IN THE COURT OF APPEALS 06/04/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00131 COA

CONSOLIDATED WITH

NO. 95-CA-00222 COA

CLEO WOULARD, JR.

APPELLANT

v.

SHIARA R. WOULARD DELOACH

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 H. MYERS

COURT FROM WHICH APPEALED: JACKSON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

ALPHONSO W. GIBBS

ATTORNEY FOR APPELLEE:

DONALD P. SIGALIS, SR.

NATURE OF THE CASE: DOMESTIC RELATIONS-CHILD SUPPORT

TRIAL COURT DISPOSITION: HELD CLEO WOULARD IN CONTEMPT; AWARDED SHIARA CHILD SUPPORT ARREARAGE PLUS INTEREST, PORTION OF MEDICAL BILLS AND ATTORNEY FEES

BEFORE FRAISER, C.J., McMILLIN, AND PAYNE, JJ.

McMILLIN, J., FOR THE COURT:

This case comes before this Court after a convoluted and confusing history at the trial level. The case revolves around Cleo Woulard's alleged failure to honor the terms of the judgment of divorce dissolving his marriage to Shiara Woulard, specifically in the area of child support. Mr. Woulard appeals from an order adjudicating him to be in contempt for willful failure to pay child support and reducing a substantial arrearage in child support to judgment. He also complains that an adjudication of his liability for certain medical bills was error and contests an award of attorney's fees to Mrs. Woulard. Finally, Mr. Woulard claims error in the chancellor's decision to impress an equitable lien on his potential recovery under an unresolved workers' compensation claim to secure payment of his child support obligation.

I.

Facts

The Woulards were divorced in December 1988 by a decree that granted custody of the children of the marriage to Mrs. Woulard and ordered Mr. Woulard to pay $100 per week as child support. In addition, he was ordered to be responsible for one half of all medical expenses for the children not covered by insurance.

Thereafter both parties embarked on a practice of filing repeated motions seeking to have the other cited for contempt for various matters relating to child support, child visitation, and medical expense reimbursement. In April 1992, the chancellor entered an order that, among other things, directed Mr. Woulard to present documentary proof to Mrs. Woulard of all payments of child support and to forthwith pay any past due child support for which he was unable to present proof of payment. This order never became final because Mrs. Woulard filed a motion to alter or amend under Mississippi Rule of Civil Procedure 59(e) within ten days of its entry. The flood of motions continued unabated until finally, in March 1994, a new chancellor who had taken over the case after the earlier chancellor resigned from the bench, entered an order tentatively adjudicating Mr. Woulard's arrearage in child support to be $16,932. This was not a final adjudication, however, because the terms of the order permitted Mr. Woulard a period of forty-five days to come forward with additional documentary evidence of proof of payment. In response to this opportunity, Mr. Woulard filed a tabulation several pages in length showing alleged dates, amounts, and form of payment of child support installments. Attached to the tabulation were photocopies of receipts, money orders, and canceled checks that Mr. Woulard contended would support the various entries on the tabulation.

The chancellor considered the matter further in December 1994, and once again adjudicated Mr. Woulard's arrearage to be $16,932. In addition, he increased the arrearage by $9,500 on the basis that Mr. Woulard had presented no evidence of any child support payments in the 95 weeks that had transpired since January 1993, the date the chancellor indicated was the last payment date shown on the tabulation sheet. (The chancellor was in error in his reading of the tabulation sheet, as will be discussed in more detail hereafter.) The principal amount reduced to judgment for past due periodic installments of child support apparently should have been, therefore, $26,432 ($16,932 plus $9,500);

however, the chancellor, in an apparent calculation error, computed the sum of the two arrearage figures to be $27,432. To that amount, the chancellor added $8,774 in interest, stating that this was 5.27 years' interest at six percent, a figure which appears to be erroneous also, since the correct calculation (disregarding the initial error of an incorrect principal amount) would be $8,674. Additionally, the chancellor found that Mr. Woulard owed $639.44 as his share of unreimbursed medical bills for the children, and he assessed Mr. Woulard with $1,750 in attorney's fees.

II.

