

IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00425 COA

FRANKLIN EARL MANN

APPELLANT

v.

SUSAN MANN MATTISON

APPELLEE

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

TRIAL JUDGE: HON. WOODROW WILSON BRAND, JR.

COURT FROM WHICH APPEALED: OKTIBBEHA COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

CHARLES D. EASLEY, JR.

ATTORNEY FOR APPELLEE:

J. TYSON GRAHAM

NATURE OF THE CASE: CIVIL CHILD SUPPORT; MODIFICATION

TRIAL COURT DISPOSITION: AWARDED RETROACTIVE SUPPORT AND ALLOWED
FATHER TO RECEIVE WRONGFUL DEATH BENEFITS

BEFORE BRIDGES, P.J., McMILLIN, AND PAYNE, JJ.

BRIDGES, P.J., FOR THE COURT:

Susan Mann Mattison and Franklin Earl Mann were divorced and custody of their minor child was granted to Mattison. At the time of the divorce, Mann was serving a sentence in Parchman and was not ordered to pay child support and was not granted visitation. He never saw his child nor offered to help pay any expenses. Their son died and now Mann seeks to claim proceeds from his estate. The lower court granted Mattison retroactive child support from the date of their divorce and offset the award against Mann's portion of his share of the estate. Finding that the court was in error, we reverse and remand.

THE FACTS

Susan Mann Mattison and Franklin Earl Mann were lawfully married and to this union one son, Nathan McCleary Mann, was born in 1975. On October 21, 1976, the couple were divorced by the Lowndes County Chancery Court. Mattison was granted full custody of the minor child. At the time of the divorce, Mann was serving a fifteen-year sentence for aggravated assault upon a two and one-half year old child whom he almost killed. He was not ordered to pay child support to Mattison nor was he granted visitation with Nathan.

Mattison remarried on September 16, 1978. She and her husband, Richard Mattison, raised Nathan until his death. Nathan was tragically shot and died on April 25, 1992. Before his death, Mann never attempted to make any contact with his son. After his death, an estate was opened and Susan Mattison was appointed executrix. Nathan's estate consisted of \$100,000 received from a wrongful death settlement. Mann now seeks to profit from his son's death and share in his estate. To prevent this, Mattison filed a complaint in the Oktibbeha County Chancery Court seeking an attachment of the wrongful death proceeds and reimbursement for back child support. The lower court awarded Mattison \$24,547.58 for child support and medical expenses from the date of their divorce to the date of Nathan's death. Mann's share of Nathan's estate was approximately \$12,850. His share was ordered to be paid to Mattison to offset his arrearage. He now appeals arguing that Mattison should not have been awarded any back child support.

DISCUSSION OF THE LAW

I. WHETHER THE COURT ERRED IN AWARDING RETROACTIVE CHILD SUPPORT TO MATTISON.

It is well established that the duty to support a child is upon both parents and is a "continuing duty, both legal and moral in nature, and a vested right of the child growing out of the marriage relation." *Alexander v. Alexander*, 494 So. 2d 365, 367 (Miss. 1986). However, the amount allowed for the support of the child depends largely upon the financial condition of the father and the needs and circumstances of the child. *McCormick v. McCormick*, 293 So. 2d 454, 456 (Miss. 1974). In other words, Mattison was entitled to support, but that support was limited to Mann's ability to pay. *Kergosien v. Kergosien*, 471 So. 2d 1206, 1212 (Miss. 1985). After careful review of the record, we have failed to find any testimony by Mattison's witnesses to substantiate her expenses claimed. We also have failed to find sufficient evidence of a finding by the chancellor of Mann's ability to pay the

support and of Mann's portion and responsibility to pay the expenses claimed by Mattison. We can find no law that states a father is required to pay all of a child's funeral or medical expenses. These expenses may however be taken from the wrongful death estate before the monies are distributed to the beneficiaries. Miss. Code Ann. § 11-7-13 (1972).

The Mississippi Supreme Court has held that it "is elementary that awards of child support are within the discretion of the chancellor." *McAdory v. McAdory*, 608 So. 2d 695, 701 (Miss. 1992). Only in cases of manifest error will the court be reversed. *Id.* We find that the chancellor erred in awarding retroactive child support to Mattison without making a factual finding of Mann's ability to pay and without sufficient proof of those expenses required of him to pay. We therefore reverse the decision of the lower court and remand for further proceedings consistent with this opinion.

THE JUDGMENT OF THE OKTIBBEHA COUNTY CHANCERY COURT OF AWARD OF RETROACTIVE CHILD SUPPORT TO MATTISON TO BE SET OFF FROM MANN'S INHERITANCE IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. MATTISON IS TAXED WITH ALL COSTS OF THIS APPEAL.

BARBER, COLEMAN, KING, MCMILLIN AND SOUTHWICK, JJ., CONCUR. PAYNE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, P.J., AND DIAZ, J. FRAISER, C.J., CONCURS WITH RESULT ONLY.

IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00425 COA

FRANKLIN EARL MANN

APPELLANT

v.

SUSAN MANN MATTISON

APPELLEE

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

PAYNE, J., DISSENTING:

I respectfully dissent. After careful consideration of the majority's opinion, I find that the chancellor correctly applied the case law as equity principles dictate, and would, therefore, affirm the chancellor's decree.

