IN THE COURT OF APPEALS 10/15/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-01196 COA

HOWARD J. LADNER

APPELLANT

v.

TANYA LADNER BOUTWELL

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JASON H. FLOYD JR.

COURT FROM WHICH APPEALED: HANCOCK COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

MICHAEL C. HILL

ATTORNEY FOR APPELLEE:

WALTER C. TEEL

NATURE OF THE CASE: DOMESTIC RELATIONS - CHILD CUSTODY

TRIAL COURT DISPOSITION: CHILD SUPPORT INCREASED, ATTORNEY'S FEES AWARDED

BEFORE BRIDGES, P.J., BARBER, AND MCMILLIN, JJ.

BRIDGES, P.J., FOR THE COURT:

This is an appeal from the Chancery Court of Hancock County concerning (1) the modification of child support, (2) custody, (3) visitation, and (4) the chancellor's award of attorney's fees. The chancellor ordered (1) that the child support payment be raised from $80 per month to $140, (2) that the mother retain primary custody, (3) that the father have visitation every other weekend, and (4) awarded $500 in attorney's fees. On appeal, the husband seeks to reverse all four of the chancellor's decisions. We affirm the chancellor on parts one through three and reverse on part four.

STATEMENT OF FACTS

Howard Ladner and Tanya Ladner Boutwell were granted a divorce on the ground of irreconcilable differences on July 22, 1991. During their marriage, the parties had a son named Brett Ladner born June 22, 1989. Pursuant to their agreement, Ms. Boutwell was granted custody of their son, Brett, subject to visitation rights of Mr. Ladner consisting of alternate weekends and holidays. Ms. Boutwell was also granted $80 per month in child support.

On May 8, 1992, Mr. Ladner filed a complaint for modification seeking joint legal custody of their son and changes in the visitation schedule. On July 27, 1992, Ms. Boutwell answered and counterclaimed opposing joint custody and requesting an increase in child support.

Through a court order on September 17, 1992, a psychological evaluation was ordered on both parents and Brett. Thereafter, the court entered its judgment granting $100 in arrears for child support payments and a $60 increase in child support payments. The court denied Mr. Ladner's request for weekly visitation, but granted visitation every other weekend. Also included in the chancellor's judgment was a $500 award for partial reimbursement for Ms. Boutwell's attorney's fees.

To fully understand the chancellor's ruling on these matters, it is necessary to explain both the psychological and physical condition of Brett Ladner. At the time of trial, Brett was four years old and suffering from Rubinstein-Taybi Syndrome. This is a type of severe retardation. Brett is unable to feed himself, to clothe himself, or to use the bathroom. He cannot understand the meanings of words, except for the word "no." He requires a special diet, diapers, and constant supervision. Because of this, Ms. Boutwell stays at home with her son.

The court relied on Dr. Cutrer's psychological report of the parents and child. Dr. Cutrer explained that Mr. Ladner "is a man who has superficial relationships, [and] has significant difficulty with close relationships. It is indicated that he is immature, impulsive, and may sometimes show bad judgment." She also explained that he has "an insensitivity to the needs of his son."

In regard to Ms. Boutwell, Dr. Cutrer explains, "Ms. Boutwell appears to be a well-functioning woman with a positive attitude and bright outlook for the future. She is very family focused and shows repeated and genuine concern for the best interests of her son."

In her final summary, Dr. Cutrer recommended that before visitation is increased "Mr. Ladner [must] first demonstrate more frequent and consistent use of the daytime visitation that is granted, and that

Brett be given the opportunity to establish more regular and consistent contact with his father and adjust to the changes with that."

SCOPE OF REVIEW

This Court has a limited scope of review concerning the chancellor's decision regarding matters of child support and custody. 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) (citations omitted).

