Draper* is the only case which the mother cites to support her contention that the chancellor erred in this way.

Unlike the case *sub judice*, which involves a modification of an existing decree to change the amount of child support, *Draper* involved the chancellor's calculation and award of the father's child support payments as a part of granting the divorce. *Id.* at 867. Although the divorce was awarded on the grounds of irreconcilable differences pursuant to Section 93-5-2 of the Mississippi Code, the Drapers submitted several unresolved issues to the chancellor for his adjudication pursuant to Section 93-5-2(3) of the Mississippi Code. Among these issues was the amount of child support to be paid by the father. *Id.*

In *Draper*, the chancellor ordered the father to pay \$350 per month in child support although the guidelines established by Section 43-19-101 would have required the father to pay 22% of his

adjusted gross income for three children, or \$495 per month. *Id.* at 870. Regardless of the guideline's requirement that the chancellor make "a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate . . . as determined under the criteria specified in Section 43-19-103," he made no such finding to support his award of child support. His award of \$350 per month was \$145 per month less than the amount of \$495 per month, which the statutory guideline presumed to be adequate. *Id.* The supreme court held that this was reversible error, and it remanded for a new hearing on the issue of child support. *Id.*

In her brief, the mother in the case *sub judice* emphasizes the chancellor's failure to apply these same guidelines to the determination of the amount of child support which he ought to have ordered the father to pay. She calculates that twenty percent of adjusted gross income which Section 43-19-101 requires the father to pay for the support of his two children was \$7,111.20 per year, or \$1,111.20 more than the \$6,000 per year which the father was paying pursuant to the 1979 Final Decree of Divorce. She argues that *Draper* is ample authority for this Court to reverse the chancellor's refusal to increase the amount of child support.

Unlike *Draper*, the case *sub judice* concerns the wife's effort to modify an existing divorce decree. Without a material change in the circumstances of the father, the mother, or the children, which would have occurred after the Final Judgment of Divorce was entered on January 24, 1979, the chancellor was not at liberty to modify it. We have held that there was substantial evidence to support the chancellor's determination that there had been no such material change in their circumstances. We further held that the chancellor did not abuse his discretion in determining that the mother had failed to show a material change of circumstances sufficient to warrant an increase in the amount of the father's child support. Therefore, in the absence of a material change in circumstance of the parties and their children, the chancellor could not modify the 1979 Final Decree of Divorce. He could not modify the decree even if the amount of child support which it required the father to pay was less than what Section 43-19-101 would otherwise require.

In *Gregg v. Montgomery*, 587 So. 2d 928 (Miss. 1991), the father's child support payments were more than twenty percentum of his adjusted gross income. *Id.* at 932. He sought to modify the decree which established the amount of child support on the ground that the adoption of the guidelines was a sufficient material change in circumstances to warrant the requested modification. *Id.* He argued that the guidelines required the reduction of his payment of child support to twenty percentum of his adjusted gross income. *Id.* The Mississippi Supreme Court rejected Gregg's argument. It held that the enactment of the child support guidelines in Section 43-19-101 did not constitute a material change in circumstances which justified a modification of the original divorce decree. We refer to *Gregg v. Montgomery* because to this Court it seems that the wife argues that the adoption of these guidelines alone was a sufficient material change in circumstances to warrant the modification of the 1979 Final Judgment of Divorce which she sought.

We resolve this issue adversely to the wife and affirm the chancellor's refusal to increase the amount of the father's child support payments.

C. Second Issue

2. Whether the chancellor should have awarded reasonable attorney's fees on Mrs. Floyd's petition for increased child support and other relief.

We previously noted that the mother earned \$16,500 per year as an administrative assistant for a community counseling service and that she also received alimony from her second husband at the rate of \$1,250 per month. Thus for 1994 the mother had an annual income of \$31,500, or only \$566.88 less than that of the father's for the same year. In addition, she received an annual sum of \$6,000 for the support of her two children.

In her brief, the wife emphasizes the size of her burdensome debt, which she alleges would ordinarily qualify her for relief under the nation's bankruptcy laws. The wife argues that the evidence shows that her two sons and she incur basic monthly expenses of \$2,809.22 and that her entire disposable income is \$2,500.00 per month. Thus, she contends that the chancellor manifestly erred when he declined to award her an attorney's fee. To support her contention she cites several cases, among which are *McKinney v. McKinney*, 374 So. 2d 230 (Miss. 1979) (evidence of changed circumstances was sufficient to support decree requiring husband to pay attorney fees and child support to former wife); *Pearson v. Hatcher*, 279 So. 2d 654 (Miss. 1973) (divorced wife who sought increase in child support provision of divorce decree was entitled to attorney's fees on the court's finding that the wife was unable to pay such a fee); *Castleberry v. Castleberry*, 214 Miss. 94, 58 So. 2d 67 (1952) (where wife filed cross-petition to recover additional sums for emergency expenses arising out of injuries sustained by the children, and wife prosecuted the cross-petition in good faith, she was entitled to solicitor's fees for prosecuting her petition, even though she was unsuccessful in part); *Walters v. Walters*, 180 Miss. 268, 177 So. 507, 508 (1937) (statute providing that court granting divorce decree may, on petition, change decree and make such new decrees as case may require, necessarily implies that court may impose on father obligation to pay expenses incident to presentation of petition for increase in child support, including attorney's fees). In response to these cases, the father asserts that in each of them the supreme court found a financial inability to pay which simply is not present in the mother's situation.

