

IN THE COURT OF APPEALS 10/31/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00671 COA

ROBERT E. KING, JR.

APPELLANT

v.

MADELEINE B. KING

APPELLEE

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

TRIAL JUDGE: HON. WILLIAM L. STEWART

COURT FROM WHICH APPEALED: CHANCERY COURT OF HARRISON COUNTY

ATTORNEY FOR APPELLANT:

LAURIE S. CALDWELL

ATTORNEY FOR APPELLEE:

JOSEPH R. MEADOWS

NATURE OF THE CASE: DOMESTIC RELATIONS - DIVORCE

TRIAL COURT DISPOSITION: PERIODIC ALIMONY AWARD TO WIFE OF \$500 PER
MONTH; AWARD OF \$1,000 TO WIFE FOR ATTORNEY'S FEES

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

PAYNE, J., FOR THE COURT:

Robert E. King, Jr. and Madeleine B. King were married May 28, 1983. The parties agreed, by written consent (which was filed January 5, 1994), to be divorced on the ground of irreconcilable differences. The parties also consented to have the chancery court decide the remaining disputed issues: (1) all matters touching support of the wife, including alimony, both periodic and lump sum; (2) the wife's contribution to the accumulation of the marital estate, if any; (3) the award of attorney's fees to Husband/Wife, if any; and (4) should the parties be required to file amended tax returns, both Federal and State, for the tax year 1992. A judgment of divorce was entered February 1, 1994, on the ground of irreconcilable differences. Before this Court on appeal, Robert appeals assigning the following issues: (1) the court's award of periodic alimony was grossly oppressive, against the overwhelming weight of the evidence, and an abuse of the chancellor's discretion; and (2) the court erred in awarding attorney's fees to the Appellee. Finding no error, we affirm.

FACTS

Robert E. King, Jr. (hereinafter "Robert") and Madeleine B. King (hereinafter "Madeleine") were married May 29, 1983, and separated in November 1992. The marriage did not produce any children. The record contains the parties' 1992 income tax return which reveals Robert's wages of \$43,923 and Madeleine's wages of \$19,751. On January 5, 1994, a hearing was held in the Chancery Court of Harrison County. The court awarded the parties a divorce on the ground of irreconcilable differences, and awarded Madeleine the sum of \$500.00 per month as periodic alimony. Madeleine was also awarded \$1,000.00 toward the payment of her attorney's fees. On January 14, 1994, Robert realized an error in his financial declaration and detailed the errors in a letter to his attorney on January 14, 1994. This letter was filed with the court on January 31, 1994. The court's Final Judgement of Divorce was entered February 1, 1994. Robert filed a motion to reconsider, which was overruled.

The hearing produced testimony by Madeleine of her numerous health problems. Madeleine also testified that she supported the couple for five years while Robert was in school (1983-1988).

The testimony revealed Robert's salary to be \$36,900 for 1993. Robert's income history indicated that he earned additional wages from overtime in the amount of \$7,900 in 1992, \$2,900 in 1991, and \$4,000 in 1990. Madeleine provided evidence that her monthly net income is \$1,123.59.

ISSUES

I. THE COURT'S AWARD OF PERIODIC ALIMONY WAS GROSSLY OPPRESSIVE, AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, AND AN ABUSE OF THE CHANCELLOR'S DISCRETION.

"Our scope of review of an alimony award is well-settled. Alimony awards are within the discretion of the chancellor, and his discretion will not be reversed on appeal unless the chancellor was manifestly in error in his finding of fact and abused his discretion." *Ethridge v. Ethridge*, 648 So. 2d 1143, 1145-46 (Miss. 1995) (quoting *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993) (citation omitted)). "This Court will not disturb a chancellor's ruling if the findings of fact are supported by credible evidence in the record." *Ethridge*, 648 So. 2d at 1146 (citations omitted).

Robert argues that the court erred in awarding alimony, or in the alternative, that the award was excessive. On November 26, 1994, Madeleine remarried, thus Madeleine asks this Court to take

judicial notice of this fact and argues that the issue regarding alimony is moot. Since we are able to address this assignment of error on its merits, we will not speak to the mootness question.

The Mississippi Supreme Court has set out nine factors which are to be considered in determining a reasonable award for alimony:

- (1) the health of the husband and his earning capacity;
- (2) the health of the wife and her earning capacity;
- (3) the entire sources of income of both parties;
- (4) the reasonable needs of the wife;
- (5) the reasonable needs of the child;
- (6) the necessary living expenses of the husband;
- (7) the estimated amount of income tax that the respective parties must pay on their incomes;
- (8) the fact that the wife has the free use of the home, furnishings, automobile; and
- (9) such other facts and circumstances bearing on the subject that might be shown by the evidence.