ARGUMENTS AND DISCUSSION OF THE LAW

I. DID THE CHANCELLOR ERR BY INCREASING CHILD SUPPORT?

Chancery courts may modify final decrees which pertain to child support. This authority exists by statute as well as by virtue of the inherent power of the chancery court. *McEachern v. McEachern*, 605 So. 2d 809, 813 (Miss. 1992). To obtain a modification in child support payments, there must be a "substantial and material change in the circumstances of one of the interested parties arising subsequent to the entry of the decree sought to be modified." *McEwen v. McEwen*, 631 So. 2d 821, 823 (Miss. 1994); *Gillespie v. Gillespie*, 594 So. 2d 620, 623 (Miss. 1992). The factors to be considered are:

1) increased needs of children due to advanced age and maturity,

2) increase in expenses,

3) inflation,

4) relative financial condition and earning capacity of the parties,

5) health and special medical needs of the child, both physical and psychological, 6) health and special medical needs of the parents, both physical and psychological,

7) necessary living expenses of the father,

8) estimated amount of income taxes each party must pay,

9) free use of residence, furnishings, and automobile, and

10) other facts and circumstances bearing on the support as shown by the evidence.

Powell v. Powell, 644 So. 2d 269, 275 (Miss. 1994) (citations omitted).

On appeal, Mr. Ladner argues no material change of circumstances, while Ms. Boutwell argues that, in fact, many material changes have occurred. Though it is at the chancellor's discretion to order a modification of child support, the chancellor should use the above factors.

First, we consider Brett's increased needs due to advanced age and maturity and the increase in expenses. At the time of the original support decree, Brett was four years old. At the time of appeal, he was six and a half years old. Due to the fact that growing children require new and different needs, the expense to keep up with these needs must be coupled with an increase of child support. In Brett's case, he still requires the same special needs of a retarded child, *plus* those of a growing child. Because of this, the Appellee, Ms. Boutwell, should retain her modification of child support. The modification from $80 a month to $140 is not excessive when compared to Brett's needs.

The next factor to be considered is the relative financial condition and earning capacity of the parties. Mississippi cases establish that both parents have an equal obligation to support their children, proportionate to their ability to pay. *Tedford v. Dempsey*, 437 So. 2d 410, 422 (Miss. 1983). Consequently, material changes can relate to the circumstances of the children or of either parent. *McEachern v. McEachern*, 605 So. 2d 809, 813 (Miss. 1992).

Therefore, an increase in Mr. Ladner's ability to support his child, combined with Brett's increasing needs, would logically lead to an increase in child support payments. During the divorce and child support decree, Mr. Ladner, was essentially unemployed. He explained at trial that "over the past three years I've been laid off from the ammo plant [and] from NASA . . . [and] I've collected unemployment for probably a total of a year until I found other jobs to get back on my [feet]." Due to Mr. Ladner's original financial position, his child support payments were only $80 per month.

Yet, at the time of the child support modification, Mr. Ladner was gainfully employed. According to a pay stub entered into evidence, Mr. Ladner works a forty hour week at a rate of $6.75 per hour for Blossman Companies. As such, his financial position and earning capacity have materially changed. Therefore, Mr. Ladner should be required to pay the additional $60 per month. This increase is not excessive and is well within the discretion of the chancellor.

The last factor to discuss in terms of child support modification is inflation. Inflation is a regular occurrence from year to year. It is an added increase to everyday life and, as such, should be an increase in Mr. Ladner's child support obligation. As explained in *Morris v. Stacy*, in the child support provisions of their separation agreements, "the parties generally ought be required to include escalation clauses tied to the parents' earnings or to the annual inflation rate or to some factored combination of the two." *Morris v.* Stacy, 641 So. 2d 1194, 1201 (Miss. 1994) (citing *Tedford v. Dempsey*, 437 So. 2d 410, 419 (Miss. 1983)).

Mr. Ladner also argues that he should not be required to pay any additional child support because if he increases his support payments, Brett's social security benefits will decrease. As explained by the case of *Hammett v. Woods*, a disabled child's receipt of Supplemental Security Income from the Social Security Administration does not reduce parental support obligations. *Hammett v. Woods*, 602 So. 2d 825, 828 (Miss 1992). This is further illustrated by the chancellor who explained, "I think Mr. Ladner should pay his fourteen percent, that means the taxpayers of this country won't have to pay that social security." Because of this, Mr. Ladner, not the Social Security Administration, is responsible for Brett's increase in needs.

