

**IN THE COURT OF APPEALS 2/11/97**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CA-01285 COA**

**WILLIAM TERRY CHISM**

**APPELLANT**

**v.**

**CHARLENE CLARK**

**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. GRIFFIN JR.

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

WALTER BEAUREGARD SWAIN, JR.

ATTORNEY FOR APPELLEE:

WILLARD L. MCILWAIN, JR.

NATURE OF THE CASE: DOMESTIC RELATIONS

TRIAL COURT DISPOSITION: WILLIAM TERRY CHISM WAS HELD TO BE IN CONTEMPT OF COURT, ORDERED TO PAY CHILD SUPPORT ARREARAGE, AND ORDERED TO INCREASE THE AMOUNT OF CHILD SUPPORT PAID AND TO PAY ATTORNEY'S FEES.

BEFORE BRIDGES, C.J., BARBER, AND DIAZ, JJ.

BRIDGES, C.J., FOR THE COURT:

This is an appeal from the Washington County Chancery Court, where William Terry Chism was held in criminal contempt and sentenced to serve sixty days in the county jail because of his failure to pay past due child support. On appeal, Chism alleges that (1) the chancellor erred in finding him in civil and criminal contempt, (2) the chancellor erred in increasing child support payments, and (3) the chancellor erred in ordering him to pay the appellee attorney's fees.

### FACTS

Charlene Chism Clark (Clark) came before the Washington County Chancery Court on a contempt action against her ex-husband, William Terry Chism (Chism), seeking an order of contempt for Chism's willful failure to abide by the final decree. Chism alleges impossibility of performance of his obligations as they pertained to support. The parties stipulated that Chism was \$8,150 in arrears on his child support obligation. Further, the court found that Chism did not prove an impossibility of performance. Chism admitted that over the ten-month period prior to the hearing, he had income from his job of \$40,872. In addition, he had income from a trust account of approximately \$1,600 to \$2,000 per month. During that ten-month period, he paid only \$1,350 in child support, though his total child support obligation for that time was \$4,000.

The court found Chism in willful and contumacious contempt for his total disregard of the previous orders of the court and his failure to pay child support as ordered. The court then sentenced Chism to serve sixty days in the Washington County jail for his contempt.

### SCOPE OF REVIEW

This Court has a limited scope of review concerning the chancellor's decision regarding matters of child support. We are without authority to disturb the chancellor's decision unless we determine that there has been a manifest abuse of discretion or an erroneous application of law. *Ethridge v. Ethridge*, 648 So. 2d 1143, 1145-46 (Miss. 1995). Findings of facts will be affirmed where there is substantial evidence in the record to support the chancellor's findings, and absent manifest error, this Court will not reverse. *Gebetsberger v. East*, 627 So. 2d 823, 826 (Miss. 1993); *Bank of Mississippi v. Hollingsworth*, 609 So. 2d 422, 424 (Miss. 1992).

With regard to the standard of review for contempt, the supreme court has stated, "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 we are." *Varner v. Varner*, 666 So. 2d 493, 496 (Miss. 1995) (citing *Cumberland v. Cumberland*, 564 So. 2d 839, 845 (Miss. 1990)).

I. DID THE COURT ERR IN HOLDING THE APPELLANT IN CIVIL AND CRIMINAL CONTEMPT OF COURT?

In the case sub judice, Clark filed a petition for contempt against Chism because of his failure to pay child support as ordered by the final decree. Chism contends that he was unable to pay his child support arrearage because his employment is not always stable, conceivably creating periods of time when he has no income. Though both the record and the briefs allude to the fact that Chism is being held in criminal contempt, the chancellor is more accurately holding Chism in civil contempt.

To begin with, it is necessary to distinguish between criminal and civil contempt. If the purpose of the proceedings is to coerce action or non-action by a party, the order of contempt is characterized as civil. This type contempt proceeding is ordinarily instituted by one of the parties to the litigation who seeks to coerce another party to perform or cease performing an act. The order of contempt is entered by the court for the private benefit of the wounded party. Such orders classically provide for termination of the contemnor's sentence upon purging himself of the contempt. The sentence is usually indefinite and not for a fixed term. Consequently, it is said that the contemnor "carries the key to his cell in his own pocket." *Jones v. Hargrove*, 516 So. 2d 1354, 1357 (Miss. 1987) (quoted in *Varvaris v. State*, 512 So. 2d 886, 887 (Miss. 1987)).