Hemsley v. Hemsley, 639 So. 2d 909, 912-13 (Miss. 1994). "Generally, a wife is entitled to periodic alimony when her income is insufficient to maintain her standard of living, and the husband is capable of paying." *Heigle v. Heigle*, 654 So. 2d 895, 898 (Miss. 1995) (citing *Rainer v. Rainer*, 393 So. 2d 475, 478 (Miss. 1981)).

Madeleine presented a financial declaration indicating a monthly net income of \$1,123.59 with \$3046.26 in monthly expenses. Robert argues (and cross-examined Madeleine upon the point at trial) that there are several problems with Madeleine's figures. Robert challenges her expenses in regard to rent, her Master Card balance, medical, school, clothing, life insurance, and church tithe expenses. Robert also points out that Madeleine's declaration does not contain an additional \$100.00 in income. Assuming arguendo that Robert is correct on these matters, he still fails in this assignment of error. Madeleine's expenses still exceed her income, even with the adjustments Robert challenges. We decline to address each of Robert's challenges to Madeleine's expenses, in that the chancellor was in the position to weigh the evidence and credibility of the parties. There is ample proof in the record that Madeleine's monthly expenses exceeded her monthly net income.

We now turn to Robert's ability to pay alimony. Robert provided the court with a financial declaration which stated a net monthly income of \$2,042.97. The testimony revealed that his monthly expenses would total \$1,520.00, thus reflecting a \$500.00 a month surplus. After the chancellor made his ruling, Robert argues that he discovered errors in his financial declaration. Robert reevaluated his financial declaration and claims that he only calculated an excess of \$141.29 per month. Robert argues he is being deprived of a decent standard of living because he is not able to pay

Madeleine \$500.00 per month in periodic alimony. However, Robert fails to take into account his additional wages which were not reflected in his updated figures. Regardless, the chancellor had all the financial information of both parties before entering the order. We do not find that the chancellor was manifestly in error in his findings of fact or that he abused his discretion in awarding Madeleine periodic alimony on the amount of \$500.00 per month. Thus, this issue is without merit.

II. THE COURT ERRED IN AWARDING ATTORNEY'S FEES TO THE APPELLEE

"The award of attorney's fees in a divorce case is generally left to the discretion of the chancellor." *Brooks v. Brooks*, 652 So. 2d 1113, 1120 (Miss. 1995) (citation omitted); *see also Hemsley*, 639 So. 2d at 915. The Mississippi Supreme Court has held:

[W]hen a party is able to pay attorney's fees, award of attorney's fees is not appropriate. *Martin v. Martin*, 566 So. 2d 704, 707 (Miss. 1990). However, where the record shows an inability to pay and a disparity in the relative financial positions of the parties, we find no error. *Powers v. Powers*, 568 So. 2d 255 (Miss. 1990).

Brooks, 652 So. 2d at 1120 (citing *Hammett v. Woods*, 602 So. 2d 825, 830 (Miss. 1992)).

Robert argues that there was no proof as to Madeleine's inability to pay and that the court erred in allowing Madeleine to estimate attorney's fees instead of providing time records. Madeleine's attorney estimated 23.5 hours had been spent on her case. However, the record contradicts Robert's arguments. The financial declarations of the parties and accompanying testimony do reflect Madeleine's inability to pay in that her expenses clearly exceed her income. Robert fails to recognize the proof offered as to Madeleine's attorney's fees. Mr. Meadows [Madeleine's attorney] made the statement:

Your Honor, I would state unto the Court that we have represented Mrs. King now since the inception of this lawsuit. We have prepared the complaint for divorce; prepared the discovery; we have attended then two formal depositions; we have attended court here today, about an hour and a half this morning plus yesterday afternoon; we have had approximately three conferences with my client, lasting approximately three hours in preparation for the trial.

Madeline's attorney also stated, "We probably have about 23-1/2 hours in the case so far" and that his hourly rate is \$125.00. When asked by the chancellor if Robert wanted to cross-examine Mr. Meadows, he declined to do so. Immediately after that, the chancellor invited both parties to make any comments. Again, Robert declined. Thus, when twice presented with the opportunity to challenge the proof, Robert declined to do so. We find that the chancellor was well within his discretion in awarding Madeleine partial payment of her attorney's fees. We find that this assignment of error is without merit.

CONCLUSION

If the Court's calculations are correct, the amount in controversy here is only \$4,500.00, maximum, in alimony plus reasonable attorney's fees. This case is one in which an alternative, less expensive

method of resolution might be appropriate since no new precedent is involved.

THE JUDGMENT OF THE CHANCERY COURT OF HARRISON COUNTY IS AFFIRMED. APPELLANT IS TAXED WITH ALL COSTS OF THIS APPEAL.

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