Because of the rationale set forth, we find no merit to the above claim and affirm the chancellor as to his order of child support.

II. DID THE CHANCELLOR ERR BY REFUSING THE FATHER'S APPEAL FOR JOINT CUSTODY?

The Mississippi Supreme Court has stated:

> There are in our law two prerequisites to a modification of child custody. First, the moving party must prove by a preponderance of the evidence that, since entry of the judgment or decree sought to be modified, there has been a material change in circumstances which *adversely* affects the welfare of the child. Second, *if* such an adverse change has been shown, the moving party must show by like evidence that the best interest of the child requires the change of custody.

Pace v. Owens, 511 So. 2d 489, 490 (Miss. 1987).

During the trial Mr. Ladner failed to prove that there has been a material change in circumstances which have adversely affected the welfare of Brett. As previously discussed in the facts, the court ordered Dr. Cutrer to preform a psychological evaluation on Mr. Ladner, Ms. Boutwell, and Brett. As per Dr. Cutrer's recommendation, she states, "Ms. Boutwell is agreeable to her ex-husband's request for joint legal custody of Brett; however, she protests his request for immediate overnight visitation . . . she is extremely sensitive to [Brett's]special needs and care related to the conditions of his Rubinstein-Taybe Syndrome and demonstrated genuine concern for the needs of her son and a willingness to work together with her ex-husband . . . ." This report, coupled with the lack of a material change adversely affecting Brett, shows it is in his best interest to stay with his mother. In relying on this report, the chancellor was correct in ordering primary custody to remain with Ms. Boutwell. This Court finds no merit to the above claim and affirm the chancellor as to his order of child custody.

III. DID THE CHANCELLOR ERR IN NOT GRANTING APPELLANT WEEKLY AND SUMMER VISITATION?

On visitation issues, as with other issues concerning children, the chancellor enjoys a large amount of discretion in making its determination of what is in the best interest of the child. *Ash v. Ash*, 622 So. 2d 1264, 1266 (Miss. 1993) (citations omitted). When the chancellor determines visitation, he must keep the best interest of the child as his paramount concern while always being attentive to the rights of the non custodial parent, recognizing the need to maintain a healthy, loving relationship between the non custodial parent and his child. *Harrington v. Harrington*, 648 So. 2d 543, 545 (Miss. 1994) (citations omitted).

The chancellor's ruling of visitation from 6:00 P.M. Friday until 6:00 P.M. Sunday, every other weekend, was well within his discretion. His recommendation goes beyond that of the assessment by Dr. Cutrer, who said, "I am reluctant to recommend that Mr. Ladner be given significantly increased or overnight visitation with his son at this time." At this time Mr. Ladner should be very appreciative of the visitation rights he continues to enjoy.

The case of *Clark v. Myrick* explained that all that need be shown is that there is a prior decree providing for reasonable visitation rights which is working and which is in the best interest of the child. *Clark v. Myrick*, 523 So. 2d 79, 83 (Miss. 1988). As already explained, it is in Brett's best interests to remain with Ms. Boutwell daily, with Mr. Ladner having the limited visitation as determined by the chancellor. Because of this, we find no merit to the above claim and affirm the chancellor as to his order of visitation.

IV. WAS THE TRIAL COURT IN ERROR IN GRANTING ATTORNEY'S FEES?

Our supreme court has held that a party seeking attorney's fees must clearly demonstrate the inability to pay the fees, and in the absence thereof, the chancellor may not award such fees. *Rogers v. Rogers*, 662 So. 2d 1111, 1116 (Miss. 1995); *Martin v. Martin*, 566 So. 2d 704, 707 (Miss. 1990). If the record fails to reflect the inability to pay, or if the party seeking the fees does not testify that she is unable to pay the fees, then the chancellor *must* find that the party was unable to pay her attorney's fees, a factor necessary in making such an award. *Johnson v. Johnson*, 650 So. 2d 1281, 1288 (Miss. 1994) (citations omitted).

