IN THE COURT OF APPEALS 11/14/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00594 COA

CHAUNCEY L. GALE, JR.

APPELLANT

v.

CATHERINE SMITH GALE (BROOKING)

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. R. B. REEVES, JR.

COURT FROM WHICH APPEALED: PIKE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

WILLIAM E. GOODWIN

ATTORNEY FOR APPELLEE:

RONALD L. WHITTINGTON

NATURE OF THE CASE: CONTEMPT PROCEEDING/CHILD SUPPORT

TRIAL COURT DISPOSITION: HELD FATHER IN CONTEMPT OF COURT, AWARDED JUDGMENT FOR CHILD SUPPORT ARREARAGE, AND INCREASED FATHER'S PAYMENT OF CHILD SUPPORT

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

COLEMAN, J., FOR THE COURT:

The present appeal arises from a judgment of the Pike County Chancery Court in which it (1) found Chauncey L. Gale, Jr. the father, to be behind in child support payments in the amount of $8,328.00 and thus in contempt of court, (2) determined that Gale's payment of child support should be increased from $400.00 per month to $556.00 per month, and (3) denied Gale's motion to reduce the amount of child support. Gale appeals from that judgment; but we affirm.

I. Facts

Chauncey L. Gale (father) and Catherine Smith (mother) were married on October 19, 1975. Two children were born to their marriage: David Michael Gale on February 13, 1978, and Stephen Stewart Gale on December 11, 1982. The Gales were divorced on June 10, 1983. The chancery court incorporated into the Final Judgment of Divorce a Separation Agreement and Property Settlement (Agreement) executed by the Gales on April 4, 1983. In the Agreement the Gales provided that the mother would have "the permanent care and custody" of both their minor children. The father agreed to pay to mother $400.00 per month child support, of which $200 would be payable on the first and $200 would be payable on the fifteenth of each month beginning April 1, 1983. The Agreement included the following escalation provision with regard to the father's payment of child support:

> [A]nd said child support is to be increased in a percentage equal to the percentage increase for military pay as established by the United States Congress. If no increase for military pay is granted by the Congress then the child support will not be increased. The increase is to be on an annual basis subject to the fact that Congress does not pass an increase.

Nearly nine years later, on May 29, 1992, the mother filed a Complaint for Citation of Contempt and Modification of Former Judgment in which she asked the court to find the father in contempt of court, to increase the amount of child support, to require the father to maintain medical and dental insurance for their two children, and to require the father to pay the mother's attorney's fee and the costs of court. The father filed an Answer and Counterclaim to the Complaint, in which he raised the affirmative defenses of laches on the mother's part, the mother's waiver of her rights, and the vague and uncertain language of the provisions of the Judgment of Divorce pursuant to the Mississippi Supreme Court case of *Wing v. Wing*, 549 So. 2d 944 (Miss. 1989). The father counterclaimed against the mother to pay child support of only b$300 per month on the grounds that she was in a much better financial position to support the children than was he and that the current amount of child support which he was paying exceeded the "statutory guidelines."

Other motions and requests for discovery were filed by the father and the mother. On July 21, 1993, the chancery court entered an Agreed Temporary Order in which it appointed Gary Boggs, C. P. A., as a special master to this court to determine the following issue(s):

1. How much of an increase in child support payments would be payable following all provisions on the Separation Agreement and Property Settlement dated April 4, 1983.

2. How much back child support payments would be due if Chauncey Gale failed to increase the support payments and paid the stated $400.00 per month as stipulated in the order?

On April 18, 1994, the chancery court conducted a hearing on the merits of the mother's Complaint for Citation of Contempt and Modification of Former Judgment. At the conclusion of this hearing, the chancellor delivered the following opinion from the bench:

> The matter of course is before the court today upon the complaint for citation for contempt and modification of the judgment of divorce of June of 1983. The basis for that centers around the language in the agreement paragraph 3 dealing with the acceleration clause. As I said earlier this morning, I wish it were as clear to me as apparently it's clear to the lawyers. However, there is no question the parties agreed upon it. Therefore in the court's opinion that takes it outside of the guidelines for child support payments. They are bound by it whatever it means and a clear, plain, concise reading of the provision says that Mr. Gale is obligated to pay a percentage child support increase based upon his increase for military pay as established by the Congress. Now Mr. Boggs has done a very thorough job and he has come up with some $21,000 based upon the pay raises passed by Congress together with the step increases, the rank increases. He also has computed it based upon the what we'll call the cost-of-living increase. *The court feels that at this point Mr. Gale is obligated to pay only the cost-of-living increases as provided for by the Congress. That figure through this date is $8,328.* Judgment will be entered against him for that amount. The court will direct that the judgment be paid at the rate of $150 per month in addition to the child support obligation. Mrs. Brooking seeks to have him found in contempt for failure to comply with the support obligation. The testimony is that he has not done it. He has been regular and faithful in his $400 a month and I commend him for that. . . . But nevertheless he made the agreement, he is bound by it, and he will have to live with it. And the court finds that according to his testimony he did not pay any cost-of-living increase. He did not intend to. That his former wife had contacted him about it, but he couldn't afford it. The court finds that that is a wilful, deliberate and intentional violation of the order of this court. Mr. Gale will be fou nd in contempt for his failure to comply with that agreement. (Emphasis added.)

