

IN THE COURT OF APPEALS 04/22/97

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00498 COA

MICHAEL EARL DOWELL

APPELLANT

v.

ROBERTA SOURS DOWELL

APPELLEE

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

TRIAL JUDGE: HON. PATRICIA D. WISE

COURT FROM WHICH APPEALED: CHANCERY COURT OF HINDS COUNTY

ATTORNEY FOR APPELLANT:

MICHAEL J. MALOUF

ATTORNEY FOR APPELLEE:

CYNTHIA LEE BREWER

NATURE OF THE CASE: CIVIL

TRIAL COURT DISPOSITION: MODIFICATION OF CHILD SUPPORT AND ALIMONY
PAYMENTS GRANTED

MANDATE ISSUED: 7/8/97

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

THOMAS, P.J., FOR THE COURT:

Michael and Roberta Dowell were married in 1971, and after ten years of marriage they divorced in 1981 on the ground of irreconcilable differences. The couple had one child born to the marriage, Michael Sours Dowell. The divorce decree provided that: (1) Michael Dowell was to pay Roberta Dowell the sum of six hundred dollars per month for child support for their one child until the child reached the age of nineteen years or commenced attending an institution of higher learning, whichever shall occur first; (2) Michael Dowell agreed to pay for their child's college education as long as the child is making satisfactory progress; and (3) Michael Dowell was to pay Roberta Dowell the sum of eight hundred dollars per month for two years, and then six hundred dollars per month as periodic alimony until Roberta Dowell shall die or remarry.

In 1996 Roberta sought to have the divorce decree modified so that child support payments would continue past the child's nineteenth birthday, despite the fact that the decree ordered Michael to pay all college expenses for their child. Michael filed a counter motion to have the periodic alimony paid to Roberta either terminated or reduced in sum. The chancellor found that there had been a material change in circumstances with respect to child support and granted Roberta's motion and ordered Michael to pay two hundred fifty dollars a month in child support until age twenty-one, in addition to Michael paying the college expenses of their child. The chancellor also found there had not been a material change in circumstances which would warrant a modification of alimony and denied Michael's counter motion. Finally, the chancellor found a substantial material change in circumstances to allow Michael to reduce the amount of an insurance policy he was required to maintain on Roberta from \$171,733.50 to \$150,000.00. Feeling aggrieved, Michael appeals raising the following issues as error:

I. WHETHER THE LOWER COURT ERRED IN FAILING TO COMPLY WITH THE REQUIREMENTS OF MISS. CODE ANN. §43-19-101 AND WHETHER AN ERRONEOUS LEGAL STANDARD WAS APPLIED.

II. WHETHER THE LOWER COURT'S FINDING THAT THERE HAD NOT BEEN A MATERIAL CHANGE IN CIRCUMSTANCES TO WARRANT A MODIFICATION OF PERIODIC ALIMONY WAS MANIFESTLY WRONG OR CLEARLY ERRONEOUS.

Finding error, we affirm in part, reverse and remand in part.

ANALYSIS

I.

DID THE LOWER COURT ERR IN FAILING TO COMPLY WITH MISS. CODE ANN. §43-19-101 AND WAS AN ERRONEOUS LEGAL STANDARD APPLIED?

Michael argues that the chancellor did not comply with Miss. Code Ann. §43-19-101 (Supp. 1993) when ordering that child support payments would continue past the child's nineteenth birthday. Michael asserts that the chancellor's findings were neither in writing nor specific on the record as required by §43-19-101. Roberta argues that the chancellor did not exceed the guidelines of §43-19-101, and that the chancellor had the power and discretion to modify the amount of the child support payments.

Miss. Code Ann. §43-19-101 provides guidelines for chancellors to follow regarding child support awards in this state. Subsection (1) affords a rebuttable presumption that one child should be awarded 14% of adjusted gross income for child support. Subsection (2) provides that the guidelines in subsection (1) apply unless the chancellor modifying or awarding the amount of child support makes a written finding or specific finding on the record that the application of the guidelines would not be appropriate in this particular case. Subsection (3) requires the calculation of adjusted gross income after determining gross income, federal, state and local taxes, social security contribution, and mandatory retirement and disability contribution. Subsection (4) requires a written finding in the record as to whether or not the application of the guidelines is reasonable in cases involving adjusted gross income of more than fifty thousand or less than five thousand dollars.

