

IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00771 COA

SUSANNE WELLS SANDIFER A/K/A SUSANNE

SANDIFER HARDIN APPELLANT

v.

ROBERT HOUSTON HARDIN APPELLEE

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

TRIAL JUDGE: HON. DENISE S. OWENS

COURT FROM WHICH APPEALED: HINDS COUNTY CHANCERY COURT

ATTORNEY(S) FOR APPELLANT(S): CAROLINE R. MOORE

ATTORNEY(S) FOR APPELLEE(S): JAMES L. MARTIN

NATURE OF THE CASE: DOMESTIC RELATIONS/MODIFICATION OF CHILD SUPPORT -
MINOR CHILD'S EDUCATION COSTS

TRIAL COURT DISPOSITION: MATERIAL CHANGE IN CIRCUMSTANCES JUSTIFIED
MODIFICATION - FATHER TO PAY COSTS OF ATTENDING IN-STATE HIGH SCHOOL
ONLY

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

PAYNE, J., FOR THE COURT:

INTRODUCTION

This appeal concerns a dispute between divorced parents to require the other to pay for their youngest child's private high school education. Since the trial court chancellor was not manifestly in error and did not abuse her discretion, we affirm the order modifying the final judgment of divorce.

FACTS

Robert Hardin and Susanne Sandifer divorced in 1986. The divorce incorporated an agreement for custody and maintenance of their three children and a property settlement agreement. The agreement granted both Robert and Susanne joint legal custody, while it provided that Susanne would have primary physical custody. The court modified the judgment in 1988 to allow each child to select physical custody. The youngest child, Susan, whose private high school education costs are at issue here, lived with Robert most of the time after that modification. This litigation began when Susanne and Susan decided that the latter should attend a private high school in Alexandria, Virginia, rather than Jackson Academy, where she had been attending. Robert refused to pay the cost of sending Susan to the private school in Virginia, although she did attend. The original divorce property settlement agreement stated that Robert would pay all costs of private school education through high school at those certain schools agreeable to Robert, Susanne, and the child, proportionately with Robert's ability to pay and the performance of the child at school.

Susanne filed suit for modification of the original judgment, asking that Robert be required to pay all expenses of Susan's attendance at the Virginia school. The trial court determined that Susan's schooling created a material change of circumstances to justify modification of the final judgment of divorce. The court's order contained the following provisions: (1) Susan should be allowed to continue to attend the private [high] school of choice of her and one parent; (2) Robert would be required to pay tuition and costs of fees and books commensurate with Jackson Academy; and (3) Robert would pay \$500 per month plus one-half of all travel costs during the school year to and from school and home at the beginning and end of the academic year, Thanksgiving, Christmas, and Spring Break holidays. This modification effectively allowed Susan to continue attending the Virginia school. The order was to be retroactive to the beginning of the 1993-94 academic year. Susanne appeals the trial court order.

ARGUMENT

I. DID THE TRIAL COURT ERR IN MODIFYING THE TERMS OF THE FINAL JUDGMENT OF DIVORCE?

Susanne contends that she should not have to pay for Susan's Virginia private school education. She argues that the court had no factual basis to modify the terms of the original divorce because finances were not at issue and no evidence of either party's financial condition was admitted at trial. Finally, she argues that Robert never tried to reconcile the disagreement with her and that Robert acquiesced in Susan's attendance at the Virginia school.

On the other hand, Robert argues that the chancellor was correct in modifying the terms of the

original divorce. He agrees that he should not be required to pay all of Susan's Virginia private schooling costs.

ANALYSIS

The Mississippi Supreme Court has held that, on appellate review, a chancellor's findings of fact will not be disturbed if substantial evidence supports those factual findings. *Brooks v. Brooks*, 652 So. 2d 1113, 1124 (Miss. 1995) (citations omitted). In a domestic relations context, this Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong or clearly erroneous, or if an erroneous legal standard was applied. *Setzer v. Piazza*, 644 So. 2d 1211, 1215 (Miss. 1994) (citations omitted); *see also Steen v. Steen*, 641 So. 2d 1167, 1169 (Miss. 1994) (appellate review is limited since court will not disturb the chancellor's findings unless manifestly wrong or clearly erroneous, or if erroneous legal standard was applied) (citation omitted); *Morris v. Stacy*, 641 So. 2d 1194, 1196 (Miss. 1994) (chancellors have broad discretion regarding child support modification, but court will reverse if chancellor committed manifest error in a finding of fact or abused his discretion) (citations omitted); *McEwen v. McEwen*, 631 So. 2d 821, 823 (Miss. 1994) (while chancellor is given broad discretion in area of child support modification, court will reverse when chancellor was manifestly in error in finding of fact or if abuse of discretion is evident) (citation omitted); *Crow v. Crow*, 622 So. 2d 1226, 1228 (Miss. 1993) (appellate court is required to respect findings of fact made by chancellor that are supported by credible evidence and not manifestly wrong, particularly regarding divorce and child support matters) (citations omitted). This Court is required to respect a chancellor's findings of fact that are supported by credible evidence, particularly in the areas of divorce and child support. *Steen*, 641 So. 2d at 1169 (citations omitted).