* * *

Mr. Gale seeks to find Mrs.. Brookings in contempt of court for violation of the terms of

> visitation and seeks to have the support reduced. The court finds no basis upon which to reduce the support, nor to find that she is in contempt

The court also stated:

> [T]he support today is $556 under the provision of the decree. In addition to that he's also paying or providing for the medical and dental coverage which under the circumstances seems reasonable.

We have emphasized that the chancellor's restriction of the amount of the increase in the father's child support to the cost of living adjustments passed by the Congress in accordance with Gary Boggs' calculation of that amount. The chancellor also agreed that the escalation clause remained in effect and "will continue just as it is, but I suggest you [the mother] don't wait ten years to enforce it." Finally, the chancellor ordered that the father pay $250 for Mr. Bogg's fee, the mother's attorney's fee, and court costs.

On May 18, 1994, the chancery court entered a Judgment in which it incorporated the previously quoted findings and adjudications. From this judgment, Chauncey L. Gale, Jr., has appealed.

III. Issues and the law

We quote from Appellant Chauncey L. Gale, Jr.'s brief to state the four issues which he presents for this court's resolution:

> I. The Court erred when it failed to dismiss the motion for contempt on the grounds that the order was not complete within itself.
>
> II. The escalation clause sued upon is void pursuant to the criteria set out in *Tedford v. Dempsey*.
>
> III. Catherine Gale (Brookings) is barred by laches from enforcing the escalation clause.
>
> IV. The Court erred in failing to apply the statutory guidelines for support payments.
>
> **A. This court's duty is to the children, which is to be discharged in accordance with the appropriate standard of review.**

As does the case *sub judice*, *Tedford v. Dempsey*, 437 So. 2d 410 (Miss. 1983), involved an escalation clause in the separation agreement which the husband and wife made as a prerequisite to obtaining a divorce on the grounds of irreconcilable differences pursuant to Section 93-5-2 of the Mississippi Code of 1972. In *Tedford*, the Mississippi Supreme Court established that this court's primary duty in cases like this one is to the children -- and not to their divorced parents. The supreme court wrote:

> We are first and foremost concerned about the material well being of the . . . children . . . . The legalistic arguments pro and con marshalled by counsel largely ignore this. All need be reminded that in cases such as this the best interests of the children are as always our touchstone.

Id. at 417 (citations omitted). This court intends to discharge conscientiously its duty to David Michael Gale and Stephen Stewart Gale as it considers and resolves the issues with which their father has confronted it. Of course, we must also resolve them harmoniously with the appropriate standard of review.

The Mississippi Supreme Court has often repeated: "On appeal this Court will not reverse a chancery court's factual findings, be they of ultimate fact or evidentiary fact, where there is substantial evidence in the record supporting these findings of fact." *Cooper v. Crabb*, 587 So. 2d 236, 239 (Miss. 1987), *(citing Mullins v. Ratcliff*, 515 So. 2d 1183, 1189 (Miss. 1987)). On issues of contempt of court, which is the heart of the case *sub judice*, the supreme court has provided the following instruction for our consideration of these issues:

> We have stated that "contempt matters are committed to the substantial discretion of the trial court which, by institutional circumstance and both temporal and visual proximity, is infinitely more competent to decide the matter than are we." *Cumberland v. Cumberland*, 564 So. 2d 839, 845 (Miss. 1990). *See Milam v. Milam*, 509 So. 2d 864, 866 (Miss. 1987); *Walters v. Walters*, 383 So. 2d 827, 829 (Miss. 1980).

Morreale v. Morreale, 646 So. 2d 1264, 1267 (Miss. 1994).

B. First Two Issues:

I. The Court erred when it failed to dismiss the motion for contempt on the grounds that the order was not complete within itself.

> II. The escalation clause sued upon is void pursuant to the criteria set out in *Tedford v. Dempsey*.

