

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RODNEY REDIX

APPELLANT

VERSUS

CAUSE NO.:2008-CA-00039

THERESA REDIX NICHOLS

APPELLEE

**APPEAL FROM THE CHANCERY COURT
OF JACKSON COUNTY, MISSISSIPPI**

**BRIEF OF APPELLEE-DEFENDANT/COUNTER-PLAINTIFF
(THERESA REDIX NICHOLS)**

Michael J. Vallette
900 Washington Ave.
Ocean Springs, MS 39564
228-875-6700-Office
228-875-6702-Fax.
MSB# [REDACTED]

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for Defendant/Counter-Plaintiff (Appellee), Certifies the following parties have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

Chancellor:

Honorable Jaye A. Bradley
Chancellor
P.O. Box 998
Pascagoula, MS 39568

Appellant:

Rodney Redix
16500 Robinson Road
Gulfport, MS 39503

Appellee:

Theresa Redix Nichols
11716 Quail Creek Drive
Ocean Springs, MS 39564

Attorney for Appellant:

Woodrow W. Pringle, III
Attorney At Law
2217 Pass Road
Gulfport, MS 39501

Attorney for Appellee:

Michael J. Vallette
Attorney at Law
900 Washington Ave.
Ocean Springs, MS 39564

Interested Party:

Department of Human Services
C/O James Smallwood, Esq.
Attorney at Law
P.O. Box 1317
Gulfport, MS 39502

Respectfully submitted, this the 23rd day of July, 2008.


MICHAEL J. VALLETTE

STATEMENT REGARDING ORAL ARGUMENT

Appellee, Theresa Redix Nichols, respectfully submits that oral argument is not necessary in this case. This case involves well-settled straight forward principles of law which are neither close nor complex. The briefs of the parties adequately address the legal issues raised and the Chancery Courts Opinion is concise and well-reasoned. Further, the undisputed facts are abundantly clear from the record and oral arguments would not be of benefit to the Appellate Court.

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TABLE OF AUTHORITIES

CASES:

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Blevins v. Bardwell, 784 So.2d 166, 168 (¶ 12) (Miss. 2001)

Chamblee v. Chamblee, 637 So.2d 850, 860 (Miss.1994)

McKee v. McKee, 418 So.2d 764 (Miss 1982)

Mixon v. Mixon, 724 So. 2d 956 (¶ 29) (Ms. Ct. App. 1998)

Morreale v. Morreale, 646 So.2d 1264, 1266 (Miss. 1994)

Omnibank of Mantee v. United Southern Bank, 607 So. 2d 76, 82 (Miss. 1992)

Rees v. Rees, 194 So.2d 750 (Miss. 1940)

Smith v. Smith, 545 So. 2d 725, 727 (Miss 1989)

STATEMENT OF THE ISSUES

1. Whether the trial court erred in awarding Theresa Redix Nichols attorneys fees on her Counter-claim for contempt.

STATEMENT OF THE CASE

Rodney Redix initiated this action subsequent to the parties divorce in 2001. Mr. Redix filed a Motion for Modification of Visitation and Contempt. Theresa Redix Nichols filed an Answer and Counter-Claim for Contempt for an arrearage in child support. The parties reached an agreement on the revised visitation and the trial Court entered its Judgment modifying visitation.

The Court directed the Department of Human Services to file an accounting of all sums of money received from Rodney Redix' employer. The Court also reserved the issue of the arrearages.

Counsel for Mrs. Nichols through Subpoena Deces Tecum's obtained copies of money orders from the issuers of the money orders which indicated that some of the receipts provided by Mr. Redix had been altered to make it look like he had paid Mrs. Nichols more in support than he actually had.

A hearing was conducted on October 18, 2007. Counsel for Rodney Redix had stipulated that there had been an arrearage in child support and that it had been brought current in April or May of 2007, after Mrs. Nichols had filed her Counter-Complaint for Contempt.

There was an arrearage in child support at the time of the filing of the contempt action by Mrs. Nichols. The Trial Court awarded Attorney's fees based on an itemized statement provided by counsel and testimony. The trial court determined that attorneys fee were warranted, and ordered attorneys fees in the amount of \$2,950.00.

STATEMENT OF THE FACTS

The parties hereto were married to one another on March 19, 1993.

