NO. 2008-CA-00190

IN THE SUPREME COURT OF MISSISSIPPI

MARK ANDREW WEST, SR.

APPELLANT

VS.

APRIL SAYLORS WEST

APPELLEE

BRIEF OF APPELLEE

GEORGE S. LUTER
MSB [redacted]
405 Tombigbee Street
Post Office Box 3656
Jackson, Mississippi 39207-3656
Telephone: (601) 948-0021
Facsimile: (601) 354-5548
GEOLAW1502@AOL.COM

Attorney for Appellee

IN THE SUPREME COURT OF MISSISSIPPI

MARK ANDREW WEST — APPELLANT

VS. — No. 2008-CA-00190

APRIL SAYLORS WEST — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Mark Andrew West, Sr., Appellant;
2. H. R. Garner, Attorney for Appellant;
3. April Saylors West, Appellee;
4. George S. Luter, Attorney for Appellee;
5. Hon. Vicki B. Cobb, Chancellor.

Respectfully submitted,

GEORGE S. LUTER

George A. Luter

ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES

BRIEF OF APPELLEE

I.

STATEMENT REGARDING ORAL ARGUMENT

The appellee April Saylors West does not request oral argument but would assert that the briefs adequately address the issues in this case and oral argument is not necessary.

STATEMENT OF THE CASE

The appellee April Saylors West files this Brief to urge the Court to affirm the order of the Chancery Court of DeSoto County entered January 4, 2008 in which the Court denied the Appellant's Motion for Modification of Child Support and subsequent Motion to Set Aside Portion of Judgment for Divorce. (R 121-122, RE 61-62).

II.

STATEMENT OF THE ISSUES

1. Did the chancellor err in failing to set aside the Court's prior order containing an escalation clause regarding child support relying on the case of Rogers v. Rogers?

2. Did the chancellor err in failing to make a written finding regarding the applicability of child support guidelines?

III.

STATEMENT OF THE FACTS

The appellant, Mark Andrew West, Sr., and the appellee, April Saylors West, were divorced on October 5, 2005 due to irreconcilable differences. (R 43-44, RE 3-4, Tab 1). April was represented by counsel but Mark was not. (R 21, RE 13, Tab 1) One child was born of the marriage and the parties executed a property settlement agreement which in regard to child support contained the following pertinent part:

> (3) **CHILD SUPPORT:** The father shall be responsible for paying unto the mortgage company the monthly mortgage payment on the marital residence in lieu

of child support. Child support payments in the amount of $1,150 shall commence and be payable unto the Mother on the lst of the month following the sale of the marital residence and shall be due and payable on the first of each month thereafter, or payable as directed by an Order of Withholding, until such time as the minor child becomes emancipated by the laws of the State of Mississippi. ....." (R 17-18, RE 9-10, Tab 1)

The parties agreed on the following escalation clause:

"The Parties agree that there will be a substantial change in the needs of the minor child every (5) years and thus the Non-Custodial parent shall be responsible for providing to the Custodial parent, every five (5) years a copy of his/her current year's tax return of W-2 form immediately upon the filing of his/her tax returns. **Should the Non-Custodial parent have an increase in pay of $10,000 or more, child support shall automatically be raised to an amount equal to fourteen percent (14%) of his/her new adjusted gross income and an Order directing same shall be entered.**" (R 18, RE 10, Tab 1)

On May 3, 2006, the parties filed an Agreed Order of Modification giving Mark use and possession of the marital residence thereby modifying the prior agreement that he pay the mortgage in lieu of child support. (R 50, RE 19, Tab 2)

On March 19, 2007, Mark filed his Petition for Modification of Child Support in the Chancery Court of DeSoto County alleging that "the Court failed to make a finding into the record as to the reason or reasons that the child support guidelines did not apply" and the failure to make such finding made "void or voidable the child support of One Thousand Fifty Dollars ($1,150.00) per month." (R 60-61, RE 29-30, Tab 3).

