

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KENNETH E. SMITH

FILED

APPELLANT

MAR 03 2009

VS.

OFFICE OF THE CLERK NO. 2008-CA-00683-00A
SUPREME COURT
COURT OF APPEALS

SANDRA K. SMITH

APPELLEE

APPEAL FROM THE CHANCERY COURT OF RANKIN COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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ATTORNEYS FOR APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF ISSUES

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING KENNETH'S OBJECTION TO SANDRA'S TESTIMONY THAT HER EMPLOYER DEDUCTED \$35.00 A WEEK AND PAID KENNETH THAT WEEKLY SUM FOR CHILD SUPPORT AND IN ALLOWING HER CREDIT FOR HER UNPAID CHILD SUPPORT FOR HER ALLEGED \$35.00/ MONTHLY PAYMENTS AND/OR IN ALLOWING HER CREDITS FOR THE TIME THE CHILD ALLEGEDLY LIVED WITH HER FROM 2002 THROUGH 2004.

STATEMENT OF THE CASE

The parties are in substantial agreement about the facts with important exceptions to be noted in the argument.

SUMMARY OF THE ARGUMENT

Kenneth argued that he trial court erred in giving Mrs. Smith credits for the payments allegedly deducted from her paycheck while she was in Arkansas for two reasons. First of all, he argued that her testimony violated the best evidence rule because she failed to offer written documentation and failed to offer an adequate excuse for her failure to do so. Secondly, he argued that assuming that that testimony was properly admitted, the evidence fails to support the amount of credit given for the alleged payroll deductions. In response, Mrs. Smith, who is proceeding pro se, goes outside the record to support her claim that she provided an adequate excuse for her failure to produce records.

Finally, Kenneth argued that the trial court erred in giving Mrs. Smith the credits given for the time when Nicki was allegedly living with her because Mrs. Smiths' evidence was insufficient to support the amount credited. Again, Mrs. Smith goes outside the record evidence in support of her claim that she was entitled to the amount credited. *

ARGUMENT

- I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING KENNETH'S OBJECTION TO SANDRA'S

TESTIMONY THAT HER EMPLOYER DEDUCTED \$35.00 A WEEK AND PAID KENNETH THAT WEEKLY SUM FOR CHILD SUPPORT AND IN ALLOWING HER CREDIT FOR HER UNPAID CHILD SUPPORT FOR HER ALLEGED \$35.00/ MONTHLY PAYMENTS AND/OR IN ALLOWING HER CREDITS FOR THE TIME THE CHILD ALLEGEDLY LIVED WITH HER FROM 2002 THROUGH 2004.

Although Mississippi law allows the non-custodial parent to receive credit for child support payments owed where she pays the support directly to or for the benefit of the child, where to hold otherwise would unjustly enrich the other parent. However, any evidence of direct payments must be clear and convincing *Baier v. Baier*, 897 So.2d 202, 204-05 (Miss.App. 2005). [citing *Lahmann v. Hallmon*, 722 So.2d 614, 620 (Miss. 1998).

Kenneth claimed unpaid child support from Sandra in the sum of \$24,000.00 for unpaid child support from July 1, 1989 through February of 2006 when Nicki turned 18 years of age. C.P. 1-10.

The lower court ultimately found that Sandra was entitled to credits totaling \$14,000.00 for two periods of time: (1) the amounts of her alleged payroll deductions while she was working in Arkansas; and (2) the time between 2002 and 2004 when she claimed Nicki was living with her and not with her father. RE 5-8.

Set off for payments Sandra claimed were deducted from her paycheck from March of 1991 to November of 1994 and which were allegedly sent directly to Kenneth:

Sandra claims that from March of 1991 until November of 1994 she had \$35.00 a week deducted from her paycheck at work and sent directly by her employer to Kenneth. Tr. 9-12, 22. Kenneth denied that he received any such payments. Sandra's testimony reflects that she believed she was entitled to a deduction of \$7,000 to \$8,000 for these payments. Tr. 22-23. Kenneth, on the other hand, denied receiving any \$35.00 payments during that time period.

Kenneth's records, on the other hand, showed that she made payments of \$1480.00 (none of which were in the sum of \$35.00) from March of 1991-December of 1994. C.P./15.

The only evidence Sandra submitted in support of her claim for the \$35.00 payments was her testimony. Although the best evidence of the payments would have been her pay stubs, income tax records or documentation from her employer, Sandra produced none of those. Although M.R.E. Rule 1004 allows other evidence of the contents of a writing, it does so only if the proponent demonstrates that all originals have been lost or destroyed or no original can be obtained by any available judicial process or procedure. The only testimony about the unavailability of the checks came from Sandra who claimed someone at the company told her that they could not be found. Tr. 10-12. *

Sandra now claims in her brief that she produced documented calls to the company where she requested copies of the checks numerous times. She also claims that she did not request Kenneth's records because he had not filed a tax return in approximately eight years. She also now claims that subpoenaed copies of her pay stubs would not have been beneficial because child support is deducted after taxes. Significantly, Sandra made none of these claims in the trial court, and NONE OF THE CLAIMS IS SUPPORTED BY THE RECORD. Therefore, they are not properly before this court.

As the Court pointed out in *Dorr v. Dorr*, 797 So.2d 1008 (Miss.App. 2001), Sandra had means other than merely calling someone at the company to obtain evidence that she had paid the sums in question. She could have made a request for admissions from Kenneth or she could have subpoenaed duplicates from the Internal Revenue Service or records from her own bank showing that deductions had been made from her check. *Dorr v. Dorr*, 797 So.2d at 1017.

