# IN THE COURT OF APPEALS 09/17/96

# OF THE

# STATE OF MISSISSIPPI

**NO. 94-CA-00947 COA**

**CONSOLIDATED WITH**

**NO. 94-CA-01158 COA**

**PAUL BLAND**

**APPELLANT**

**v.**

**SHEILA MCCORD**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. CHARLES D. THOMAS

COURT FROM WHICH APPEALED: ALCORN COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

B. SEAN AKINS

ATTORNEY FOR APPELLEE:

JOHN A. HATCHER

NATURE OF THE CASE: DOMESTIC RELATIONS: MODIFICATION OF CHILD SUPPORT

TRIAL COURT DISPOSITION: MODIFIED SUPPORT, CHILD SUPPORT IS NOT MONEY JUDGMENT, ATTORNEY'S FEES AWARDED TO APPELLEE

BEFORE THOMAS, P.J., DIAZ, AND PAYNE, JJ.

DIAZ, J., FOR THE COURT:

This appeal arises from an attempt to modify a child support decree. In the lower court, the chancellor found that there was a material change in circumstances, and accordingly modified the child support. He then determined that prospective child support was not a money judgment, and therefore, an appeal with supersedeas bond would not be applicable in such an instance. Furthermore, the chancellor awarded the Appellee $663.70 in attorney's fees. Feeling aggrieved by this judgment, the Appellant, Paul Bland (Bland), appeals to this Court asserting the following issues: (1) that the chancellor erred in reviewing the child support obligations outside the provisions provided for in the divorce decree; (2) that the chancellor erred in holding that child support is not a money judgment, thereby holding that an appeal with supersedeas is not applicable; and (3) that the chancellor erred in awarding attorney's fees to the Appellee. This Court finds that the chancellor erred only in awarding attorney's fees in this instance. Therefore, we affirm in part and reverse in part the judgment of the lower court.

## FACTS

Bland and his ex-wife Sheila Bland McCord (McCord) were divorced on March 14, 1990. A property settlement agreement was entered into by the parties which set forth the marital property division and the child custody and child support provisions. In the agreement, Bland was to pay $350.00 per month for child support beginning on February 1, 1990. Two years later, Bland filed a motion for modification of the child support agreement. On September 29, 1992, the parties entered into an agreed order of modification of the final divorce decree. In the modified order, Bland's child support payments were reduced to $130.00 per month beginning October 1, 1992. Furthermore, the order stated that the sum of child support was to be adjusted at least annually to reflect fourteen percent (14%) of the gross annual income of Bland, but no less than $130.00 per month. The annual review was to be conducted on or by the first of July of each year. The review would be conducted without a hearing by the court on motion for modification, with proof of substantial and material changes in circumstances.

On May 18, 1994, McCord filed a complaint for modification of child support. In the complaint, McCord sought to increase the amount of child support to $350.00 per month. After a hearing, the chancellor increased Bland's child support obligations to $291.00 per month based on fourteen percent of his monthly salary. This was to be effective as of July 1, 1994.

On September 13, 1994, Bland filed his notice of appeal along with a supersedeas bond in the amount of $1,416.00. McCord subsequently filed a motion to discharge supersedeas alleging that the child support judgment was not a money judgment, therefore, not subject to supersedeas bond. In her motion, she also requested reasonable attorney's fees. A hearing was held wherein the chancellor determined that child support did not constitute a money judgment, and accordingly, discharged the supersedeas. Furthermore, he awarded McCord $663.70 for attorney's fees and expenses incurred in filing her motion.

## DISCUSSION

### I. MATERIAL CHANGE IN CIRCUMSTANCES

Bland's first issue on appeal is that the chancellor erred in awarding the modification of child support outside of the annual time frame originally contemplated in the previous order of the court. Bland focuses on the clause in the order stating in part:

> Commencing July 1, 1993, the sum of child support shall be adjusted at least annually to reflect fourteen percent (14%) of the adjusted gross annual income of Paul Lawrence Bland, but no less than $130.00 per month and this shall be reviewed and reset without further order of the court on or by the 1st day of July of each year thereafter, based on the rate of fourteen percent (14%) of the adjusted gross annual income of Paul Lawrence Bland, but going no less than $130.00 per month without a hearing by the Court on proper motion for modification, with proof of substantial and material change in circumstances; . . .