On May 2, 2007, Mark filed his Motion to Set Aside Portion of Judgment of Divorce essentially making the same argument made in his Petition for Modification of Child Support. (R 88, RE 39, Tab 4)

On December 3, 2007, Chancellor Vicki B. Cobb rendered a bench opinion denying Mark's Petition for Modification of Child Support and Motion to Set Aside Portion of Judgment of Divorce stating partly as follows:

"The facts of this case also are that Mr. West was not represented by counsel at the time of the divorce and Mrs. West was represented by counsel and to just be as honest and candid as I know how to be, I think Mr. West made a bad deal when he entered into the divorce agreement. Of course, I don't know the totality of the circumstances. The things that have been brought to this Court's attention are the child support matters.

Mr. West agreed to pay the house payment, which was $1,371.62 according to the testimony that I heard at my hearing in lieu of child support until the house was sold, and Mrs. West continued to live in the house with the child.

Then for some reason Mrs. West moved out of the house, Mr. West moved back in the house and according to and in compliance with the divorce decree, the divorce decree originally provided that he would pay the house payment until the house was sold and at that time his child support -- he would pay child support directly to Mrs. West of $1,150.00 per month.

Well, the house wasn't sold at that point but actually Mr. West moved back in it and started living in it and agreed -- the parties agreed by an agreed order entered in April of 2006 that he was going to live in the house, pay the house payment, make arrangements to sell the house and basically buy Mrs. West out and he had a payment schedule that he was going to pay her $10,000 equity in the house, and at that point he agreed also in addition to those matters about the house, to pay the $1,150.00 in child support directly to Mrs. West, beginning after that agreed order as child support payments.

And the testimony at trial showed that Mr. West's income was over $50,000 -- his adjusted gross income was over $50,000 at the time of the separation, at the time of the divorce and at the present time, but that 14 percent of his adjusted gross income was less than $1,150.00. It still is less than $1,150.00.

However, the parties agreed for him to pay that amount of child support and Mr. Garner then some year and a half or so after the divorce after the divorce decree filed on behalf of Mr. West a petition to modify his child support and both of you have done a great job of arguing your positions." (R 60-62, RE 46-48, Tab 5).

The Chancellor then noted that Mark had not filed timely filed a petition under Rule 59 or Rule 60 of the Miss Rules of Civil Procedure to set aside the divorce decree and thus the Court would have to apply the regular standard in regard to a modification hearing:

"I've researched this over and over again because I really believe that Mr. West made a deal when he was granted his divorce that was probably not in his best interests. It was absolutely -- he is paying above what the guidelines would require to pay. **And he waited to long to ask the Court to change that.**

He could have filed a petition or something under Rule 59 or Rule 60 of the Mississippi Rules of Civil Procedure; however he had to do that timely and obviously he didn't seek legal representation until those time periods had long passed.

So because those things were not done and this Court is not faced with a Rule 59 motion or a Rule 60 motion to set aside a divorce decree or to modify it or set aside the provisions of it at this point the Court has got to apply the regular standard that the Court would apply to any modification proceeding.

There needs to be some demonstration to this Court of a substantial and material change in circumstances in order for the Court to modify this child support and the only testimony with regard to a material change in circumstances with regard to Mr. West's income was that Mr. West's income has increased in fact since the divorce decree.

I think the testimony was that his net income or probably his adjusted gross income had not actually changed that much, or at least that was his testimony, but his gross income has increased considerably since the divorce decree or several thousand dollars since the divorce decree.

But that substantial and material change in circumstances will certainly not allow this Court to modify the child support downward." (R 63-64, RE 49-50, Tab 5).

The Chancellor entered an order encompassing its bench opinion on January 4, 2008. (R 121-122, RE 61-62, Tab 6). Mark subsequently filed a Motion for Reconsideration on January 8, 2008 which was subsequently denied by the Chancellor on January 28, 2008. (R 141-142, 146, RE 64-66, Tab 7).

Appeal was timely filed to the Mississippi Supreme Court on January 28, 2008. (R 148, RE 68, Tab 7).

SUMMARY OF THE ARGUMENTS

The decision of the DeSoto County Chancery Court should be affirmed because the Appellant failed to timely move to have the original property settlement modified or set aside and having not done so, showed no material changes in circumstances that warranted a modification of such agreement. Moreover, *Rogers v. Rogers,* 919 So. 2d 184 (Miss. App. 2005) squarely holds that parties, such as Mark and April, can freely contract to do more than what the law requires of them.