On the other hand, a criminal contempt proceeding is solely to vindicate the authority of the court, or to punish for conduct offensive to the public in violation of an order of the court. *Jones v.*

*Hargrove*, 516 So. 2d 1354, 1357 (Miss. 1987). Criminal contempt is punishment for a past offense, is quasi-criminal, and the essence of the offense is that a defendant willfully, maliciously, and contumaciously has refused to comply with a decree of the court. *Langford v. Langford*, 176 So. 2d 266, 267 (Miss. 1965).

Furthermore, there are certain safeguards available to one exposed to the possibility of criminal sanctions that are not available if only civil sanctions are sought. If criminal punishment is sought, the burden of proof is higher, being beyond a reasonable doubt. *Gompers v. Buck's Stove and Range Co.*, 221 U.S. 418, 444 (1911). Also, the alleged contemnor is entitled to assert his Fifth Amendment right against self-incrimination. *Id.* If the criminal sanctions are severe enough, he may even be entitled to a jury trial. *Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1995). Because of the inherent differences in a proceeding for punishing one criminally for contempt as opposed to a proceeding seeking only coercive civil remedies, it is also clear that one being exposed to possible criminal sanctions is entitled to appropriate notice. *Wood v. State*, 227 So. 2d 288, 290 (Miss. 1969). Because of this distinction, Chism's issue on appeal should have been whether the court erred in holding him in civil contempt.

It is the general rule that a decree ordering child support payments, with proof of defendant's failure to make the payments, is sufficient to make out a prima facie case of civil contempt. *Masonite Corp. v. International Woodworkers of America*, 206 So. 2d 171, 183 (Miss. 1967). A defendant may avoid a judgment of contempt by establishing that he is without the present ability to discharge his obligations. *Varner v. Varner*, 666 So. 2d 493, 495 (Miss. 1995); *Gebetsberger v.*

*East*, 627 So. 2d 823, 826 (Miss. 1993). However, since Chism raised his inability to pay the child support as a defense, the burden is on him to show this with particularity. *Morreale v. Morreale*, 646 So. 2d 1264, 1267 (Miss. 1994).

During trial, the judge was unimpressed with Chism's proof and ruled that "the Defendant has not proved an impossibility of performance." A judgment was entered for the delinquent child support and Chism was sentenced to serve sixty days in the Washington County jail.

This represents a clear example of civil contempt, which has been defined as follows:

If the purpose of the proceedings is to coerce action or non-action by a party, the order of contempt is characterized as civil. Such orders, although imposing a jail sentence, classically provide for *termination of the contemnor's sentence upon purging himself of the contempt*. The sentence is usually indefinite and not for a fixed term.

*Newell v. Hinton*, 556 So. 2d 1037, 1044 (Miss. 1990) (emphasis added); *Jones v. Hargrove*, 516 So. 2d 1354, 1357 (Miss. 1987). According to the Mississippi Supreme Court, "the determination of punishment for contempt falls within the discretion of the chancellor, and this Court will not reverse on appeal absent manifest error or application of an erroneous legal standard." *Smith v. Smith*, 607 So. 2d 122, 126 (Miss. 1992).

In the case at hand, the chancellor applied an erroneous legal standard by setting a fixed sixty day period for incarceration. A chancellor must either abide by the civil contempt procedure, which is to sentence the defendant to incarceration until he purge's himself, or follow section 9-1-17 which states:

The Supreme, circuit, chancery, and county courts and the Court of Appeals shall have power to fine and imprison any person guilty of contempt of the court while sitting, but the fine shall not exceed one hundred dollars for each offense, not shall

the imprisonment continue longer than thirty days.