There was one child born to the marital union, namely, Bryce A. Redix, a male child born on November 19, 1984. The parties and were subsequently divorced by the Chancery Court of Jackson County, Mississippi, on October 1, 2001. (RE 7-12)

The divorce granted Joint Legal Custody of the minor child, Bryce A. Redix to the parties with the Appellee herein, Theresa Redix Nichols, being granted primary physical custody of the child. (RE 8)

In typical fashion the Judgment and Amended Judgment of Divorce, awarded child support to be paid by RODNEY REDIX, in the sum of \$300.00 per month, and also granted him visitation rights with his son. (RE 8)

The Appellee herein subsequently remarried, and her new husband, a member of the military, was transferred to the State of Hawaii. As a result of this transfer, the Appellant herein filed a Motion for Modification of visitation and Contempt on March 11, 2003. (RE 13-15) Appellee herein, subsequently on June 19, 2003, Mrs. Nichols filed her Affirmative Defenses, Answer and Counter-Complaint for Contempt, (RE 16-18), alleging that Rodney A. Redix was in contempt of this courts Order awarding child support, and alleging that he was in arrears in child support in the amount of \$4,830.00. (RE 19)

On September 10, 2004 the Court entered a Judgment modifying visitation as requested by Rodney A. Redix, for so long as the Theresa Redix Nichols resided in the state of Hawaii or any other location that makes visitation impractical for Mr. Redix. (RE 28-29)

Prior to the Order being entered dated September 10, 2004, Rodney A. Redix produced *copies* of numerous money order receipts as proof of payment of child support. Mrs. Nichols did not accept all of these receipts and questioned the validity of many of them. A few of the money order receipts produced by Mr. Redix as proof of payment of his child support were made part of the record in the hearing held on October 18, 2007. (RE 61-62)

In the Judgment dated September 10, 2004, the Court further directed counsel for Rodney A. Redix to file a Motion directing the Department of Human Services to file an accounting of the monies it received from Mr. Redix for child support. The Trial Court specifically retained jurisdiction for the purpose of determining whether there was an arrearage in child support. (RE 29)

Subsequent to the September 10, 2004 Judgment, Mrs. Nichols began obtaining copies of the money order receipts from the companies that issued the money orders. As it turns out several of the copies of the money orders provided to Mrs. Nichols by Mr. Redix as proof of payment of his child support, turned out to have been altered. (RE 57-62)

The remaining issues of child support arrearage and attorneys fees came on for hearing before the trial court on October 18, 2007. Rodney A. Redix chose not to be present for this hearing but his counsel did appear. (RE 37) At this hearing counsel for Rodney A. Redix stipulated that at the time Mrs. Nichols filed her Counter-Complaint for Contempt (June 13, 2003), Mr. Redix was in arrears in child support, but that he had caught up the arrearage in March or April 2007, (RE 45) while waiting for this matter to come to trial.

With the stipulation by counsel for Mr. Redix, that Mr. Redix was in arrears, at the time of the filing of the Counter-Complaint for Contempt, but brought his arrearage current in April or March, 2007, the only issue to proceed to trial on October 18, 2007, was the issue of attorneys fees.

Rodney A. Redix did not appear at the hearing held on October 18,
2007. (RE 37) In fact no witnesses appeared on behalf of the Appellant. (RE
53)

Mrs. Nichols testified, (RE 37-45) and her counsel testified regarding his bill for services rendered. (RE 46-53) Counsel for Mrs. Nichols submitted his itemized bill documenting 20.50 hours of time expended solely on the contempt portion of the suit, and sought compensation at the rate of \$150.00 per hour, which counsel for Mrs. Nichols submitted at reasonable for an attorney practicing law for 27 years at the time of the hearing. (RE 32-33, 46)

After hearing the testimony the Chancellor found that attorneys fees were appropriate in this case. (RE 53) However, she did reduce Mrs. Nichol's attorneys bill by one hour and awarded attorneys fees to Mrs. Nichols in the amount of \$2,925.00. (RE 53) Counsel for Appellant objects to any award of attorneys fees.

SUMMARY OF THE ARGUMENT

Rodney A. Redix was in arrears in his child support payments on June 19, 2003, the day his ex-wife, Theresa Redix Nichols filed her Counter-Complaint for Contempt, and he did not purge himself of said arrearage until March or April of 2007 when he paid his arrearage off, as stipulated by his counsel.