Child Support Arrearage Computations

The law is clear in Mississippi that the burden of proof on a contested issue of payment of child support lies with the payor. *Garceau v. Roberts*, 363 So. 2d 249, 250 (Miss. 1978). This fact, combined with the fact that no statute of limitations runs against the accruing obligation during the affected child's minority, s*ee Wilson v. Wilson*, 464 So. 2d 496, 498-99, (Miss. 1985), presents the possibility of very involved and tedious presentation of proof. This case serves as an example of that proposition, since Mr. Woulard was required to present proof of payment of every installment of child support since the date of his divorce in 1988. Because child support was payable in weekly installments so that approximately 354 installments would have accrued by the December 1994 hearing, and since the parties were apparently unable to agree on a substantial number of the items of credit claimed by Mr. Woulard, the central issue before the chancellor effectively dissolved itself into 354 separate subissues concerning the sufficiency of Mr. Woulard's documentary proof of payment of each installment. To meet his burden, Mr. Woulard presented documents including canceled checks, receipts, and money orders, that, if his summary tabulation is accurate, totaled $27,776. It is a simple mathematical computation to determine that Mr. Woulard's gross obligation for periodic child support during that same period was $35,400, thereby leaving an apparent deficiency in the range of $7,000-8,000, not considering, for the moment, the question of interest on past due installments. This figure is drastically different from the $27,432 arrearage adjudicated by the chancellor.

There is nothing in the record to indicate that Mrs. Woulard specifically contested the validity of any part of the documentary evidence at the December 1994 hearing. It appears to this Court that documentary proof such as submitted by Mr. Woulard would be at least prima facie evidence of payment except to the extent that the evidence was specifically refuted. This Court is somewhat handicapped in its review of the record since some of the photocopies of the various documents furnished as proof of payment are so difficult to discern as to be essentially illegible. Nevertheless, insofar as our review of the documentation permits, there seems to be a supporting document for every entry on Mr. Woulard's summary sheet. That being the case, this Court is left with the inescapable conclusion that the chancellor's computation of an arrearage of $16,932 is not supported by competent evidence and constitutes the manifest error that requires reversal under the standard of review enunciated in such cases as *Tanner v. Roland*, 598 So. 2d 783, 785-86 (Miss. 1992), and *Clark v. Myrick*, 523 So. 2d 79, 80 (Miss. 1988).

We can say with even more certainty that the chancellor was manifestly in error in finding that Mr. Woulard had made no child support installment payments since January 1993, resulting in an

additional $9,500 deficiency. The summary sheet clearly indicates that, from January 1993 through February 1994, Mr. Woulard paid an additional $5,867.50 in child support, and it appears, once again, that there are corresponding documents evidencing such claimed payments. The summary sheet itself was prepared shortly after the March 1994 hearing and does not appear to have been updated in the period thereafter leading up to the December 1994 hearing. Thus, we find nothing in the record that would indicate whether Mr. Woulard continued his payments during that period. However, even assuming he did not, the $9,500 additional deficiency figure seems unquestionably erroneous. *Tanner*, 598 So. 2d at 785-86.

While we are in sympathy with the chancellor in his apparent frustration regarding the lack of organization in Mr. Woulard's documentary evidence, nevertheless, it must be remembered that Mr. Woulard himself faced the daunting task of providing documentation affecting 354 separate and distinct transactions covering a period in excess of seven years. We simply cannot conclude that his failure to better organize his evidence constitutes a rational basis to assess a deficiency some $20,000 in excess of what the documentary evidence on its face would appear to warrant.

It would seem that there may be other avenues to expedite the resolution of this dispute over the amount of child support arrearage. In *Garceau v. Roberts*, the supreme court considered the feasibility of remanding a child support arrearage case "for statement of account between the parties by a master," but rejected the idea because of an apparent deficiency in the available evidence. *Garceau*, 363 So. 2d at 251. In this case, there appears to be no shortage of evidence upon which to state an accounting with the sole problem being to find a way to expeditiously organize and present the evidence. Rule 53 of the Mississippi Rules of Civil Procedure addresses referrals to masters, and subsection (f) states that the "court may direct an account to be taken in any cause in vacation or in term, and when the master shall doubt as to the propriety of admitting any item of debit or credit claimed by either party, he may state in writing the points on which he shall doubt and submit same for decision to the court . . . ." M.R.C.P. 53(f). This procedure would appear to permit a significant narrowing of the issues that must be resolved by the chancellor to those documents as to which there is some legitimate contest. Rule 53 further permits the taxing of the master's compensation as a part of costs, thereby permitting the court to assess that expense in such manner as seems equitable in the circumstances. *Crowe v. Smith*, 603 So. 2d 301, 308 (Miss. 1992); *see* M.R.C.P. 54(d). It may also prove true that, faced with the possibility of being taxed with a master's fee, the parties themselves may be able to consult and, acting between themselves, narrow the issues to those legitimate disputes concerning Mr. Woulard's claimed credits that require adjudication.

It should be clear that we are not ordering such a reference, but in light of the supreme court's pronouncement in *Garceau*, we merely suggest this as one avenue to resolve this fairly involved matter. We do conclude, however, that the present adjudication of the arrearage is simply not supported by the evidence and must be reversed. *Lawrence v. Lawrence*, 574 So. 2d 1376, 1382 (Miss. 1991).