We combine these two issues for our consideration because they are essentially identical. The father's reliance of the case of *Wing v. Wing*, 549 So. 2d 944 (Miss. 1991) to support his argument on both issues attests to their identity. The father argues that the Final Judgment of Divorce rendered on June 10, 1983, was not complete within itself because the chancellor found its terms "not that clear to me." He attempts to emphasize its vagueness by stressing that the chancellor found it necessary to appoint a public accountant, Gary Boggs, as a special master to apply the provisions of the escalation clause to determine the amount of child support which it required the father to pay.

He also objects to the extraneous references in the judgment, *I. e.*,"specifically actions taken by Congress." In short, even though he agreed to it when the divorce was granted, he now argues that the provision is ambiguous.

In *Wing*, the case on which the father relies, Barbara Wing, the mother, filed a motion for contempt against her former husband for his failure to pay monies due for their child's support under an automatic adjustment clause in their agreement required to obtain a divorce on the grounds of irreconcilable differences. *Id.* at 945. The clause read as follows:

> The Husband further agrees to increase said support each year according to the rate of inflation as set forth in the consumer price index.

Id. at 946.

At the hearing on the motion for contempt, Barbara Wing presented testimony that Russell Wing was in arrears in the amount of $13,736.40. *Id.* at 946. The testimony was taken from summary reports prepared by the Mississippi Employment Security Commission based on data released by the Bureau of Labor Statistics, Southeastern Regional Office, Atlanta, Georgia. *Id.* Two consumer price indices were available, one for all urban workers and another for urban wage earners and clerical workers. *Id.* All items were based upon United States City Averages. *Id.* Barbara Wing's witness further testifies that this calculation would result in an increase in monthly child support to the sum of $660.04. *Id.* Russell Wing offered different calculations which indicated an arrearage of only $7, 014.39. *Id.*

As had Gale, the father in the case *sub judice*, Russell Wing had paid the base rate of child support in the amount of $400 per month. *Id*. Nevertheless, because the chancellor viewed Wing's testimony as an admission that he had wilfully failed to comply with the divorce decree, he found him to be in civil contempt. As the father in the case *sub judice* correctly notes, the supreme court held that the initial agreement lacked specificity to be enforceable and reversed and rendered the chancellor's finding of *contempt. Id.* at 948. However, the supreme court had earlier found:

> Through his testimony, Russell Wing demonstrated that an "ordinary person reading the court's order" would not "be able to ascertain readily from the document itself exactly

> what conduct is prescribed or mandated." *See* Comment, Miss.R.Civ.P. 65(d). A genuine dispute existed over the amount owed, over the commencement year of the escalation clause, and over which Consumer Price Index was to be utilized.

Id. at 947.

In *Wing*, the supreme court enthusiastically impressed its stamp of approval on escalation clauses which establish potential for periodic changes in the amount of child support without the parents having to resort to the judicial process to effect them. *Id.* at 947. To encourage their use of such child-support escalation clauses, the supreme court offered the following guidelines for lawyers to consider when they formulated these escalation clauses for future irreconcilable divorce agreements:

> Noting these problems relating to escalation phrases, we urge the bench and bar, when employing "escalation" clauses for child support, to: (a) specify with certainty the particular cost of living or consumer price index which is to be utilized (there are many); (b) show the applicable ratio (present CPI is to ascertainable CPI as present award is to future award); © calculate the base figure as of the date of judgment; (d) establish frequency of adjustments (we suggest nothing less than yearly); and (e) establish an effective date for each adjustment (e.g., anniversary of date of judgment). Caution should be exercised in applying a consumer price index that comports with Mississippi's economic picture, as well as the parent's job status.

Id. at 948.

We now compare the escalation clause in the case *sub judice* with these standards.

(a) <u>The particular cost of living or consumer price index which is to be utilized</u>

The Gale clause specified that the child support is to be increased "in a percentage equal to the percentage increase for military pay as established by the United States Congress." This court finds "the percentage increase for military pay as established by the United States Congress" to establish the particular cost of living index to be utilized; and thus it satisfies the first part of the *Wing* test.

(b) <u>Show the applicable ratio (present CPI is to ascertainable CPI as present award is to future award)</u>

The Gale clause provided that "said child support is to be increased in a percentage equal to the relevant Congressional act." We think "said child support" clearly relates to the initial amount of child support, which was $400 per month. Thus the percentage of the Congressional increase would be applied to the amount of child support which the father had been paying for the previous year. This

satisfies the second part of the *Wing* test.