The failure of a party to comply with a Court Order is prime facia evidence of contempt. Once the prima facia case is made, the burden shifted to Rodney A. Redix to show that he had a valid defense for the arrearage, such as inability to pay, etc. Rodney A. Redix never testified at any point in the entire proceeding, and never set out any defense other than his general denial in his Answer. Yet his attorney stipulated to an arrearage in Court on October 18, 2007.

It was the Appellant's arrearage on June 19, 2003 that prompted Mrs. Nichols to file her contempt action. Further, Mr. Nichols action in providing altered money orders further resulted in Mrs. Nichols having to expend monies to prove that Mr. Redix had provided altered money orders to his counsel and to counsel for Mrs. Nichols.

Rodney A. Redix did not seek modification or suspension of the decree before commencement of contempt proceedings. Thus, he has the burden of purging himself of contempt by showing clearly compliance with the decree, inability to do so, or impossibility of performance, none of which Mr. Redix had done prior to the contempt action being filed.

Failure to award attorneys fees in a case such as this would cause no peril to those who are in arrears and then purge the arrearage after suit is filed against them. Especially in a case such as this on where Mr. Redix provided altered money orders to counsel opposite as proof of payment of child support that had in fact not been paid.

It is well settled that in domestic relations cases Chancellors are vested with broad discretion, and this court will not disturb the chancellor's findings unless the court's actions were manifestly wrong, the court abused its discretion, or the court applied an erroneous legal standard.

The Chancellor did not abuse her discretion in awarding attorneys fees under the circumstances in this case.

ARGUMENT

The Standard for review in domestic relations cases is well settled in this State. “This Court will not disturb a chancellor’s findings where there exists substantial evidence in the record to support his Judgment.” Morreale v. Morreale 646 So.2d 1264, 1266. (Miss,1994), quoting from Omnibank of Mantee v. United Sourthern Bank, 607 So.2d 76, 82 (Miss. 1992). “A chancellor’s decision cannot be disturbed unless the chancellor abused his discretion, was manifestly wrong or clearly erroneous, or an erroneous legal standard was applied”. Barnett v. Oathout, 883 So.2d 563, 566 (¶6) (Miss. 2001), quoting Blevins v. Bardwell, 784 So.2d 166, 168 (¶ 12) (Miss, 2001). “The Chancellor has the sole responsibility to determine the credibility of witnesses and evidence, and the weight to be given to each”. Lee v. Lee, 798 So.2d 1284, 1288 (¶ 14) (Miss. 2001), citing Chamblee v. Chamblee, 637 So.2d 850, 860 (Miss. 1994).

“Findings of fact made by a chancellor may not be set aside or disturbed on appeal unless manifestly, wrong; this is so whether the finding relates to evidentiary or ultimate fact question... With respect to issues of fact where the chancellor made no specific finding, this Court proceeds on the assumption that the chancellor resolved all such fact issues in favor of the appellee, or at least in a manner consistent with the decree.” Smith v. Smith, 545 So. 2d 725, 727 (Miss. 1989).

The standard of review for award of attorneys fees in divorce cases is set forth in McKee v. McKee, 418 So. 2d 764, (Miss 1982). Citing Rees v. Rees, 194 So. 2d 750 (Miss. 1940), the court stated “In determining an appropriate amount of attorneys fees, a sum sufficient to secure one competent attorney is the criterion by which we are directed. The fee depends on consideration of, in addition to the relative financial ability of the parties, the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, as well as the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case.”

However, in Mixon v. Mixon, 97-CA-01129 (¶ 29) (Miss. Ct. App. 2007), the court stated, “We agree that the establishment of the *McKee* factors are not necessary for a contemnee to recover attorneys fees related to pursuing actions where a contemnee has willfully violated a lawful order of the court. To hold otherwise would be cause no peril to those restrained from certain conduct if they violate the orders of a court. See also Allred v. Allred, 97-CA-01171(¶ 18-23) (Miss Ct. App. 1999).