III.

Interest Computations

Though not specifically raised on appeal, we feel compelled to note as plain error the method used by the chancellor to compute interest on the child support arrearage. After computing the gross amount of the arrearage, the chancellor awarded interest on the entire amount for a period of 5.27 years, which apparently related back in some way to the date of the 1988 divorce. The evident error in this computation is that the entire arrearage was not due and payable for purposes of interest computation at the time of the entry of the divorce decree. The law is quite clear that an installment of child support does not commence to accrue interest until it is due. *Brand v. Brand,* 482 So. 2d 236, 237-38 (Miss. 1986). By way of example of the gross inequity of the chancellor's method of computing interest, the $100 weekly unpaid installment for the week prior to the 1994 order was increased, by the interest computation, to approximately $131.62, although it was less than one week past due. To an increasingly lesser extent, but nevertheless a significant one, each earlier installment was, by this method of computation, distorted to an amount larger than warranted under the law.

The proper procedure for computing interest on past due child support is set forth in some detail in *Brand* , 482 So. 2d at 237-38. A review of the procedure mandated by that case, involving an allocation of each payment first to accrued interest on the arrearage and the balance to reduction of the principal obligation, seems once again to suggest quite strongly the appropriateness of a referral to a master to compute the exact amount of the arrearage once those specific disputes over the validity of any particular documents are resolved. It is apparent that this determination, if made according to the dictates of *Brand,* will involve a lengthy series of mathematical computations, a process that the law clearly requires, but one which seems singularly ill-suited for a chancery court evidentiary hearing.

IV.

Medical Bills

As to the chancellor's finding that Mr. Woulard owed $639.44 in medical bills, we are unable to determine that the chancellor was manifestly in error, and we, therefore, affirm that portion of the judgment. *Lawrence,* 574 So. 2d at 1382. We note that the April 1992 order, entered by the former chancellor hearing this case, which stated that any bills not presented by Mrs. Woulard to Mr. Woulard within fourteen days of receipt by her would not be eligible for reimbursement, never became a final order. Keeping in mind the primary consideration of the best interest of the children, we find this ruling to be rather arbitrary and not one designed to promote the best interest of the children by ensuring their continued access to available medical treatment. We also note that Mr. Woulard has already attempted to avail himself of this provision to escape responsibility for his portion of some of the children's medical bills, indicating some uncertainty as to the enforceability of the provisions of this order. In order to avoid confusion in the future, we suggest the propriety of the chancellor indicating whether this particular provision of the previous chancellor's order shall, in the future, be enforced.

V.

Contempt and Attorney's Fees

Because we are uncertain as to the extent and the cause of Mr. Woulard's arrearage, we are vacating the present adjudication of contempt for reconsideration by the chancellor after a rehearing on this matter in conformance with the terms of this opinion. Likewise, because of the uncertainty of what the ultimate outcome of this matter will be, we are unable to adjudicate with the necessary degree of certainty that the award of attorney's fees was appropriate, and that part of the chancellor's order is also vacated for reconsideration once the matter of the child support arrearage is more fully explored.

VI.

The Equitable Lien

We can find no manifest error in the chancellor's decision to award Mrs. Woulard a lien against Mr. Woulard's contingent right of recovery in a pending personal injury proceeding to secure payment of all amounts adjudicated due. The chancellor has broad power under section 93-5-23 of the Mississippi Code of 1972 to "require bond, sureties *or other guarantee for the payment*" of support payments. Miss. Code Ann. § 93-5-23 (1972). This authority has been said to permit the placing of liens upon the obligor's real and personal property. *See, e.g., Morreale v. Morreale*, 646 So. 2d 1264, 1269 (Miss. 1994). We see no reason why such power should not extend likewise to an inchoate right such as now under consideration. That portion of the chancellor's order is, therefore, affirmed.

THE DECISION OF THE JACKSON COUNTY CHANCERY COURT IS REVERSED AND THIS CAUSE REMANDED IN PART FOR DETERMINATION OF CHILD SUPPORT ARREARAGE AND INTEREST, AFFIRMED IN PART AS TO MEDICAL COSTS ASSESSED TO THE APPELLANT, AS WELL AS THE AWARD OF ANY LIEN NECESSARY TO SATISFY THE EXISTING INDEBTEDNESS AND VACATED IN PART AS TO ATTORNEY'S FEES AND CONTEMPT. COSTS OF THIS APPEAL ARE TO BE DIVIDED EQUALLY BETWEEN THE APPELLANT AND APPELLEE.

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