In the Opinion and Judgment of the Court which the chancellor entered on September 8, 1994, he found:

Colleen O'Mara McDonald Floyd had an adjusted gross income in 1993 of \$28,618.00. In view of her income and in view of her failure to prove a material change of circumstances, Colleen O'Mara McDonald Floyd's request for attorney's fees is denied.

This court notes that the chancellor's findings omitted any reference to the evidence that the wife's monthly expenses exceeded her income by more than \$300.00. It further notes that in his brief, the husband does not attack the credibility of the conclusion that the wife's monthly expenses exceeded her income by more than \$300.00.

A perusal of the Opinion and Judgment reveals that the father was not entirely blameless. This Court notes that the mother obtained some relief from her foray into the Monroe County Chancery Court in search of more child support. The chancellor further found:

With respect to college expenses of the oldest child of the parties, the attorney for Colleen

O'Mara McDonald Floyd shall within fifteen days of the date of this Judgment advise the attorney for Michael T. McDonald of the remaining balance of the college expense. Within fifteen days thereafter, Michael T. McDonald shall pay the amount owed to Colleen O'Mara McDonald Floyd.

This court concludes that there was no substantial evidence to support the chancellor's denial of an attorney's fee to the mother because she was financially able to pay her attorney. Our comparison of the mother's monthly income with her monthly living expense demonstrates her inability to pay her attorney.

The chancellor also appeared to deny the mother an attorney's fee because she had failed to demonstrate a material change in the circumstances of the father, the children, or her. However, he allowed her to prevail on collecting the father's delinquent payment of the remaining balance of Michael's college expense, an obligation which the father had voluntarily assumed and which the Final Judgment of Divorce had ratified. Therefore, we conclude that the chancellor abused his discretion when he denied the wife's request for an attorney's fee.

The wife asserts that her attorney is entitled to be paid a fee of \$1,617.00 and reimbursed for \$315.26 in expenses which he incurred in representing her. The chancellor admitted into evidence an itemized statement for that fee, which was based on an hourly rate of \$80.00. However, from the record in this case, we are unable to determine whether such an amount would be reasonable pursuant to the criteria which the Mississippi Supreme Court established in the case of *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982). In *McKee*, our supreme court wrote:

In determining an appropriate amount of attorneys fees, a sum sufficient to secure one competent attorney is the criterion by which we are directed. *Rees v. Rees*, 188 Miss. 256, 194 So. 750 (1940). The fee depends on consideration of, in addition to the relative financial ability of the parties, the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, as well as the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case.

Id. In *McKee* the supreme court found that there was insufficient evidence presented to the trial court to accurately assess attorneys fees; and it accordingly remanded the case on that issue for further testimony and determination by the chancellor. *Id.* We do the same thing in the case *sub judice*.

V. Conclusion

In accordance with the standards of review appropriate to cases which involve issues of modification of child support and the award of attorney's fees such as we have in this case, we hold that substantial evidence supported the chancellor's finding that the mother failed to establish a material change of the father's, the children's, or her circumstances after the entry of the January, 1979, Final

Judgment of Divorce. We conclude that his application of law to those findings of fact on that issue were correct and appropriate. However with regard to the issue of his refusal to award the mother an attorney's fee to be paid by the father, we hold to the contrary. We do so because of the apparent inadequacy of the mother's income to satisfy her and her two children's living expenses, about which the chancellor made no adjudication in his Opinion and Judgment. Moreover, the chancellor found that the father had not paid all of the older son's college expense; and he ordered him to do so within fifteen days of the wife's lawyer advising his lawyer of the unpaid amount of those expenses.

Therefore, this Court affirms the chancellor in so far as he denied an increase in the amount of child support to be paid by the father. However, this Court reverses the chancellor in so far as he denied the mother an award of attorney's fees and remand this case to the Monroe County Chancery Court for further testimony and determination by the chancellor on the issue of what would be a reasonable attorney's fee for the father to pay the mother's attorney.

THE JUDGMENT OF THE MONROE COUNTY CHANCERY COURT IS AFFIRMED IN PART AND REVERSED IN PART AND REMANDED. COSTS ARE TAXED TO THE APPELLEE.

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