

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KENNETH E. SMITH

FILED

APPELLANT

DEC 15 2008

VS.

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

NO. 2008-CA-00683-COA

SANDRA K. SMITH

APPELLEE

APPEAL FROM THE CHANCERY COURT OF RANKIN COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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BRIEF OF APPELLANT

CERTIFICATE OF INTERESTED PARTIES

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 refusal:

1. Kenneth E. Smith, Plaintiff-Appellant;
2. Sandra K. Smith Spurlock; Appellee;
3. E. Michael Marks and Julie Ann Epps, counsel for Appellant on appeal;
4. E. Michael Marks, counsel for Appellant at trial;
5. Larry E. Yarborough, counsel for Appellee at trial.;
6. Honorable John C. McLaurin, Jr., Family Master, Chancery Court of Rankin County;
7. J. Dan Fairly, Chancellor

This, the 15th day of December, 2008.


COUNSEL 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

(i) Course of the Proceedings and Dispositions in the Court Below:

Kenneth E. Smith and Sandra K. Smith (now Sandra Spurlock) were divorced in Rankin County on June 14, 1989. C.P. 2. A copy of the decree can be found in the clerk's papers at 5-6. Kenneth received custody of the minor child, Nicki (born 2/17/1988). Sandra was ordered to pay Kenneth \$125.00 a month as support and maintenance for Nicki, with the first payment to begin on July 1989. In addition, she was also ordered to pay all of Nicki's medical, dental and hospital expenses. C.P. 6.

(ii) Statement of the Facts:

In December of 2007, Kenneth moved to have Sandra cited for contempt for past due child support of \$24,000.¹ C.P. 2-17; Tr. 22. At trial, Sandra sought a set off against this amount claiming that she had paid child support of \$35.00 a week from March of 1991 until November of 1994 and claiming that she should not have to pay child support from March of 2002 through April of 2004 when she claimed Nicki was living with her rather than her father. Tr. 16, 22.

At the trial, Sandra admitted she made no payments from July of 1989 through October of 1989. She testified, however, that she made payments from October of 1989 through

¹ Kenneth's demand was for unpaid child support until Nicki was 18 in February of 2006. He did not ask for support after she turned 18 because Nicki did not live with him after she was 18. Tr. 21.

November of 1994 by having her employer deduct \$35.00 a month and pay it directly to Kenneth. Tr. 7, 12, 22. In May of 1994, she married her current husband, and she testified she quit paying because Kenneth would not let Nicki visiting in Sandra's home with her new husband. Tr. 12.

Sandra claimed that from the time she moved to Arkansas and became employed in March of 1991 until November of 1994, she had \$35.00 a week withheld from her job. According to her, her employer sent this money to Kenneth. Tr. 9-10, 22. Sandra, however, could produce no documentation from her employer or any tax returns or other documentation verifying that she had paid Kenneth this \$35.00 a week payment, and Kenneth denied receiving it. No order of withholding was entered by the Chancery Court. Although Sandra claimed she was unable to obtain records showing these payments from her employer, she gave no satisfactory reason why she was unable to do so; nor did she seek to produce secondary documentary proof. Although Kenneth objected to her testimony based on the best evidence rule, the Master overruled Kenneth's objection and admitted her testimony that she had made the \$35.00 weekly payment from March of 1991 through November of 1994. Tr. 9-10, 22, RE 9-12.

Sandra also claimed credit for a time between 2002 and 2004 when she claimed Nicki lived with her. Both Kenneth and Nicki denied that Nicki resided with Sandra other than intermittently. They both denied that Sandra was the primary source of support for Nicki. Tr. 34, 38.

Despite Sandra's lack of documentation of her claim that she had made the \$35.00 weekly payments, the Master gave her credit for a total of \$14,000. Those credits included the time "from 2002 and 2004 when the child lived with her mother" and "for the payments that she made while she was working in Arkansas that were withheld fro her paycheck." Tr. 66-67. By judgment entered March 25, 2008, the Chancellor and Master entered a judgment against Sandra

for \$10,000, plus \$750.00 in attorney's fees, \$135.00 in costs and fees, along with legal interest in the sum of 8% per annum. They directed that she pay the judgment to Smith at the rate of \$200.00 a month beginning June 1, 2008. C.P. 24-26. Kenneth timely filed a notice of appeal. C.P. 26-27.

SUMMARY OF THE ARGUMENT

The trial court erred in giving Mrs. Smith credits for the payments allegedly deducted from her paycheck while she was in Arkansas for two reasons. One the Court erred in admitting her testimony that she made payments in violation of the best evidence rule. Secondly, even assuming that that testimony was properly admitted, there is no evidence to support the amount of the credit given by the Chancellor for payroll deductions.

The trial court next erred in giving Mrs. Smith the credits given for the time when Nicki was allegedly living with her. The evidence is insufficient to support 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.

A. Standard of Review:

On appeal, the Supreme Court must consider the entire record before it and accept all those facts and reasonable inferences which support the Chancellor's ruling. *Madden v. Rhodes*, 626 So.2d 608, 616 (Miss. 1993). The Chancellor's findings will not be disturbed, be they on evidentiary facts or ultimate facts, unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous, or unless he applied the wrong legal standard. *Id.* A finding of fact is

“clearly erroneous” when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made. *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.*, 525 So.2d 746, 754 (Miss.1987)).