During trial, Ms. Boutwell failed to prove her inability to pay attorney's fees. The only

remarks on record concerning attorney's fees are the following:

Q. You've asked the Court to award you attorney's fees to reimburse you in this matter; is that correct?

A. Yes, sir.

Q. Have you and I had a number of conferences?

A. Yes, sir

Q. Letters?

A. Yes, sir.

Q. Phone calls?

A. Yes, sir.

Q. All right. At this time, Your Honor, I'd move to introduce a copy of my itemized statement for time and charges, that does not include today's hearing.

After this exchange Ms. Boutwell's attorney sought to have Mr. Ladner's paycheck admitted into evidence. Ms. Boutwell is unemployed, and Mr. Ladner works full time. The court in *Brooks v. Brooks* stated:

> We have also held that consideration of the relative worth of the parties, standing alone, is

> insufficient. The record must reflect the requesting spouse's inability to pay his or her own attorney's fees.

Brooks v. Brooks, 652 So. 2d 1113, 1120 (Miss. 1995) (citing *Benson v. Benson*, 608 So. 2d 709, 712 (Miss. 1992)).

Because the chancellor did not make a finding of fact that Ms. Boutwell could not pay her attorney's fees, and she did not prove her inability to pay, this Court reverses the chancellor on the issue of attorney's fees.

THE JUDGMENT OF THE HANCOCK COUNTY CHANCERY COURT IS AFFIRMED ON THE ISSUES OF CHILD SUPPORT, CHILD CUSTODY, AND VISITATION, AND REVERSED AND RENDERED ON THE ISSUE OF ATTORNEY'S FEES. ALL COSTS OF THIS APPEAL ARE TAXED EQUALLY BETWEEN BOTH PARTIES.

FRAISER, C.J., COLEMAN, DIAZ, KING, AND McMILLIN, JJ., CONCUR. PAYNE, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY BARBER AND SOUTHWICK, JJ. THOMAS, P.J., NOT PARTICIPATING.

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PAYNE, J., CONCURRING IN PART, DISSENTING IN PART:

While I agree with the majority's analysis on the issues of child support, custody, and visitation, I am compelled to dissent on the issue of attorney's fees. I agree that the *McKee* factors apply in this case, the place where I differ with the majority is that I believe the factors were met and the award of partial attorney's fees should be affirmed.

"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 v. Hemsley*, 639 So. 2d 909, 915 (Miss. 1994). 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)).

This case involves a $500 award in *partial* payment of Ms. Boutwell's attorney's fees. These parties are the parents of a special needs child. Because of the child's affliction with Rubinstein-Taybi Syndrome which results in his *constant need for care and supervision*, Ms. Boutwell is not employed and stays home to attend to the child. The record clearly reflects the disparity in the relative financial positions of the parties. To penalize Ms. Boutwell for staying home to meet the needs of her child simply because of the absence of the magic words "I am unable to pay" defeats the entire purpose of attorney's fees awards.

Put very simply, the majority mistakenly concludes that Ms. Boutwell failed to establish her inability to pay. This conclusion follows a discussion by the majority of the parents proportionate ability to pay for the support of the child. It is entirely inconsistent for the majority to conclude that under the

issue of child support that the record establishes Mr. Ladner's *ability to pay* an increase in child support and Ms. Boutwell's unemployed situation reflects her *inability to pay* for the increasing needs of the child, and then to turn around and conclude on the sole issue of attorney's fees that somehow the entire picture has changed and that Ms. Boutwell has failed to show her inability to pay.

In *Setser v. Piazza*, 644 So. 2d 1211 (Miss. 1994), the Mississippi Supreme Court held, "[t]his Court will not reverse the chancellor on an award of attorney's fees unless manifest error is *revealed by the record*." *Id.* at 1215 (emphasis added). The record in this case is clear-- Ms. Boutwell clearly established her inability to pay, and the chancellor did not abuse his discretion or commit manifest error in awarding Ms. Boutwell $500 toward partial payment of her attorney's fees. I would affirm on this issue.

BARBER AND SOUTHWICK, JJ., JOIN THIS SEPARATE WRITTEN OPINION.