IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00487 COA

STUART V. ALLEN, II **APPELLANT**

v.

ERNESTINE M. ALLEN **APPELLEE**

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

DATE OF JUDGMENT:	4/17/96
TRIAL JUDGE:	HON. WILLIAM HALE SINGLETARY
COURT FROM WHICH APPEALED:	HINDS COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	ROSS R. BARNETT JR.
ATTORNEY FOR APPELLEE:	RONALD M. KIRK
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	STUART ALLEN ORDERED TO PAY INTEREST ON PAST DUE CHILD SUPPORT PAYMENTS
DISPOSITION:	AFFIRMED-11/18/97
MOTION FOR REHEARING FILED: 12/12/1997	
CERTIORARI FILED:	
MANDATE ISSUED:	3/30/98

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

COLEMAN, J., FOR THE COURT:

The Chancery Court of the First Judicial District of Hinds County entered its final order on April 17, 1996, by which it ordered Stuart V. Allen, II (father) to pay interest in the amount of $12,153.86 on child support arrearage which he owed as of July 7, 1994, and monthly "child support arrearage" payments in the amount of $350, together with interest thereon at the rate of 5 percent per annum, to Ernestine M. Allen (mother), his former wife. The father has appealed to argue that the chancellor erred when he ordered the father to pay this interest and additional child support because the final order contravened the doctrine of res adjudicata and Rules 59 and 60(b) of the Mississippi Rules of Civil Procedure. We affirm.

I. Facts

Stuart V. Allen, II and Ernestine M. Allen were married on May 1, 1964. Two children were born to their marriage: Stuart V. Allen, III on September 24, 1967, and Stephen Todd Allen on July 8, 1973. The Chancery Court of the First Judicial District of Hinds County granted a divorce to Mr. and Mrs. Allen by its final decree rendered on February 23, 1982. The Allens had agreed in their amended property settlement, child custody, child support and visitation agreement that the father would pay the mother child support "on or before the first of each and every month commencing December, 1981, the sum of . . . $100 per month, per child." In its final decree, the chancery court ratified and approved the amended agreement and thus ratified and approved the father's payment of child support to the mother in the amount of $100 per month per child.

Pursuant to the mother's successive motions to find the father in contempt of court for his failure to pay child support, the chancery court entered judgments against the father for unpaid child support in the amounts of $9,450 on November 7, 1983, and $15,716 on September 16, 1988. After the mother's third motion for contempt filed on November 17, 1993, the court entered a judgment for contempt on January 11, 1994. In this 1994 judgment, the chancellor found that since the entry of the earlier contempt judgment on September 16, 1988, Mr. Allen had paid $4,235 as of December 15, 1993, but remained in arrears in his payment of child support in the amount of $17,781. The court ordered the father "to continue to pay $100.00 per month current support, and beginning February 1, 1994, to pay an additional $100.00 per month on the arrearage [of $17,781] until July 1, 1994, at which time current support shall cease and [the father] will begin paying $200.00 per month on the arrearage until said arrearage is paid in full." Because the latter two motions for contempt had been filed by the Department of Human Services, the court ordered the father to pay "[a]ll child support payments and fees . . . through the Hinds County Department of Human Services."

II. Litigation

Included in the Allens' amended property settlement agreement which the final decree ratified and approved was a clause pertaining to the marital home which read:

> [Stuart v. Allen, II] has quitclaimed all right, title and interest in that certain house located at 5023 Will-O-Wood Boulevard, Jackson, Mississippi, in consideration of a Promissory Note in the amount of the lesser of Ten Thousand Dollars ($10,000.00) or twenty-five percent (25%) of the equity upon sale of said house. This note to be active upon the sale of the property, upon remarriage of [Ernestine M. Allen] or joint agreement to sell.

The father filed a motion for contempt against the mother pursuant to that section of the divorce decree because she had remarried but had not paid him what he was owed for his share of the equity in their home. The mother answered and filed a counterclaim against him for arrearage of child support including interest on the past-due payments. Included in the mother's response to the father's motion for contempt was a motion to correct judgments, which she made pursuant to Rule 60(b)(1) and (4) of the Mississippi Rules of Civil Procedure. She moved the court "to set aside and/or correct all prior Judgments of Contempt entered in this cause to reflect the proper amount of child support owed by [the father] to [the mother] as well as interest thereon."