Where, there are no specific findings of fact provided by the chancellor, this Court must look to the evidence and see what state of facts will justify the decree. *Boatright v. Horton*, 233 Miss. 444, 102 So.2d 373, 374 (1958). This Court, however, “may not credit unspoken findings not fairly inferable from the trial court’s action.” *Riddle v. State*, 580 So.2d 1195, 1200 (Miss.1991); *Century 21 Deep South Properties, Ltd. v. Corson*, 612 So.2d 359, 367 (Miss.1992). *Accord, United States v. Castaneda*, 162 F.3d 832, 835 (5th Cir. 1998) [where the trial court fails to make written findings of facts, the appellate court will review the claim de novo to ascertain if the facts support the holding].

Findings of fact are entitled to deference when reviewed on appeal but will be reversed where they are clearly erroneous. Rulings of law are subject to *de novo* review. *Dorr v. Dorr*, 797 So.2d 1008 (Miss.App. 2001).

B. The Merits:²

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. *Baier v. Baier*, 897 So.2d 202, 204 (Miss.App. 2005). However, any evidence of direct payments must be clear and convincing [citing *Lahmann v. Hallmon*, 722 So.2d 614, 620 (Miss. 1998); *Baier v. Baier*, 897 So.2d at 205.

² In the interests of brevity and because they are interrelated, Kenneth will discuss his claim that the court erred in violation of the “best evidence” rule in admitting Sandra’s testimony that she paid Kenneth \$35.00 a month and his claims that the evidence does not support set offs in the amounts awarded by the Chancellor together as one proposition although any one or all of his claims would support relief.

Any child support payments owed by one spouse to the other becomes fixed and vested when it comes due and is not paid. *Id.* Each unpaid monthly payment takes on the nature of a judgment that may not, in the ordinary course, be later modified by the court. *Id.* The true beneficiary of the child support payments is the child. *Dorr v. Dorr*, 797 So.2d at 1012.

The divorce decree granted custody to Kenneth and provided that Sandra was to pay Kenneth \$125.00 per month as child support beginning July 1, 1989. C.P./5-6 In December of 2007, Kenneth Smith sought back unpaid child support payments from Sandra in the amount for \$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. Kenneth did not claim payments after that date because Nicki no longer lived with him. Tr. 21.

As an Exhibit to his complaint, Kenneth attached a summary of the payments he claimed Sandra made from July 1, 1989 through February of 2006. The summary showed she had paid \$1480.00 and still owed \$24,000. C.P./6, 15-17.

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. The Special Master admitted being confused about the sums testified to; consequently, he lumped the two time periods together for a total of \$14,000.00 rather than separating the amounts for the two time periods, thus making the basis for his calculation of amounts somewhat unclear. The ambiguity of the order suggests a less favorable standard of review of that court's findings. *See*, discussion *supra* under the Standard of Review.

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 claimed 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.

At trial, the only evidence Sandra submitted in support of her claim that she had the company send those \$35.00 payments to Kenneth was her own testimony. She produced no pay check stubs, no documentation from the company and no tax returns to support her testimony. Nor did she request admissions from Kenneth or attempt to subpoena his bank records to show proof that he had received the alleged payments.

Kenneth objected to her testimony based on the so-called "best evidence" rule arguing that documentation from the company was the best evidence that the payments had been made. That objection was erroneously overruled. RE 9-12.

In *Dorr v. Dorr*, *supra*, the Court of Appeals held that the rules of evidence require that the original writing is necessary to prove the content of the writing. *Id.* at 1018; M.R.E. Rule 1002. Here Sandra testified that her paychecks reflected a withholding and remittance to Kenneth every month of \$35.00. Tr. 9-10. M.R.E. Rule 1004 allows other evidence of the contents of a writing only if 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.

As the Court in *Dorr* pointed out in holding testimony on the issue to be admissible, there were other means available, however, for obtaining the checks. 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. A finding of fact is "clearly erroneous" when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made. *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.*, 525 So.2d 746, 754 (Miss.1987).

Assuming, however, for the sake of argument that the evidence shows that Sandra paid \$35.00 a month during the time in question, 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.

Nicki testified her father bought her clothes during this time. Tr. 35. She testified that "occasionally [her mother] would help out [with her spending money], but for the most part everything was handled by my father." Tr. 35.

Kenneth likewise denied that Nicki lived exclusively with Sandra for two years. Nicki stayed with her off and on; however, she stayed mostly with him, and he bought her clothes, gave her money and provided for whatever she needed. Tr. 42. He denied that he received any \$35.00 payments from her. Tr. 43.

The burden is on Sandra to show that she expended money entitling her to a credit. *Dorr v. Dor*, 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. *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc., supra*.

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 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.

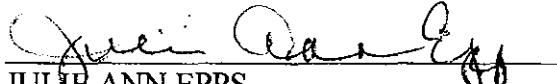
RESPECTFULLY SUBMITTED,
KENNETH E. SMITH, APPELLANT


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 104 Mendenhall Avenue, Richland, MS 39218 and Hon. J. Dan Fairly, PO Box 1437, Brandon, MS 39043.

This, the 15th day of December, 2008.


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