Bland argues that because this allows an annual review and modification of child support if necessary, any attempt to force modification within the yearly time frame was untimely and therefore, should have been rejected. We do not agree with this contention. Chancellors are given broad discretion in cases regarding modification of child support. *Morris v. Stacy*, 641 So. 2d 1194, 1196 (Miss. 1994). This Court has stated that with regard to the modification of child support agreements, the burden of proof must be met by the party seeking a financial modification to show a material change in circumstances of one or more of the interested parties, arising subsequent to the original decree. *Morris*, 641 So. 2d at 1197. Furthermore, case law merely requires that to justify modifying a divorce decree, the movant must show that there was a material or substantial change in the circumstances of the parties. The change is one that could not have been anticipated at the time of the original decree. *Herrington v. Herrington*, 660 So. 2d 215, 218 (Miss. 1994). Upon a finding of a material and substantial change in circumstances, the chancellor was acting well within his discretion in modifying the child support agreement. There is no merit to this issue.

## II. SUPERSEDEAS BOND

Bland's second assignment of error addresses the issue of the supersedeas bond. Bland argues that child support payments should be regarded as a money judgment, and therefore, his motion to stay upon posting the supersedeas bond should be granted. The issue of whether a judgment for child support is a money judgment has not specifically been addressed by the Mississippi Supreme Court.

Rule 8(a) of the Mississippi Rules of Appellate Procedure states in pertinent part:

> 8(a) **Stay by Clerk's Approval of Supersedeas Bond.** The appellant shall be entitled to a stay of execution of a *money judgment* pending appeal if the appellant gives a supersedeas bond. . . conditioned that the appellant will satisfy the judgment complained of and also such final judgment as may be made in the case.

M.R.A.P. 8(a) (emphasis added).

There seems to be no argument that arrearages in child support may be reduced to money damages against the delinquent parent. *Tanner v. Roland*, 598 So. 2d 783, 786 (Miss. 1992). The question for

us to consider is whether prospective child support may be considered a money judgment so that a supersedeas bond can actually suspend the payment of such support until a final determination on its merits.

It is the duty of both parents to provide for the maintenance, protection and education of the child unless that duty has been assigned to one parent by the court. Shelton Hand, *Mississippi Divorce, Alimony and Child Custody* §11-11 (4th ed. 1995); *see* Miss. Code Ann. § 93-5-23 (Rev. 1994). Where proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability of each. Miss. Code Ann. § 93-5-23 (Rev. 1994). The public policy reasons behind child support prevent one parent from escaping his or her duty of supporting the child. The Mississippi Supreme Court has always recognized this fact. In the case of *Petersen v. Petersen*, the chancellor initially issued a decree awarding temporary support and maintenance for the minor children at issue. After the final hearing on the cause, the chancellor issued a decree that awarded permanent custody of the children with the appellee, and directed the appellant to pay $100 per month for child support. The chancellor further ordered the appellant to pay $450 in arrears from the previous decree awarding temporary support, and $400 for attorney's fees. The chancellor added that should the appellant decide to appeal with supersedeas, the original decree which directed the appellant to pay temporary support was to remain in full force and effect pending such appeal, and that the appellant was required to pay the amount for purposes of child support and maintenance each month during the appeal. *Petersen v. Petersen*, 118 So. 2d 300, 302 (Miss. 1960). On appeal, the supreme court held that the chancellor did not abuse his discretion by providing that the child support decree was to remain in effect despite an appeal with supersedeas. *Petersen*, 118 So. 2d at 304. The purpose of course was to provide support for the children during the further pendency of the suit on appeal. Th e supreme court found that this was clearly justified in such circumstances. *Id.*

After careful consideration, this Court finds that the chancery court correctly vacated the supersedeas bond that Bland posted. Prospective child custody payments are not money judgments in that they are not a sum or a certain amount because they can be modified upon a showing of a material change in circumstances; because we determine that prospective child support is not a money judgment, an appeal with supersedeas in this instance is within the sound discretion of the trial court. *See* M.R.A.P. 8(b). A supersedeas or stay will not be granted unless it is apparent that it is necessary to prevent irreparable injury or miscarriage of justice, and that substantial questions will be presented on appeal. *Sartin v. Barlow*, 16 So. 2d 372, 376 (Miss. 1944). A supersedeas will not be granted "where the supersedeas or stay may defeat the ends of justice or result in irreparable or disproportionate injury to the appellee; where it would permit such change of status of the subject matter as to render further proceedings ineffectual, or destroy the subject matter of the litigation and leave nothing but an abstract question to be passed upon by the appellate court." *Sartin*, 16 So. 2d at 376. In entering the decree for child support, the chancellor found that McCord needs $291.00 per month as child support, and Bland is able to pay that amount. The purpose of child support is defeated if a child support award is stayed pending the appeal process. Therefore, the supersedeas bond was correctly vacated in this instance.