The denial of the Chancellor to make any finding as to the applicability of child support statutory guidelines is not in error since the parties by their agreed modification of May 3, 2006 made such finding unnecessary.

ARGUMENT

1. The chancellor did not err in failing to set aside the Court's prior order regarding child support.

As stated on December 3, 2007, Chancellor Vicki B. Cobb rendered a bench opinion denying Mark West's Petition for Modification of Child Support and Motion to Set Aside Portion of Judgment of Divorce.

The Court first correctly noted that Mark failed to take any action to set aside the original property settlement agreement under Mississippi Rules of Civil Procedure Rule 59 or Rule 60;

Rule 59 (e) states as follows in applicable part: **Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment. Rule 60 (b) (6) states as follows in applicable part: **(b) Mistakes, Inadvertence; Newly Discovered Evidence; Fraud, etc.** and lists six (6) instances that Mark could have used to set aside the property settlement agreement **if** he had acted within a reasonable time, and not more than six months for certain reasons. This Mark did not do.

The Chancellor then noted that Mark had not shown any material change sufficient to warrant a modification:

> "There needs to be some demonstration to this Court of a substantial and material change in circumstances in order for the Court to modify this child support and the only testimony with regard to a material change in circumstances with regard to Mr. West's income was that Mr. West's income has increased in fact since the divorce decree.
>
> I think the testimony was that his net income or probably his adjusted gross income had not actually changed that much, or at least that was his testimony, but his gross income has increased considerably since the divorce decree or several thousand dollars since the divorce decree.
>
> But that substantial and material change in circumstances will certainly not allow this Court to modify the child support downward." (R 63-64, RE 49-50, Tab 5)."

April would argue that the Chancellor correctly found no material changes in circumstances and followed long standing case law. "The Chancellor can modify the child support provisions of a divorce decree only when there has been a material or substantial change in circumstances. *Shipley v. Ferguson,* 638 So. 2d 1295, 1297 (Miss. 1994) as quoted in *Bruce v. Bruce,* 687 So. 2d 1199 (Miss. 1996). "Further the Chancellor is afforded broad discretion in child support modification cases and we will reverse only when he is manifestly wrong in his finding of facts or has abused his discretion. *Hammett v. Woods,* 602 2d 825, 828 (Miss. 1992). Here, the Chancellor clearly did not abuse her discretion or was manifestly wrong particularly in light of the fact that Mark's income was at least slightly higher.

Rather, Mark argues the the Chancellor erred in her reliance on *Rogers v. Rogers,* 919 So. 2d 184 (Miss. App. 2005) which held in regard to child support in that case the following:

> "The parties may in fact agree of their own volition to do more than the law requires of them. Where such a valid agreement is made, it may be enforced just as any other contract. *East v. East,* 493 So. 2d 927, 931-932 (Miss. 1986)."[1]

Mark argues the Chancellor's reliance on such case was anathema to the holdings of

[1] In that case, unlike Mark, the father apparently timely filed a Motion to Alter or Amend Judgment.

Tedford v. Dempsey, 437 So. 2d 410 (Miss. 1983) and *Wing v. Wing,* 549 So. 2d 944 (Miss. 1989) which merely *urged* the use of escalation clauses stating[2] : "In child support provisions of their separation agreements, the parties *generally ought* to be required to include escalation clauses." *Wing, supra,* while affirming *Tedford* merely reversed and remanded the case after the father was held in contempt since no consumer price index was specified in the escalation clause.

Rather, there was ample evidence that the Chancellor took notice that Mark and April for some reason agreed to modify payment of child support when Mark took possession of the former marital residence and agreed to a payment plan of $5000 to April only six months after they were divorced. (R 50, RE 19, Tab 2). The Chancellor noted:

> "Then for some reason Mrs. West moved out of the house, Mr. West moved back in the house and according to and in compliance with the divorce decree, the divorce decree originally provided that he would pay the house payment until the house was sold and at that time his child support -- he would pay child support directly to Mrs. West of $1,150.00 per month.
>
> Well, the house wasn't sold at that point but actually Mr. West moved back in it and started living in it and agree -- the parties agreed by an agreed order entered in April of 2006 that he was going to live in the hour, pay the house payment, make arrangement to sell the house and basically buy Mrs. West out and he had a payment schedule that he was going to pay her $10,000.00 equity in the house, and at that point in addition to those matters about the house, to pay the $1,150.00 in child support directly to Mrs. West, beginning after agreed order as child support payments." (R 61, RE 47, Tab 5)