(c) Calculate the base figure as of the date of judgment.

As we previously noted, the base figure of the child support was $400 per month. This satisfies the third part of the *Wing* test.

(d) Establish frequency of adjustments.

The Gale clause required that "The increase is to be on an annual basis subject only to the fact that Congress does not pass an increase." We note that the supreme court suggested "nothing less than yearly." This adjustment was to be done annually, which complied with the court's suggestion of "nothing less than yearly." This satisfies the fourth part of the *Wing* test.

(e) Establish an effective date for each adjustment (e.g., anniversary of date of judgment).

The Gale clause did not specifically establish an effective date for each adjustment; but to do so was unnecessary because the Congressional act which instituted the increase would provide the date on which the increase would become effective. By implication, the Gale clause adopted this effective date for the adjustment. This satisfies the fifth part of the *Wing* test.

This court concludes that the Gale escalation clause satisfied all five parts of the *Wing* test; and that therefore *Wing* actually supports its implementation, contrary to the father's argument.

We think that our conclusion is consistent with the Mississippi Supreme Court's decisions in other cases about escalation clauses for child support. For example, in *McNeil v. McNeil*, 607 So. 2d 1192 (Miss. 1992), the divorce decree included the following cost-of-living adjustment provision:

> [U]pon the anniversary of the entry of this Decree, annually, the provisions for periodic child support shall be modified to reflect the changes, if any, in the cost of living by the following formula: (a) The periodic payment is equivalent to 100% of the cost of living index as published by the Bureau of Labor Statistics on the date of entry of this Final Decree; (b) If on the anniversary of this Final Decree such cost of living index is different from the index on the date of this Final Decree, the obligation of support for the next year shall be increased or decreased by the same percentage as the increase or decrease of the said cost of living index; © In no event will the support of the children go below the amount of periodic payments heretofore ordered and agreed upon in the Property-Settlement Agreement.

Id. at 1196. The chancellor invalidated this escalation clause, which he characterized as "ambiguous and unenforceable." *Id.* The supreme court found that:

> The cost-of-living provision in the original decree in this action constitutes an unambiguous and enforceable provision. . . . Presumably, the chancellor who first heard

> the case balanced the support-award factors before fashioning a decree. In the instant case, the chancery court's citation of the provision's failure to incorporate gross income does not constitute sufficient evidence to warrant a decree modification. In fact, the cost-of-living provision does satisfy the *Wing* criteria, and in 1988, a chancellor had no problem enforcing the cost-of-living provision ordered in the original decree. The decree: (a) specifies a particular cost-of-living index; (b) specifies the ratio; (c) names the base figure of $1500 per month; (d) establishes a yearly adjustment and; (e) fixes the adjustment date as the judgment anniversary. In the voiding of the cost-of-living provision, this Court holds that there was manifest error by the chancellor and reverses and renders on this issue and reinstates the provision in the parties' agreement and in the court order. This case shall be remanded for the chancery court to compute the amounts owing since Don last fulfilled his obligations in this regard.

Id. at 1197.

From our analysis of the *Wing* and the *McNeil* opinions, we conclude that the Final Judgment for Divorce was complete within itself. We further conclude that the escalation complied with the criteria established in *Wing*. We accordingly find no merit in these two issues.

C. Third Issue:

III. Catherine Gale (Brookings) is barred by laches from enforcing the escalation clause.

The father cites no cases in which any court has held that a custodial parent may be barred by the doctrine of laches from seeking recovery of child support from a non-custodial parent. From our consideration of *Varner v. Varner*, 588 So. 2d 428 (Miss. 1991), *Guthrie v. Guthrie*, 537 So. 2d 886 (Miss. 1989), and *Premeaux v. Smith*, 569 So. 2d 681 (Miss. 1990), we conclude that laches is no defense to the collection of child support. In *Varner*, the mother attempted to collect child support from the father, some of which (for one child) had been due six-plus and (for another child) four-plus years after the emancipation of the minors for whom the father owed the child support. *Id*. at 432 Moreover, the mother waited for some nine years and five months after the father first reduced the amount of his monthly child support payment before she filed a complaint in chancery court to recover these long over-due sums from her former husband. *Id.* The supreme court first noted that "Claims for back child support may be brought at any time within seven years of the child's emancipation. Miss. Code Ann. § 15-1-43 (1972); *Wilson v. Wilson*, 464 So.2d 496 (Miss.1985)." *Id.* It then reviewed the law on child support as follows:

> Courts award child support to the custodial parent for the benefit and protection of the child. Such benefits belong to the child, and the custodial parent has a fiduciary duty to hold them for the use of the child. Such support obligations vest in the child as they accrue, and no court may thereafter modify or forgive them if they be not paid. The only defense to an action therefor is payment.