In *Baier v. Baier*, *supra*, the Court of Appeals held that where the party claiming a set off failed to support his testimony with receipts of purported payments, cancelled checks,

corroborating witnesses or evidence of any kind other than his own testimony, he failed to satisfy his burden of showing that he was entitled to a set off for payments he allegedly made to his children.

In summary, the evidence was insufficient to support the deduction of any amounts for sums allegedly deducted from Sandra's paycheck.

Moreover, even assuming that Sandra was entitled to some setoff for the \$35.00 monthly payments, the most that she should have been given credit for would have been for 65 months times \$35.00 which would be \$2,275.00. Since Kenneth had given her credit already in his calculations for having paid \$1,480.00, the most she should have received credit for would have been \$2,275.00 less \$1,480.00 or \$795.00--the difference between what she claimed she paid and what Kenneth claimed she had paid. The Chancellor erred in awarding her any more than that.

Set off for time allegedly spent with Sandra:

The Chancellor erroneously gave Sandra a credit of an unspecified amount for the time she claimed Nicki had spent with her from the end of March or first part of April of 2002 through April of 2004. Sandra claimed that in March of 2002, Nicki came to live with her and stayed there until April of 2004 when the paternal grandmother was granted temporary custody and she was returned to her father that same month in April of 2004. Tr. 16-17. Assuming for the sake of argument only that Nicki in fact lived exclusively with her mother and received her support from her mother and not her father during that time, \$125.00 times the 26 months (giving her credit for both March of 2002 and April of 2004) in question would be \$3,250.00.

Both Nicki and Kenneth, however, disputed that Nicki resided with her mother for that entire time period and that her mother supported her that entire time. Nicki for example testified that after her mother moved back to Jackson, she stayed with her off and on until she was about 17 but "never actually lived with her." She claimed her residence was with her father. Tr. 34-35.

Her mother and father lived about two miles apart. Tr. 37. She further testified that after she was 17 until her 18th birthday, she lived exclusively with her father and/or grandmother. Occasionally, she stayed a night with her mother but did not live there. Tr. 39. She occasionally stayed with her grandmother. Tr. 49.

Sandra admits in her brief that both Kenneth and Nicki disputed her claim that Nicki lived with her mother throughout that time, but claims that because Kenneth's mother applied for food stamps on behalf of Nicki during that time, this supports the Chancellor's finding that Nicki lived with Sandra because this showed their testimony to be untrue.

Neither Kenneth nor Nicki, however, denied that Nicki stayed with her grandmother intermittently during the time in question. Moreover, they did not deny that she stayed with her mother on occasion. It does not follow, therefore, that because the grandmother filed for food stamps that Kenneth and Nicki lied about Nicki's primary residence. Significantly, when Kenneth learned that his mother had filed for food stamps, he asked that the application be dismissed. Tr. 56-67.

Sandra also claims that she has tax returns, Federal Financial Aid Loan forms for college for Nikki to attend William Carey college in 2004, as well as documentation from Richland Middle School and Richland High School of the change to Nicki's address, *etc.* NONE OF THIS ALLEGED DOCUMENTATION, HOWEVER, WAS PRODUCED BY SANDRA AT TRIAL, IS NOT IN EVIDENCE, AND IS THEREFORE IRRELEVANT TO A DETERMINATION OF THIS CASE.

The burden was on Sandra to show that she expended money entitling her to a credit. *Dorr v. Dorr*, 797 So.2d at 1017. Sandra, however, presented nothing other than her testimony that she spent any money at all on Nicki during the time Nicki stayed with her. She presented no

receipts, check stubs, tax returns or any other documentation to support her testimony. *Baier v. Baier, supra.*

Moreover, her testimony does not support the notion that Nicki lived with her full-time during that period or that she was the child's primary support during that time to the exclusion of her father. Both Nicki and Kenneth testified that Nicki did not live with her full-time but stayed there on an intermittent basis. Furthermore, both Nicki and Kenneth testified that Kenneth was Nicki's primary means of support until her 18th birthday. Although Sandra may have occasionally given Nicki money, Sandra failed to establish how much. In short, the evidence fails to support a credit for the time Nicki supposedly lived with her mother because there is no evidence that her father did not continue to support her during that time.

Assuming for the sake of argument that Sandra was entitled to any credit at all for that time period, the most she should have been entitled to would have been \$3,250.00. The Chancellor, therefore, erred in awarding her any sum in excess of that amount.

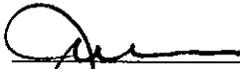
CONCLUSION

The Chancellor erred in finding that Sandra was entitled to set offs at all. This Court, therefore, should reverse and render judgment for Kenneth for \$24,000, plus attorney's fees and costs.

At best, assuming for the sake of argument that Sandra's testimony in the absence of any documentary proof was entitled to any weight at all, the most she was entitled to as a set off would have been \$3,250.00 for the time between 2002 and 2004 and/or \$795.00 for the period she claimed deductions were being made and paid to Kenneth. This Court should reverse and render judgment in an amount supported by the record but in any event no more than those sums.

Alternatively, the Court should reverse for a new trial on the amount of any set off due to Sandra from the \$24,000.00 otherwise owed to Kenneth.

RESPECTFULLY SUBMITTED,
KENNETH E. SMITH, APPELLANT

BY: 
ATTORNEY FOR APPELLANT

CERTIFICATE

I, Julie Ann Epps, Attorney for Appellant, do hereby certify that I have this date mailed, by United States Mail, first class postage prepaid, the original and three copies of the foregoing to the clerk of this Court at PO Box 249, Jackson, MS 39205 and one copy to Sandra K. Smith Spurlock at 748 Brown Street, Brandon, MS 39042 and Hon. J. Dan Fairly, PO Box 1437, Brandon, MS 39043.

This, the 3rd of March, 2009.


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