The Chancellor then noted that Mark apparently agreed to pay more child support than the law required:

> "In this particular case Mr. and Mrs. West made an agreement between themselves.[3] That agreement was made a part of the irreconcilable differences

[2] Interestingly, footnote 7 to *Tedford* states: "We recognize that the chancellor cannot make the parties agree to an escalation clause. Yet, he may clearly refuse to approve a separation agreement, and thus refuse to grant the divorce, if the parties do not include it." (437 So. 2d at 419). Arguably the original chancellor must have been satisfied with the original escalation clause since he approved it.

[3] In footnote 7 to *Tedford,* the Court noted "We take judicial notice that lawyers in the practice of their craft of private lawmaking draft thousands of escalation clauses in a great variety of contractual contexts each year. Here is but another in the lawyer's string of creative successes in helping people to cope with the ever changing circumstances in which they find themselves." (437 So. 2d at 410). Certainly it is arguable that the Agreed Modification of April 27, 2006 between Mark and April was an attempt at private lawmaking between the two to cope with their changing circumstances.

divorce decree. That agreement did not require Judge Lynchard to go back behind their agreement and actually make a finding on the record.

It was an agreement. It was an agreement whereby Mr. West agreed to do something more than he would have been required to do by the law, and this Court feels like the Court did not have to make any specific findings of fact and at this point it's not up to this Court to second guess Judge Lynchard.

The agreement was made. The time for appeal has passed. The time for a request for reconsideration has passed and in fact Mr. West at the time that he testified at our hearing he testified that when he entered the agreed order[4] on April the 27th, 2006, at that point he had another occasion to ask the Court to reduce the amount of child support or to reconsider the Court's previous ruling.

He did not because he testified that he thought his child support obligation to be $1,150.00 per month once the house was sold and he consented to that." (R 66, RE 52, Tab 5).

In announcing her ruling the Chancellor in particular relied on the rulings in *Williams v. Williams,* 510 So. 2d 613 (Miss. App. 2001) in which the Court of Appeals addressed a dispute similar to Mark and April:

> "Williams argues that the chancellor erred in modifying child support because there was no proof of a material change in circumstances, and that written findings as to the reasonableness of applying the statutory guidelines were needed because he income was greater than $50,000.[5] Miss. Code Ann. 43-19-101(4) (Rev. 2000).
>
> These arguments need not be addressed. We find that what is being appealed is an agreed modification to child support. As previously related, Hall's counsel announced after an off-record conference that the parties had reached agreement on the issue of child support modification. Williams' counsel with that announcement. Once the parties agreed to the new support amount, there was no need for Hall to demonstrate a material change in circumstances or for the chancellor to make any specific findings of fact."

April would suggest the scenario in *Williams* is exactly what happened here and the Chancellor did not err in relying on *Williams.* The parties agreed in 2006 to modify child support and what Mark attempted to do by his 2007 modification was to appeal the 2006 agreed modification of child support.

[4] Agreed modification of April 27, 2006, R 50, RE 19, Tab 2).

[5] Mark's was also over $50,000 but he admitted his gross income had increased considerably since the divorce. (R 64, RE 50, Tab 5).

Further, the Chancellor's reliance on , *Rogers, supra,* is equally correct and applicable. Although the Chancellor noted Mark agreed possibly to pay more child support than was statutorily required, he readily agreed to do such:

> "It was an agreement. It was an agreement whereby Mr. West agreed to do something more than he would have been required to do by the law, and this Court feels like the Court did not have to make any specific findings of fact and at this point it's not up to this Court to second guess Judge Lynchard."
> (R 66, RE 52, Tab 5).

Such reliance by the Chancellor upon *Rogers* was correct since it held parties may do exactly what Mark did: Do more than what the law required. As stated before *Rogers* states:

> "Mr. Rogers now argues that the chancellor's determination creates an unlawful and unenforceable child support escalation clause. This argument lacks merit. The parties may in fact agree of their own volition to do more than the law requires of them. Where such a valid agreement, it may be enforced as any other contract. *East v. East,* 493 So. 2d 927, 931-932 (Miss. 1986)."