## III. ATTORNEY’S FEES

Unless the chancellor abused his discretion or is manifestly wrong, his decision regarding attorney's

fees will not be disturbed on appeal. *Creekmore v. Creekmore*, 651 So. 2d 513, 520 (Miss. 1995). The general rule is that if a party is financially able to pay her attorney, an award of attorney's fees is not appropriate. *Magee v. Magee*, 661 So. 2d 1117, 1126 (Miss. 1995) (citations omitted). The rule applies likewise to court costs. *Martin v. Martin*, 566 So. 2d 704, 707 (Miss. 1990). McCord did not attempt to demonstrate her inability to pay attorney's fees in the proceedings below. In a hearing to determine attorney's fees, her attorney offered an accounting which concluded that McCord's attorney's fees and out of pocket expenses totaled $1,194.20 for the services rendered in connection with the motion to discharge supersedeas. The chancellor awarded McCord $663.70 in attorney's fees and out of pocket expenses for having to prosecute the motion to set aside the

supersedeas bond. On appeal, McCord argues that the award was not a manifest abuse of discretion by the chancellor, and this was an exception to the general rule stated above. McCord argues that Bland's appeal of both the modification of child support and the appeal to allow supersedeas was frivolous, vexatious, and groundless in fact or in law. We cannot agree with this contention. Bland's appeal to allow supersedeas was not a frivolous appeal. An action is frivolous only when, objectively, the pleader or movant has no hope of success. *Hurst v. Southwest Miss. Legal Servs. Corp.*, 610 So. 2d 374, 388 (Miss. 1992). The present case does not fall within that description. Therefore, we hold that it was an abuse of discretion to allow attorney's fees in this instance.

## CONCLUSION

In conclusion, we hold that because a modification in child support may be granted anytime there is a showing of a material change in circumstances, the chancellor did not err in modifying the child support before the time stated in the decree. Furthermore, because prospective child support can be modified, it is not a definite sum certain, and cannot be considered a money judgment. Therefore, for this reason, as well as public policy reasons, an appeal with supersedeas is not applicable in such an instance. Finally, we think that the chancellor did abuse his discretion in awarding attorney's fees when McCord failed to present any evidence that she was financially unable to pay her attorney. Furthermore, we do not think that appealing the motion to vacate the appeal with supersedeas from a child support decree was a frivolous appeal. This issue has not yet been addressed in Mississippi, and in applying the objective standard, Bland was not in a position where

he had no hope of success. For these reasons, we affirm in part and reverse in part the judgment of the lower court.

**THE JUDGMENT OF THE ALCORN COUNTY CHANCERY COURT IS AFFIRMED IN PART AND REVERSED IN PART. COSTS OF THIS APPEAL ARE TAXED ONE-HALF TO THE APPELLANT AND ONE-HALF TO THE APPELLEE.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, KING, AND SOUTHWICK, JJ., CONCUR.**

**PAYNE, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED BY BARBER, J.**

**MCMILLIN, J., NOT PARTICIPATING.**

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

I agree with the majority regarding all issues except the reversal of the award of attorney's fees. The majority believes that the chancellor erred in awarding attorney's fees. It states that "McCord did not attempt to demonstrate her inability to pay attorney's fees in the proceedings below" and that "we

think the chancellor did abuse his discretion in awarding attorney's fees when McCord failed to present any evidence that she was financially unable to pay her attorney."

The Mississippi Supreme Court has stated that attorney's fees are not to be awarded unless the requesting party is financially unable to pay them. *Varner v. Varner*, 666 So. 2d 493, 498 (Miss. 1995). In the present case, McCord testified that she could not pay for the services of her attorney. Moreover, the record is replete with evidence of her financial condition. Even if McCord had not said she could not pay her attorney, sufficient evidence exists in the record from which one could conclude that she could not pay for the services of her attorney. The evidence consisted of McCord's testimony throughout the record of her financial status and the costs of raising her child. Therefore, the chancellor was well within his discretion to award attorney's fees. I would affirm on this issue.

Moreover, the general rule on this issue is that where the chancellor fails to make a specific finding of fact, an appellate court will assume that the chancellor resolved factual issues in favor of the requesting party, or at least in a manner consistent with the decree. *Morreale v. Morreale*, 646 So. 2d 1264, 1266-67 (Miss. 1994) (quoting *Smith v. Smith*, 545 So. 2d 725, 727 (Miss. 1989)). In this case, the chancellor did not make a specific finding of fact that McCord could not pay her attorney. Therefore, it is incumbent upon this appellate court to assume that the chancellor resolved this fact in her favor, particularly in light of his award of attorney's fees.

**BARBER, J., JOINS THIS SEPARATE WRITTEN OPINION.**