At the conclusion of two hearings in chancery court on October 16, 1995 and December 5, 1995, the

chancellor found that the mother had re-married, albeit briefly, and must therefore pay the father $10,000 for his interest in their former home pursuant to the amended property settlement agreement of the parties and $300 for the cost of an appraisal of the former marital home. On the mother's counterclaim, the chancellor awarded her interest at a rate of five percent per annum on Mr. Allen's arrearage in his payment of child support which the court had earlier determined that he owed in the amount of $17,781. The court found that Mr. Allen owed $12,153.86 in interest on past due child support through July 7, 1994.

The father filed a motion to reconsider opinion of the court in which he asserted that the chancellor "erred in overlooking the Judgment for Contempt filed in the within cause on January 18, 1994, adjudging that [the father] was in arrears with child support through December 15, 1993, in the sum of $17,781.00." The father argued that the mother had agreed to the entry of the judgment for contempt by signing it and that the entry of this judgment constituted res adjudicata. Thus, because the mother had not appealed from this judgment of contempt, "the Court [could not] go behind the Judgment to change such Judgment." The father conceded that interest "would run on said Judgment since the entry of the Judgment on January 18, 1994." However, the father did not question the accuracy of the chancellor's calculation of the amount of interest which had accrued on his arrearage.

In the final order rendered in response to the father's motion to reconsider, the chancellor did not amend his findings from the previous opinion. The chancellor ordered "[t]hat the total interest due on child support arrearage, as of July 7, 1994, is $12,153.86 and that the sum owed by [the father] to [the mother], as interest, after the ordered credits in the amount of $10,300.00 are calculated, is $1,853.86, through July 7, 1994." The chancellor then ordered the father to pay to the mother "the monthly amount of $350.00, as child support arrearage, together with interest thereon at the rate of Five Percent (5%) per annum." The father appeals from this final order to present but one issue for our review and resolution.

III. Review and Resolution of the Issue

We quote verbatim the father's one issue from his brief:

> **Where a lower court, by judgment dated January 11, 1994, adjudicated a sum certain to be due to Appellant's ex-wife as child support, that court subsequently erred when, by order dated April 19, 1996, it required Appellant to pay additional sums as interest and child support allegedly due before, but not included in, the judgment of January 11, 1994.**

A. Standard of review

Our scope of review in domestic relations matters is limited. This Court 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).** This is particularly true "in the areas of divorce and child support." ***Nichols v. Tedder*, 547 So. 2d 766, 781 (Miss. 1989).**

B. The law of child support and interest on unpaid child support in general

The Mississippi Supreme Court has long held that "child support payments vest in the child as they accrue. Once they have become vested, just as they cannot be contracted away by the parents, they cannot be modified or forgiven by the courts." ***Tanner v. Roland,* 598 So. 2d 783, 786** (citations omitted). "Each payment that becomes due and remains unpaid becomes 'a judgment' against the supporting parent [and] [t]he only defense thereto is payment." ***Id.*** In ***Williams v. Rembert,* 654 So. 2d 26, 29 (Miss. 1995),** the supreme court reminded the state's bench and bar that "[c]onsidering this State's longstanding adherence to the principle that past due child support vests and cannot be forgiven absent payment, in the case *sub judice,* it was neither the attorneys' nor the chancellors' place to forgive the arrearage."

The Mississippi Supreme Court has held that the party owing past due payments of alimony and child support is liable for the interest which has accrued on each unpaid support payment from the time it became due. In ***Brand v. Brand,* 482 So. 2d 236, 238 (Miss. 1986),** the Mississippi Supreme Court provided the following explanation for the accrual of interest on unpaid child support:

> This approach mandated by Section 75-17-7[(1)] is consistent with economic reality. The use of one's money by another has value in economic theory and in fact. In our society this use frequently is compensated by the charging of interest, such charges being imposed variously under the authority of public and privately made law. Charges made upon the use of one's money or forbearance to collect a debt are called interest. The economic value of a supporting spouse's use of a child's money, or forbearance to pay for whatever reason, is real and should be compensated via interest. When a supporting spouse fails timely to make child support payments, he uses the child's money. (citations omitted).

The supreme court continued:

> The awarding of interest under our statute is not only consistent with the policy in our law to provide encouragement to supporting divorced spouses to make their child support payments on time but also to provide to the child some measure of compensation, albeit inadequate, for his or her loss due to the tardiness of the child support payments.