As stated earlier herein, a Chancellor is afforded broad discretion in child support modification cases and we will reverse only when he is manifestly wrong in his finding of facts or has abused his discretion. *Hammett, supra.*

April would assert that the Chancellor correctly found that Mark had not timely acted to modify his original support agreement under MRCP 59 or 60, had failed to show a material change in circumstances to modify his 2006 agreed modification, and had readily agreed to do pay more in child support than the law required. Under such circumstances, the Chancery Court of DeSoto County in this case should be affirmed.

2. Did the chancellor err in failing to make a written finding regarding the applicability of child support guidelines?

Mark asserts that the Chancellor erred in failing to make a written finding into the record as the applicability of child support guidelines pursuant to Miss. Code Ann. 43-19-101 (1972). The Chancellor declined to do so apparently because Mark readily agreed to pay more than the

statutory guidelines in the original agreement and the modified agreement stating:

> "In this particular case Mr. and Mrs. West made an agreement between themselves. That agreement was made a part of the irreconcilable differences divorce decree. That agreement did not require Judge Lynchard[6] to go back behind their agreement and actually make a finding on the record. It was an agreement. It was an agreement whereby Mr. West agreed to do something more than he would have been required to do by the law, and this Court feels like the Court did not have to make any specific findings of fact and at this point it's not up to this Court to second guess Judge Lynchard."
> (R 66, RE 52, Tab 5).

The same issue was also addressed in *Williams, supra,* where the Court of Appeals noted such a finding was not necessary in a case such as Mark and April's:

> "Williams argues that the chancellor erred in modifying child support because there was no proof of a material change in circumstances, and that written findings as to the reasonableness of applying the statutory guidelines were needed because his income was greater than $50,000.[7] Miss. Code Ann. 43-19-101(4) (Rev. 2000).
>
> These arguments need not be addressed. We find that what is being appealed is an agreed modification to child support. As previously related, Hall's counsel announced after an off-record conference that the parties had reached agreement on the issue of child support modification. Williams' counsel with that announcement. Once the parties agreed to the new support amount, there was no need for Hall to demonstrate a material change in circumstances or for the chancellor to make any specific findings of fact."

Again, Mark agreed to the agreed modification in 2006. The Chancellor in 2008 was not required to make such statutory findings once the parties agreed to the new support amount.

The denial of the Chancery Court of DeSoto County to make such statutory findings was not in error and the Chancellor should be affirmed.

CONCLUSION

The Chancery Court of DeSoto County should be affirmed on both arguments.

---

[6] Surely it can be presumed that Judge Lynchard who approved the original property settlement agreement in 2005 was satisfied that the parties met Miss. Code Ann 93-5-2(2) which required that "the parties have made adequate and sufficient provision by written agreement for the custody and maintenance..." of their one minor child.

[7] Mark's was also over $50,000 and he further admitted his gross income had increased considerably since the divorce. (R 64, RE 50, Tab 5).

CONCLUSION

The Chancery Court of DeSoto County should be affirmed on both arguments.

Respectfully submitted,

APRIL SAYLORS WEST, Appellee

BY: George A. Luter
GEORGE S. LUTER, Her Attorney

CERTIFICATE OF SERVICE

I, George S. Luter, attorney for Appellee, hereby certify that I have mailed postage prepaid a copy of the foregoing *Appellee's Brief* to the following:

Hon. Vicki B. Cobb
Post Office Box 1104
Batesville, MS 38606-1104

H. R. Garner, Esq.
Post Office Box 443
Hernando, MS 38632-0443

SO CERTIFIED this the 24th day of September, 2008.

George A. Luter
GEORGE S. LUTER, Attorney for Appellee

GEORGE S. LUTER
[redacted]
ATTORNEY FOR APPELLEE
405 TOMBIGBEE STREET
POST OFFICE BOX 3656
JACKSON, MS 39207-3656
TELEPHONE 601-948-0021
FAX 601-354-5548
GEOLAW1502@AOL.COM