The trial of this matter, held on October 18, 2007, was limited to the issue of attorney’s fees. (RE 37)

Theresa Redix Nichols testified regarding the issue of Mr. Redix's non-payment of child support, and Mr. Redix's production of copies of receipts of money orders allegedly paid to Mrs. Nichols by Rodney Redix. (RE 37-46)

In addition to the testimony of Theresa Redix Nichols, the court received into evidence copies of three money order receipts that Mr. Redix provided to counsel for Mrs. Redix, which purported to be evidence that he had paid the indicated amount in child support either to DHS for Mrs. Nichols, to directly to Mrs. Nichols. (RE 60-62). One of the pages of Exhibit 3 in evidence (RE) is a copy of the purchaser's copy of the receipt of money order number 359098196 showing that the purchaser is Rod Redix, the Payee is allegedly Theresa Redix, for child support for Bryce Redix, in the amount of \$300.00 allegedly dated May 10, 2002. (RE 61)

The copy of the actual money order number 359098196, which was produced to counsel for Mrs. Nichols under Subpoena Deces Tecum issued to Union Planters Bank indicates that money order 359098196 was actually dated November 24, 2000, was issued Rod Redix and payable to Amsouth Bank in the amount of \$481.00 (RE 57)

Furthermore, Exhibits 2 and 3 in evidence show money order receipt number 709355574, drawn on Keesler Federal Credit Union, purporting to evidence a child support payment on behalf of Bryce A. Redix in the amount of \$200.00 which is dated January 2001. (RE 60)

Once again the copy of the actual money order number 709355574, produced to counsel for Mrs. Nichols under Subpoena Duces Tecum, indicates that the money order was payable to CRDU (DHS) for child support, but the amount was for \$100.00 instead of \$200.00, and the date was December 22, 2002. (RE 59)

Finally, Exhibits 2 and 3 in evidence show money order receipt number 06-404133315 payable to Theresa Redix in the amount of \$300.00, dated 12/09/01 (hand written). (RE 60)

Once again the copy of the actual money order receipt number 06-404133315, produced to counsel for Mrs. Nichols shows that although the amount of this money order receipt is correct, the date is wrong. The copy of the receipt produced by Mr. Redix is dated 12/09/01 when the date that the original copy was run through the bank was 07/12/01, before the money order was issued. (RE 58)

Counsel for Rodney Redix objected when counsel for Mrs. Redix referred to the money orders being "altered" (RE 47). However, they were placed into evidence, and it is obvious that what Mr. Redix presented as proof of payment of child support, is at the least inaccurate if not "altered", and certainly casts doubt on all of the other money order receipts produced by Mr. Redix, and certainly caused an inordinate amount of time to be spent verifying the alleged payments made.

Theresa Redix Nichols counsel placed into evidence his itemized time and expense sheet which totaled 20.50 hours expended from June 2003 to October 18, 2007, which is related solely to time spent on the contempt portion of the litigation. (RE 32-33) Said hourly rate of \$150.00 is reasonable in the community for an attorney practicing 27 years. Counsel for Mrs. Nichols further testified that while not all of the time Mr. Pringle questioned him about was fully attributable to the issue of child support arrearage, all of the time indicated on the time and expense sheet was accurate.

Counsel for Mr. Redix has itemized time that he believes is not attributable to the contempt action. However, the fact of the matter is that after the Judgment of September 10, 2004, the only issue remaining in the case was the arrearage in child support. All other issues had been resolved. (RE 28-29)

CONCLUSION

Theresa Redix Nichols would show that the Judgment of the Trial Court should be affirmed. The Chancellor heard all of the evidence, determined that an award of attorneys fees was justified under the circumstances. The Chancellor evaluated the credibility of the witnesses and evidence and her decision was not manifestly wrong, clearly erroneous, an abuse of discretion, nor did she apply an erroneous legal standard.

RESPECTFULLY SUBMITTED, this the 23rd day of July, 2008.

THERESA REDIX NICHOLS


BY: MICHAEL J. VALLETTE

CERTIFICATE OF SERVICE

I, MICHAEL J. VALLETTE, do hereby certify that I have this day sent via U.S. mail, postage prepaid a true and correct copy of the foregoing Appellee's Brief to the following at their usual mailing address:

Hon. Jaye A. Bradley
Chancellor
P.O. Box 998
Pascagoula, MS 39568

Woodrow W. Pringle, III, Esq.
Attorney at Law
2217 Pass Road
Gulfport, MS 39501

SO CERTIFIED, this the 23rd day of July, 2008.


MICHAEL J. VALLETTE

Michael J. Vallette
900 Washington Ave.
Ocean Springs, MS 39564
228-875-6700-Office
228-875-6702-Fax.
MSB# [REDACTED]