Id.

C. Application of res adjudicata to the January 11, 1994 judgment of contempt

The Mississippi Supreme Court has opined: "In family law, as in other areas of our jurisprudence, we recognize that that which has been finally adjudicated should not be relitigated." ***Tanner v. Roland,* 598 So. 2d 783, 786 (Miss. 1992).** Nevertheless, the judgment for contempt rendered on January 11, 1994, did not calculate the amount of interest nor did it order the father to pay interest which had accrued on the father's arrearage in child support owed to the mother. As a matter of law, the arrearage "should have included interest at the legal rate from the due date of each unpaid support payment." ***See Brand,* 482 So. 2d at 237-238.**

The father argues that because the 1994 judgment of contempt, which adjudicated the father's arrearage to be the sum of $17,781 but omitted an order that he pay interest on this amount of arrearage, was mutually agreed upon by both the father and the mother, that judgment of contempt may not be amended to require him to pay interest on the arrearage. The Mississippi Supreme Court

has provided this Court with a ready answer to the father's argument in ***Varner v. Varner,* 588 So. 2d 428, 433 (Miss. 1991),** when it opined that, "[t]he basic right of the minor child to be supported by its parents is not affected by an agreement between the parties with respect to such obligations; 'children are not chattels whose rights can be bargained away by parents.'" (citation omitted).

While it is true that "that which has been finally adjudicated should not be relitigated," we hold that the doctrine of res adjudicata cannot bar the entry of the final order which required the father to pay interest in the amount of $17,781 and to repay the arrearage at the rate of $350 per month plus interest thereon at the rate of 5 percent when the original judgment of contempt failed so to order. To hold otherwise would be to ignore that "[t]he basic right of the minor child to be supported by its parents is not affected by an agreement between the parties with respect to such obligations." ***See Varner,* 588 So.2d at 433.** However, before this Court affirms the final order from which the father has appealed, it must deal with another facet of his argument on this issue.

D. The Mississippi Rules of Civil Procedure and judgments for child support

1. Rules 60(b) and 59

The Mississippi Rules of Civil Procedure are the real fulcrum upon which the father seeks to balance his argument that the chancellor erred when he ordered him to pay additional sums as interest and child support which were omitted from the 1994 judgment of contempt. He argues that while the mother sought to correct this 1994 judgment pursuant to Rule 60(b)(1) and (4),[(2)] only Rule 59 would have permitted the chancellor to amend the 1994 judgment. Rule 59(e) provides: "A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment."

The father relies on ***Bruce v. Bruce,* 587 So. 2d 898, 903 (Miss. 1991),** in which the Mississippi Supreme Court opined that Rule 59 applies to "those issues predicate to a decision on the merits." The father emphasizes that in *Bruce*, the supreme court stated "unequivocally that the subject of prejudgment interest is such an issue 'predicate to a decision on the merits,' and thus falls within the ambit of Rule 59, not Rule 60." ***Id.*** He next asserts that because the mother's motion was to modify the 1994 judgment of contempt, Rule 59 was the authority for her motion and not Rule 60(b)(1) and (4). The father then concludes that the mother was required to file her motion to modify within ten days of the date of the 1994 judgment of contempt, rather than six months later as she did.

The father continues that even if Rule 60(b) were an appropriate basis for the mother's motion to modify, which he denies, Rule 60(b) "is for extraordinary circumstances, for matters collateral to the merits, and affords a much narrower range of relief . . . ." ***Bruce,* 587 So. 2d at 903.** He concludes his argument against the application of Rule 60(b) by contending that "[n]othing in the record provides any explanation for the [mother's] failure to make plain to the [chancellor] . . . why the sum adjudicated as owed by [him] was incorrect." Therefore, he urges this Court to assume that either "the judgment was correct, or, that if it was in error, that the error was the result of [the mother's] 'negligence, ignorance, or mistake of law,' none of which are grounds for relief under Rule 60(b)." He charges that her motion to modify was simply an effort to relitigate a fact, i.e., the amount of compensation due her, including interest, for her unpaid child support, which had already been established and reduced to judgment. As we will discuss next, this Court holds that Mississippi Rules of Civil Procedure 81 serves as the appropriate basis on which to resolve this facet of the father's only

issue.