Miss. Code Ann. § 9-1-17 (Supp. 1995). In addition, a chancellor contemplating criminal contempt punishment must be sure to carefully abide by the constitutional safeguards outlined above. Since the aforementioned safeguards were not afforded to Chism, this Court will assume the chancellor

intended to impose civil contempt sanctions upon him. This being the case, the judge should have sentenced Chism to remain in jail until he paid his arrearage. Instead, he improperly imposed a criminal penalty upon Chism. Because we feel that the imposition of any criminal penalty in this case would be incorrect due to the absence of any of the attending safeguards, we need not address the possibility that the sixty day sentence was in violation of Miss. Code Ann. § 9-1-17.

At the time Clark petitioned for contempt, the parties stipulated that Chism was \$8,150 in arrears on his child support obligation. As explained above, this alone is sufficient to make out a prima facie case of civil contempt. It is also a well-settled rule in this state that the court's power to commit a person to jail until he obeys the terms of a decree depends upon his present ability to comply with the decree. *Jones v. Hargrove*, 516 So. 2d 1354, 1357 (Miss. 1987); *Wilborn v. Wilborn*, 258 So. 2d 804, 805 (Miss. 1972). It was stated in the judges findings that Chism did have the ability to comply

with the decree; and therefore, he should remain in jail until he complies.

It should be finally noted that the petition for contempt in this case originally prayed only that Willis be placed in jail until he purged himself of the contempt. No criminal contempt was ever sought. It is well-settled law in this state that a chancellor may not grant relief not prayed for in the pleadings. *Witt v. Mitchell*, 437 So. 2d 63, 65 (Miss. 1983); Warner's Griffith, Mississippi Chancery Practice (Rev. Ed.), § 564. Any attempt to do so would improperly expand the pleadings.

We find that the chancellor erred in sentencing Chism for a period of sixty days. Chism should have been incarcerated until he purged himself of the amount due to his ex-wife. For the

reasons stated throughout this opinion, we reverse and remand this issue for consideration solely on what appropriate civil sanctions might be available to procure Chism's obedience to the chancellor's order.

## II. DID THE CHANCELLOR ERR IN INCREASING CHILD SUPPORT PAYMENTS?

Since this issue has already been resolved, it requires only a brief response. The original order provided that Chism's child support be increased. Since this order was handed down, Clark filed a motion for relief of judgment believing that without filing a new petition, that portion of the order may be reversible. A hearing was held thereon, and the court ruled that the portion of the order increasing child support should be deleted. Because of this, this order is now moot and deserves no further discussion.

## III. DID THE CHANCELLOR ERR IN ORDERING CHISM TO PAY CLARK'S ATTORNEY'S EXPENSES?

Chism argues on appeal that the chancellor erred in awarding Clark attorney's fees in the contempt action. "In a civil contempt proceeding, the trial court has discretion to award reasonable attorney fees to make the plaintiff whole and to reinforce compliance with the judicial decree." *Hinds County Bd. of Supervisors v. Common Cause*, 551 So. 2d 107, 125 (Miss. 1989). "An award of attorney fees in a contempt case is proper." *Herrington v. Herrington*, 660 So. 2d 215, 218 (Miss. 1994) (quoting *Smith v. Smith*, 545 So. 2d 725, 728-29 (Miss. 1989)); *Newell v. Hinton*, 556 So. 2d 1037, 1043 (Miss. 1990) (citing *Stauffer v. Stauffer*, 379 So. 2d 922, 924 (Miss. 1980)).

Clark explained during her testimony that she was unable to pay her attorney's fees, therefore; the court's award for attorney's fees is proper. We affirm the lower court and find this argument to be without merit.

**THE JUDGMENT OF THE WASHINGTON COUNTY CHANCERY COURT HOLDING WILLIAM TERRY CHISM IN CONTEMPT AND SENTENCING HIM TO SIXTY DAYS IN THE WASHINGTON COUNTY JAIL IS REVERSED AND REMANDED**

**IN PART AND AFFIRMED IN PART WITH ALL COSTS TAXED TO THE APPELLANT.**

**MCMILLIN AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. HERRING, J., NOT PARTICIPATING.**