Modification of divorce decrees issued on the ground of irreconcilable differences is governed by Miss. Code Ann. §93-5-2 (Supp. 1994). When the provisions of §93-5-2 have been complied with, "the custody, support, alimony and property settlement agreement becomes a part of the final decree for all legal intents and purposes." *Lawrence v. Lawrence*, 574 So. 2d 1376, 1380 (Miss. 1991) (quoting *Switzer v. Switzer*, 460 So. 2d 843, 845 (Miss. 1984)). In order to justify a change or modification in the divorce decree, there must have been "a substantial or material change in the circumstances of one or more of the interested parties: the father, the mother, and the child or children, arising subsequent to the entry of the decree to be modified." *Lawrence*, 574 So. 2d at 1380 (quoting *Tedford v. Dempsey*, 437 So. 2d 410, 417 (Miss. 1983)).

We will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Denson v. George*, 642 So. 2d 909, 913 (Miss. 1994). "Where a lower court misperceives the correct legal standard to be applied, the error becomes one of law, and we do not give deference to the findings of the trial court." *Brooks v. Brooks*, 652 So. 2d 1113, 1117 (Miss. 1995).

The chancellor modified the child support payments to continue past the minor child's nineteenth birthday based upon Mississippi Supreme Court case law. In *Lawrence*, the supreme court held that a child support agreement, which has been submitted to court in divorce on ground of irreconcilable differences and "which ends support for child before that child reaches the age of twenty-one or is otherwise emancipated, is unenforceable as to the rights of the child." *Id.* at 1381. The *Lawrence* court further held that parents cannot contract away rights vested in minor children and to allow such would conflict with public policy. *Id.* Therefore, we agree with the chancellor's decision to allow child support payments to be made past the child's nineteenth birthday as specified in the original divorce decree in accordance with the *Lawrence* decision.

However, Michael asserts, and we agree, that the chancellor's award was not in compliance with

§43-19-101 in that the chancellor's findings were not in writing nor specific on the record. The chancellor noted in her final order that the modification was "based upon the statutory guidelines," but there exists no evidence to support the modification ruling in accordance with the statute. The modification apparently is not based upon the statutory guidelines because there was no mention of Michael's income and no mention of the amount of college expenses Michael is obligated to pay. The Mississippi Supreme Court in *Brennan v. Brennan*, 638 So. 2d 1320, 1325 (Miss. 1994), stated that college and the cost thereof are economic issues that impact the subject of child support.

From the judgment of the chancellor, it would appear that the two hundred and fifty dollar award is much less than the amount afforded by the guidelines. The record reflects that Michael and his wife, as partners, earned \$260,000.00 in gross income for 1995. Assuming, arguendo, that Michael's adjusted gross income is approximately \$100,000.00 after his wife receives her share of the partnership, he pays federal, state and local taxes, social security, and retirement, the modification award is clearly below the 14% statutory guideline as provided by §43-19-101. However, there are no written or specific findings of fact in accordance with §43-19-101 to allow this Court to determine if the chancellor's modification award was unjust or inappropriate. The chancellor did not include in her order a finding of Michael's adjusted gross income after taxes, etc., and did not include a statement as to whether or not the application of the guidelines was reasonable as to this case. Also, the chancellor failed to make a written finding of fact that would allow this Court to consider whether the chancellor took Michael's payment of college expenses for their minor child into account when she reduced the amount of child support.

The Mississippi Supreme Court has held that the statutory guidelines do not control per se. *Draper v. Draper*, 658 So. 2d 866, 869 (Miss. 1995); *Dufour v. Dufour*, 631 So. 2d 192, 195 (Miss. 1994). However, *Dufour* noted that the chancellor should make a specific finding with respect to the income of the paying spouse, and to justify the chancellor's award based upon this lack of finding, the court "would have to deal in speculation that would undergird the chancellor's finding." *Id.* Therefore, in accordance with *Dufour*, the child support modification award was clearly erroneous and should be reversed and remanded. On remand, the chancellor's findings should be more specific on the record in compliance with §43-19-101.

II.

DID THE LOWER COURT ERR IN FINDING THAT THERE HAD NOT BEEN A MATERIAL CHANGE IN CIRCUMSTANCES TO WARRANT A MODIFICATION OF PERIODIC ALIMONY?