Varner, 588 So. 2d at 432.

In *Premeaux v. Smith*, 569 So. 2d 681 (Miss. 1990), the mother sought to recover from her former husband some $14,755 in child support arrearage. *Id.* at 683. The only issue which the supreme court decided was whether the chancellor correctly found that the mother was guilty of criminal contempt because she had wilfully, deliberately and contumaciously concealed her son from his father. *Id*. The court noted that there was no assignment of error regarding the chancellor's overruling the mother's request for a judgment against the father for arrearage in child support. *Id*. at 684. Nevertheless, the court addressed the child's right to pursue his right to receive child support directly from his father. *Id.* at 684-85. The court wrote, "Therefore, this opinion is without prejudice to the child's right to pursue his rights directly." *Id.* at 685 (citations omitted).

Finally, in *Guthrie v. Guthrie*, 537 So. 2d 886 (Miss. 1989), the mother allowed eighteen years to pass after her first apparently unsuccessful attempt to cite her former husband for contempt in 1968 before she filed a second petition for citation for contempt against her former husband in 1986. *Id.* at 886. The chancellor dismissed the petition for citation for contempt; and the mother appealed. The Mississippi Supreme Court affirmed the chancellor's holding that the father was not in willful contempt of court*;* but it reversed and remanded for a full trial on the question and amount of delinquent support.

We conclude that laches is simply no defense to the nonpayment of child support in Mississippi. Thus this third issue affords the father no relief.

D. Fourth Issue:

The Court erred in failing to apply the statutory guidelines for support payments.

The mother correctly points out that the father cites no authority to support his argument on this issue. Thus pursuant to *James W. Sessums Timber Co. v. McDaniel*, 635 So. 2d 875 (Miss. 1994), this court need not address this issue. In *McDaniel*, the supreme court wrote:

> Wilcher and Sessums contend that the instructions granted by the court on the punitive damage issue were erroneous, because they permitted the jury to return a verdict without proper guidance. No authority is cited for their argument. We adhere to the rule that it is not necessary for this Court to address an appellate issue unsupported by authority. *R & S Development, Inc. v. Wilson*, 534 So.2d 1008, 1015 (Miss. 1988); *Devereaux v. Devereaux*, 493 So.2d 1310, 1315 (Miss. 1986).

McDaniel, 635 So. 2d at 879.

The record contains the father's Answer to the mother's Complaint in which the father included a Counter-claim in which he alleged that "[C]atherine Smith Gale is in a much better financial position to support the children than is Mr. Chauncey Gale;" and that "Mr. Gale is currently paying an amount of child support in excess of the statutory guidelines and therefore the amount of support he is paying should be reduced to $300.00 per month." The father later filed an Amended Counter-claim in which he included the subtopic, "Petition for Reduction in Child Support." Beneath this subtopic he averred that "The amount of child support Chauncey Gale pays should be reduced to the amount of $341.92, which is the statutory amount of child support according to the guidelines." The father did not plead a material change in the circumstances of his children, himself, nor the mother.

At the conclusion of the hearing, the chancellor found "no basis upon which to reduce the support. . . ." Other than including an annual analysis of the percentage of the father's income that was paid for child support through the year 1993, the father points to no evidence to support his contention that the chancellor erred by not reducing the amount of child support that he ought to pay. To prevail on this issue, the father must demonstrate that a material change in his, his children's, and/or the mother's circumstances occurred after the entry of the original divorce decree. He has shown this court no such material change, so we decide this issue adversely to the father.

IV. Conclusion

The original Final Judgment of Divorce which incorporated the escalation clause for the determination of the amount of child support to be paid by the father was complete within itself. Our application of the criteria for escalation clauses suggested in *Tedford v. Dempsey* to the Gale escalation clause persuades us that it satisfies those criteria and is therefore not void. We find that laches can be no defense to the custodial parent's collection of child support from the non-custodial parent. We conclude that the father failed to demonstrate any material change in his, his children's, or their mother's circumstances that would have authorized the chancellor to amend the original Final Judgment of Divorce by allowing the amount of father's child support to be calculated by the standards of Section 43-19-101 of the Mississippi Code of 1972. Thus the chancellor erred not when he dismissed the father's counter-claim for modification of the original Final Judgment of Divorce.

THE JUDGMENT OF THE HANCOCK COUNTY CHANCERY COURT IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. COSTS ARE TAXED TO THE APPELLANT.

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