2. Rule 81(a)(9)

Rule 81(a)(9) qualifies the application of the Mississippi Rules of Civil Procedure to issues of domestic relations as follows: "These rules apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures . . . (9) Title 93 of the Mississippi Code of 1972." Among the subjects of Title 93 is child support. For example, Section 93-5-23 provides the following with regard to the court's duty and power over its award of child support in matters of divorce:

> When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife or the husband, or any allowance to be made to her or him, and shall, if need be, require bond, sureties or other guarantee for the payment of the sum so allowed. Orders touching on the custody of the children of the marriage may be made in accordance with the provisions of Section 93-5-24. *The court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require.*

Miss. Code Ann. § 93-5-23 (Rev. 1994) (emphasis added).

The Mississippi Supreme Court has repeatedly held that the Mississippi Rules of Civil Procedure must give way to the statutory procedures under Title 93 of the Mississippi Code. ***See Rawson v. Buta*, 609 So. 2d 426, 430 (Miss. 1992)** (holding that "Mississippi divorce actions are governed by the divorce and alimony provisions of section 93, chapter 5 of the Mississippi Code and that the procedural provisions of this chapter limit the applicability of the Mississippi Rules of Civil Procedure, which govern only where the divorce statute stands silent"); ***Wilson v. Butler ex rel. Butler*, 584 So. 2d 414, 418 (Miss. 1991)** (quoting the comment to Rule 81 to explain why matters of child support are treated differently -- they are "matters of which the State has an interest in the outcome").

Section 93-5-23 clearly provides that in a divorce proceeding, the chancery court may "make all orders touching the care, custody and maintenance of the children of the marriage . . . ." This same section specifically authorizes the court to "change the decree, and make from time to time such new decrees as the case may require."

From our foregoing review of authority, we hold that Rule 81(a)(9) exempts judgments which are rendered in matters of child support from the strict application of Rules 59 and 60(b) to the modification of such judgments. To hold otherwise would impair the implementation of the provision of Section 93-5-23 which authorizes the chancery court to "change the decree, and make from time to time such new decrees as the case may require." **Miss. Code Ann. § 93-5-23 (Rev. 1994).** A purpose of Rule 81 is to avoid such impairment; therefore, we hold that the father's attempt to rest the resolution of this issue on the fulcrum of Rule 59 cannot stand in conflict with Rule 81.

IV. Summary

Child support payments vest in the child -- not the parent -- as they accrue. Every unpaid child support payment becomes a judgment against the supporting parent, who remains liable for interest which accrues on the unpaid child support payment from the time it became due. The basic right of the child to be supported by the parents cannot be affected by an agreement which the parents may make. While that which has been finally adjudicated should not be relitigated -- even in family law -- Section 93-5-23 authorizes the court which enters a judgment of divorce to "make all orders touching the . . . custody and maintenance of the children of the marriage" and "to change the decree, and make from time to time such new decrees as the case may require." **Miss. Code Ann. § 93-5-23 (Rev. 1994).**

Mississippi Rule of Civil Procedure 81(a)(9) specifically provides that the rules "are subject to limited application in . . . actions which are generally governed by statutory procedures," including Title 93 of the Mississippi Code of 1972. The Mississippi Supreme Court has reiterated that Rule 81 governs divorce and child support actions and that the procedures in the Mississippi Rules of Civil Procedure govern only where the statutes are silent or are not in conflict. Section 93-5-23 is not silent about the court's right to "to change the decree [regarding child support], and make from time to time such new decrees as the case may require." Therefore, contrary to the father's argument that only Rule 59(e) would permit the chancellor to amend the 1994 judgment of contempt against him, we hold that Rule 81(a)(9) recognizes that Section 93-5-23 controls our resolution of this issue. Section 93-5-23 authorized the chancellor to enter the final order from which the father has appealed, and we affirm it.

THE FINAL ORDER OF THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

1. Section 75-17-7 reads:

> All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.

Miss. Code Ann. § 75-17-7 (Rev. 1991).

2. Rule 60(b)(1) and (4) reads:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) fraud, misrepresentation, or other misconduct of an adverse party;
>
> . . . .
>
> (4) the judgment is void;
>
> . . . .
>
> The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken.

M.R.C.P. 60(b)(1) and (4).