Michael argues that the chancellor erred by not finding that a material change in circumstances had occurred to warrant the reduction of alimony. Michael argues that the chancellor did not take into account the fact that Roberta had received her college degree, is relatively young, is in good health, gainfully employed, and the fact that their minor child had left the home and is now attending college. Michael argues that these facts, along with the fact that he has been remarried for over ten years and has two minor children of his own to now support, warrant a reduction in alimony to Roberta.

Roberta argues the chancellor considered all the evidence and determined that the refusal to modify the alimony award was proper.

The standard of review in modification of alimony cases where the chancery court has decided upon the terms of alimony is that the determination will not be altered on appeal unless it is found to be against the overwhelming weight of the evidence or manifestly in error. *Crowe v. Crowe*, 641 So. 2d 1100, 1102 (Miss. 1994); *Tilley v. Tilley*, 610 So. 2d 348, 351 (Miss. 1992). "The amount of an alimony award is a matter to a great extent within the discretion of the chancery court because of its peculiar opportunity to sense the equities of the situation before it." *Holleman v. Holleman*, 527 So. 2d 90, 94 (Miss. 1988) (citing *Wood v. Wood*, 495 So. 2d 503 (Miss. 1986)). The chancellor is afforded wide discretion in alimony cases, and this discretion will not be reversed on appeal unless the chancellor was manifestly in error in his finding of fact and abused his discretion. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993).

Periodic alimony terminates upon the death of the paying or receiving spouse or the remarriage of the receiving spouse. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1281 (Miss. 1993). Periodic alimony may be modified by either increasing, decreasing, or terminating the award in the event of a material change of circumstances. *Id.* "The change must occur as a result of after-arising circumstances of the parties not reasonably anticipated at the time of the agreement." *Varner v. Varner*, 666 So. 2d 493, 497 (Miss. 1995).

At the time of the divorce in 1981, Roberta was not employed. Since that time, she has received a bachelor of science degree in education from Belhaven College. She now works for the Canton Public Schools as a kindergarten teacher. Her income is approximately between twenty-one and twenty-two thousand dollars per year. Roberta's health is relatively good, and she is forty-seven years of age at the time of this writing.

Michael's income at the time of the divorce was around sixty thousand dollars per year. He has since remarried, and has two minor children resulting from this new marriage. In 1995, he and his wife earned \$260,000.00 in gross income as partners in a brokerage firm. He is currently forty-six years of age, and has suffered serious nerve problems in the past. His health problems are currently in remission.

The Mississippi Supreme Court, in *Spradling v. Spradling*, 362 So. 2d 620, 623 (Miss. 1978), held that when making a determination concerning the modification of alimony, a chancellor should consider the substantial increase in earnings by one party subsequent to the decree. The court also held that the increase in the husband's earnings must be considered. *Id.* The *Spradling* court held that it was error for the chancellor to reduce alimony where the wife got a temporary teaching position. *Id.* at 624. The court stated:

The modified decree penalizes appellant for being industrious and endeavoring to accomplish something rather than depend on appellee regardless of future circumstances. We do not think the law of alimony contemplates such a penalty.

. . . Realizing that every case is different, we hold in this case that considering only the new employment by appellant, whether temporary or permanent, this does not rise to a substantial change of circumstances sufficient to modify the alimony payments.

Spradling, 362 So. 2d at 624.

The Mississippi Supreme Court was again faced with this situation in *Hockaday v. Hockaday*, 644 So. 2d 446 (Miss. 1994). The court, quoting the above language from *Spradling*, found that the chancellor did not err by refusing to permanently reduce or terminate periodic alimony payable to Mrs. Hockaday. *Id.* at 450. The *Hockaday* court concluded there had not been a material change in circumstances, and noted that Mr. Hockaday was in a much better financial position than was Mrs. Hockaday. *Id.* This is the same situation as the case at hand. Therefore, although Roberta has become employed since the time of the divorce, this employment only does not necessarily create a material change in circumstances that warrants the reduction or termination of alimony. Viewing the circumstances as a whole, we cannot conclude the chancellor was manifestly in error.

THE JUDGMENT OF THE HINDS COUNTY CHANCERY COURT IS AFFIRMED IN PART AND REVERSED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. ALL COSTS ARE ASSESSED EQUALLY BETWEEN THE APPELLANT AND APPELLEE.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. HINKEBEIN, J., NOT PARTICIPATING.