

IN THE COURT OF APPEALS 11/28/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00827 COA

LINDA ROGERS HILL

APPELLANT

v.

CHARLIE LEE HILL

APPELLEE

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

TRIAL JUDGE: HON. ANTHONY THOMAS FARESE

COURT FROM WHICH APPEALED: LAFAYETTE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

JAMES D. MINOR

ATTORNEY FOR APPELLEE:

DAVID G. HILL

NATURE OF THE CASE: CIVIL: DIVORCE

TRIAL COURT DISPOSITION: DENIED PRAYER FOR DIVORCE AND VACATED
TEMPORARY ORDER AWARDED ALIMONY

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

THOMAS, P.J., FOR THE COURT:

On October 30, 1992, Linda Rogers Hill filed a complaint for divorce based on her husband's alleged adultery and irreconcilable differences. Linda also requested child support and alimony. On November 13, 1992, the Chancery Court of Lafayette County awarded Linda temporary support and ordered Charlie Lee Hill, Linda's husband, to pay child support of \$150 monthly and \$390 a month for rent. Thereafter, Charlie failed to pay the rent as required by the court's order. Linda filed a motion for citation of contempt and temporary restraining order. After hearing all the evidence on the divorce claim, the chancery court denied Linda's prayer for divorce and retroactively vacated the temporary support order. As a result, Linda received none of the rent payments which Charlie was required to pay under the temporary support order. Feeling aggrieved, Linda appeals to this Court and asserts the following assignment of error:

I. WHETHER A CHANCERY COURT MAY VACATE A TEMPORARY ORDER AND CANCEL ACCRUED BUT UNPAID SUPPORT PAYMENTS DUE THEREUNDER WHEN THE COURT ON THE FINAL HEARING DENIES THE PRAYER FOR DIVORCE.

We find that the chancery court erred as a matter of law and reverse.

I. WHETHER A CHANCERY COURT MAY VACATE A TEMPORARY ORDER AND CANCEL ACCRUED BUT UNPAID SUPPORT PAYMENTS DUE THEREUNDER WHEN THE COURT ON THE FINAL HEARING DENIES THE PRAYER FOR DIVORCE.

Linda contends that the chancery court could not retroactively vacate the temporary support payments as each payment accrued and became vested on the date each was due. In support of this argument, Linda cites *Lewis v. Lewis*, 586 So. 2d 740, 742 (Miss. 1991), for the proposition that the temporary support payments accrued monthly pursuant to the chancery court's order and the subsequent order vacating the temporary award was void.

Charlie asserts that *Lewis* is inapplicable to the case at bar because the plaintiff in *Lewis* successfully obtained a divorce in the same action in which she was awarded temporary alimony. An analysis of *Lewis* reveals that Charlie is incorrect in his argument to this Court as one does not have to successfully obtain a divorce in order to be entitled to past due temporary support.

In *Lewis*, Minnie Lewis filed a complaint for divorce against Milton Lewis. Subsequently, the parties agreed to a temporary order which stipulated that Milton would pay Minnie \$550 monthly as temporary alimony. After this temporary order, the parties agreed to a property settlement which provided in part:

8. All property and monies not mentioned herein have been previously divided by the parties to the mutual satisfaction of each party. This agreement is intended to, and does, fully and finally settle all property rights between the parties.

9. The parties acknowledge that they have read this property settlement agreement, and it is a fair contract and is not the result of any fraud, duress, or undue influence exercised by either party upon the other, or by any other person or persons upon either party.

10. Both parties hereby certify and stipulate that this property settlement agreement contains the entire agreement and understanding of the parties, and there are no other agreements between them not set forth specifically herein, and each party hereby agrees that this separation and property settlement agreement fully, finally, and forever settles all rights, claims, and demands by either of them for support, alimony, maintenance, expenses and any other rights and obligations arising out of the marriage relationship.

11. Husband and wife respectfully hereby relinquish and release each and every right and privilege they now have or may hereafter acquire from each other as a result of said marriage.

Lewis, 586 So. 2d at 741, 743-44.

Milton Lewis never paid the \$550 temporary alimony as required by the agreed temporary order. *Id.* at 741. Despite the strong language in the property agreement, which appeared to settle the entire dispute between the parties, the supreme court held:

an obligation owed by one spouse to the other becomes fixed and vested when due and unpaid. This obligation will not be discharged or amended in an agreement between the parties unless it is explicitly plead before an informed court. To amend a prior decree, even if a temporary one, the parties hereafter should recite the change and present the same to the court, otherwise we are in the inexplicable position of having an order of the court changed by the parties without consideration for or by the court.

Id. at 743. As a result, Milton Lewis was not relieved of his duty to pay the \$550 temporary alimony pursuant to the agreed temporary order. *Id.*

Although one may argue with the merits in *Lewis*, we are constrained to follow the law of that case. Here, applying *Lewis* to the facts in the case at bar, Charlie was not relieved of his duty to pay the temporary support of \$390 per month pursuant to the order of the chancery court. The temporary support payments became fixed and vested when due and unpaid. Charlie's argument that Minnie Lewis was entitled to the temporary support *only* because she was "justified in her actions in seeking a divorce and in obtaining temporary support" are without merit as the *Lewis* case does not make any such exception to the rule delineated by the supreme court.

After Linda's divorce complaint was dismissed by the chancery court, Charlie filed a divorce complaint and was successful in obtaining a divorce. Charlie contends that Linda explicitly waived her right to the temporary support before the chancery court by agreeing to and signing the proposed

settlement agreement when Charlie obtained this divorce. Regardless of any potential merit to this argument, we are constrained, under *Lewis*, to find that the temporary support payments became fixed and vested when due and unpaid.

THE JUDGMENT OF THE CHANCERY COURT OF LAFAYETTE COUNTY DENYING LINDA ROGERS HILL THE TEMPORARY SUPPORT PAYMENTS IS REVERSED AND REMANDED FOR A HEARING TO DETERMINE THE AMOUNT OF SUPPORT PAYMENTS WHICH ARE DUE AND PAYABLE INCLUDING INTEREST. COSTS ARE TAXED TO THE APPELLEE.

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

KING, J., NOT PARTICIPATING.