The Mississippi Supreme Court has addressed the issue of a mother's right to recover from an absent father for her expenditures in raising their child:

In the cases of *Lee v. Lee*, 135 Miss. 865, 101 So. 345, and *Schneider v. Schneider*, 155 Miss. 621, 125 So. 91, 92, this court held in the latter case that 'where a decree of divorce accorded the custody of the minor children to the wife, but made no provision for their support, it is still the duty of the father to support them, unless, under the law, there is some reason why he should be relieved therefrom, and where the mother furnishes their support, and no such reason exists, the father becomes her debtor to that extent, for which debt she may recover against him.' *And this is true even if the mother failed to have allowance made on the hearing on the decree of the divorce.*

Bass v. Ervin, 177 Miss. 46, 53, 170 So. 673, 674 (1936) (emphasis added). In *Bass* the mother failed on the hearing of the annulment proceeding (between the mother and the father of the child) to petition for support of the child. *Bass*, 170 So. at 675. The Mississippi Supreme Court held that the mother's failure to request such support:

did not release or exonerate the father from the support of the child; and that its support, as a matter of public policy, could not be waived, and that the mother, the same as a stranger, upon a proper case, can recover the necessary and proper expenditures for the support of the child . . .

Id. "Otherwise there would be no appropriate and practical remedy for the enforcement of the father's duty to support his minor children." *Hill v. Briggs*, 236 Miss. 43, 109 So. 2d 349, 352 (Miss. 1959).

The court again recognized this position in *Vaughn v. Vaughn*, 226 Miss. 153, 83 So. 2d 821 (1955). In *Vaughn*, the mother sought to recover from the father for expenditures which she made for necessities for the children during the seven years without support from the children's father. *Vaughn*, 83 So. 2d at 822. The final decree provided for alimony in the sum of \$100 per month for the support of Mrs. Vaughn and the children. *Id.* at 823. Vaughn paid the \$100 a month until Mrs. Vaughn's second marriage. *Id.* Vaughn then stopped his payments with only small and occasional subsequent contributions. *Id.* The chancellor awarded the mother the sum of \$8,414.21 and the father appealed. *Id.* The mother testified to the necessity and correctness of the expenditures for which she sought recovery. *Id.* The Mississippi Supreme Court recognized that while Vaughn was no longer liable to contribute to the support of his former wife, he was obligated to contribute to the support of his children. *Id.* at 825. The court stated:

The allegations and proof showed that the sum for which judgment was rendered was

expended by [the mother] for necessary food, clothing, school supplies, taxes, and medical, dental and hospital bills. The father was liable for such expenditures. They were established with reasonable certainty and correctness, Vaughn did not dispute them, and there was no plea of the statute of limitations in bar of any part thereof.

Id.

In the present case, the chancellor made findings of fact based upon the evidence presented by Mattison as to the monies she expended in raising Nathan. Specifically, he found that Mattison actually expended an average of \$100.00 per month from the time of the divorce of the parties until the death of Nathan and that Mattison had actual unreimbursed medical and child care expenses of \$5,947.58. The chancellor's calculations were based upon *actual* expenditures that the mother could remember and substantiate. The likelihood that her award is 100% of all that she expended on necessities for Nathan is slim to none. The figures determined by the chancellor are not outrageous nor exaggerated in light of the fact that they represent the support of a child for a period of over fifteen years. The majority indicates that there is absolutely no support in the record for the chancellor's findings. To the contrary, Mattison testified regarding school, babysitting, and medical expenses which she had incurred and provided canceled checks and receipts for totals of \$782.22 and \$5,947.88. Mattison and her husband both testified that they did not have receipts for clothing or food for Nathan. However, Mattison also testified that Nathan ate food and that he was a growing boy. Richard Mattison (Mattison's husband) testified that Nathan wore clothes, that Susan Mattison purchased groceries for the family (which included Nathan), that Nathan grew from a small child "in a stroller" to a young man of over six feet tall, and that he paid premiums on health insurance policies from the time of his marriage to Susan Mattison until the time of Nathan's death. In addition to this testimony, the record includes 298 canceled checks, five pages of bank statements and three receipts. Clearly, there is ample evidence to support Mattison's expenditures and the chancellor's findings. The chancellor recognized that his award to Mattison "[u]nlike child support which is monies, if you please, of the child, this is reimbursement to the mother for funds previously expended by her for the support of the child [to] which, in the opinion of this Court, she is entitled."

I find that the chancellor acted equitably, as he is charged to do, when he determined that Mattison was entitled to an attachment of Mann's share of the estate of Nathan. I cannot imagine that equity should allow an absent father to monetarily benefit twice to the mother's detriment - first, by escaping the moral and legal obligation of supporting his minor son and, second, by benefitting from the untimely death of his son. While Mann may be entitled under the wrongful death statute of this state to recover as a beneficiary of Nathan's estate, the law clearly gives Mattison the right to offset her expenditures against Mann's share of Nathan's estate.

I would affirm the decree of the chancery court.

THOMAS, P.J., AND DIAZ, J., JOIN THIS SEPARATE WRITTEN OPINION.