The Mississippi Supreme Court has also addressed the burden of proof regarding a request to modify a child support provision of a final divorce decree. *McEachern v. McEachern*, 605 So. 2d 809, 813 (Miss. 1992). A party seeking financial modification must show a material change in circumstances of one or more of the interested parties (father, mother, or children) arising subsequent to the original decree. *Id.* (citations omitted); *see also Setzer*, 644 So. 2d at 1215 (child support modification may be warranted by a showing of an after-arising material change in circumstances of one or more interested parties) (citing *Gregg v. Montgomery*, 587 So. 2d 928, 931 (Miss. 1991)); *McEwen v. McEwen*, 631 So. 2d 821, 823 (Miss. 1994) (to obtain a child support payment modification, there must exist a substantial and material change in circumstances of an interested party that arose after entry of the decree sought to be modified).

We have reviewed the record and are satisfied that the chancellor's finding of fact was supported by substantial, credible evidence. The court made a finding of fact, based on the evidence presented, that a material change in circumstances existed. This material change justified a modification to the child support provision of the original judgment of divorce. The judgment of divorce required complete agreement between the three parties as to where each child would attend private school through high school. The court believed the change in circumstances was based on Susan's attending the Virginia private school without complete agreement between those parties. The chancellor properly, and within her discretion, crafted an equitable resolution of the dispute. We cannot say that she was manifestly wrong or clearly erroneous in her evaluation of the evidence presented, nor did she apply an incorrect legal standard. We will not disturb the chancellor's findings of fact regarding the evidence presented. The chancellor did not abuse her discretion in modifying the agreement for

custody and maintenance of children and settlement of property rights of the original judgment of divorce. We therefore affirm the order in its entirety.

**THE JUDGMENT OF THE HINDS COUNTY CHANCERY COURT IS AFFIRMED.
COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

**THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ.,
CONCUR. BRIDGES, P.J., CONCURS IN PART AND DISSENTS IN PART. FRAISER,
C.J., NOT PARTICIPATING.**

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BRIDGES, P.J., CONCURRING IN PART AND DISSENTING IN PART:

While I think that the majority arrived at the proper conclusion regarding the modification of the former judgment of the court as it pertained to the matters pled and testified about, being those matters involving tuition, fees, cost of books, costs of travel and other costs, I disagree as to any other modification. The chancellor in this case executed an order modifying the final judgment of the court as to matters not pled, testified about, or included in her findings and bench opinion. Therefore, I must respectfully dissent in part and specially concur in part.

Susanne in her motion for modification sought and prayed that the court modify paragraph 2(c) of the property settlement agreement to order Robert to pay to the Episcopal High School in Alexandria, Virginia, all of the expenses of room, board, tuition, and books for the period from September 1, 1993, until the minor child's graduation in June of 1996, and further, to pay the minor child's traveling [sic] expenses between school and home. There is no mention in the allegations of the motion, nor in the prayer thereof, for any modification of paragraph 2(c) so as to change the requirement that husband, wife, and child agree to any choice made in attending school, as specified in the property settlement. I also failed to find any testimony from any witnesses that the requirement of husband and wife and the child to agree caused any complications or problems between the parties to such an extent that such provision should be changed, thus allowing a modification of the agreement. To the contrary, Susanne testified that at all times prior to the time in question, when it became necessary to make a change in the school of either of the children, that she and Robert fully conformed to the terms of the property settlement agreement and with the agreement of the child involved. Further, she testified that until the time of the matter in question, the agreement worked well, and that any move by a child from one school to another was resolved by either husband, wife and child agreeing to the move, or by husband announcing that he had no objection to the move.

Finally, the Chancellor, in her findings and bench opinion, made no mention that the testimony was sufficient to change the wording in paragraph 2(c) so as to delete the requirement of all three persons to agree to a certain school. Without sufficient evidence and some proper findings, there is no basis for the court to order such a change.

It appears from the opinion of the majority that there may have been evidence inferred or implied from the testimony sufficient to allow the judge to order such a change. The supreme court of this state however has stated that the courts do not act on inferences. The chancellor appears to have relied on insinuations, speculations, and assumptions. The chancellor does not have authority to do this and neither do we. *Madden v. Rhodes*, 626 So. 2d 608, 624 (Miss. 1993).

The standard for appellate review is that the chancellor's finding is affirmed "unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Crow v. Crow*, 622 So. 2d 1226, 1228 (Miss. 1993). Substantial evidence must support the decision. *Mullins v. Ratcliff*, 515 So. 2d 1183, 1189 (Miss. 1987).

I believe the chancellor was manifestly wrong and clearly erroneous when she modified paragraph 2(c) of said property settlement to read, "That the minor child of the parties shall attend the private school of choice of child and one parent" rather than as originally ordered, without substantial evidence to support such decision.

I would reverse and render as to such change, but affirm in all other respects.