

SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-TS-01454

DORIS A. ANDRES

APPELLANT

VERSUS

PATRICK T. ANDRES

APPELLEE

APPEAL FROM THE CHANCERY COURT  
FIRST JUDICIAL DISTRICT  
HARRISON COUNTY, MISSISSIPPI


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BRIEF OF THE APPELLANT

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ORAL ARGUMENT NOT REQUESTED

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PARTIES

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

Doris A. Andres, Appellant

William W. Dreher, Jr., Attorney for Appellant

Patrick T. Andres, Appellee

Jennifer Sekul Harris, Esq., Attorney for Appellee

Honorable James B. Persons, Chancellor

RESPECTFULLY SUBMITTED this the 5 day of December, 2008.

DORIS A. ANDRES

BY:

  
WILLIAM W. DREHER, JR.

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## STATEMENT OF THE ISSUES

- I. WHETHER THE COURT COMMITTED MANIFEST ERROR AND ABUSED ITS DISCRETION IN MODIFYING THE JUDGMENT OF DIVORCE WITHOUT SHOWING A MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES.
- II. WHETHER THE COURT ABUSED ITS DISCRETION AND WAS MANIFESTLY IN ERROR GRANTING PATRICK CREDIT FOR SEVEN MONTHS OF CHILD SUPPORT PAYMENTS PAID TO DORIS' SISTER INSTEAD OF DORIS AS ORDERED BY THE COURT.
- III. WHETHER THE COURT WAS MANIFESTLY WRONG IN IGNORING THE CLEAN HANDS DOCTRINE IN GRANTING RELIEF TO PATRICK T. ANDRES.

## STATEMENT OF THE CASE

DORIS A. ANDRES (Doris) and PATRICK T. ANDRES (Patrick) were once husband and wife. They were granted a divorce on May 23, 1997 on the ground of irreconcilable differences. Two children were born of the marriage of the parties, A.J. and Alise. Doris was awarded paramount physical care custody and control of the children. Patrick was initially ordered to pay child support in the amount of Four Hundred Dollars (\$400.00) per month. The judgment of divorce was modified by order of the chancery court on June 11, 2003, and Patrick was required to pay Five Hundred Four Dollars (\$504.00) per month in child support.

On January 12, 2007, Doris filed a Complaint for Contempt and Modification requesting that Patrick be held in contempt of court for his failure to pay child support and that child support payments be increased. Patrick answered and counterclaimed requesting that A.J. be deemed emancipated and that child support be reduced on October 25, 2007.

A hearing was conducted on January 28, 2008 in the Chancery Court of Harrison County, First Judicial District. The chancery court entered a judgment on May 23, 2008 modifying the previous judgment of the court. The chancellor found A.J. to be emancipated as of June 2005. The court lowered child support retroactively to June of 2005 and ignored the clean hands doctrine. The court also gave Patrick credit for child support payments to Doris' sister, Dona, and a gift to Alise. Feeling aggrieved at the court's decision granting Patrick a reduction in child support retroactively and ignoring the clean hands doctrine, Doris filed this appeal.

### STATEMENT OF THE FACTS

Doris and Patrick were divorced by judgment of the Harrison County Chancery Court on February 20, 2003. (R.E. 3) Doris was awarded paramount physical custody of the children of the marriage, A.J. and Alise. (R.E. 3) The order was modified on June 11, 2003. (R.E. 4)

On August 29, 2005, Hurricane Katrina hit the Mississippi Gulf Coast where Doris and her children lived. (Tr. 8) At the time, Alise was still living with her mother. (Tr. 8) Their home flooded, and they barely escaped with their lives. (Tr. 8,71)

After the Hurricane, Doris sent Alise to live with Doris' sister, Dona. (Tr. 25, 26) Alise left for Georgia wearing only the clothes on her back -- flipflops, a t-shirt, and pajama bottoms. (Tr. 25, 26, 71) Doris asked Patrick to send one month of child support to Dona because Alise did not have any clothes. (Tr. 25, 26) Patrick complied and sent Dona a check for \$504.00 in September for payment of the August 2005 child support. (Tr. 25) Patrick then faithfully paid child support to Dona for the another seven (7) months. (Tr. 10-11, 25-26; Ex. 3)

When Alise returned to Mississippi to live with Doris in the summer of 2006, Patrick made only two full payments and another payment for one-half of the monthly child support before he stopped paying altogether. (Tr. 31-32; Ex. 3) From July 2006 through September 2007, Patrick did not pay a dime. (Tr. 59, 79; Ex. 3) From October 2007 through January 2008, Patrick paid approximately \$1,500 of the approximately \$2,000 that he owed. (Ex. 3)

In July of 2007, Alise was visiting her Aunt Debbie in Texas. (Tr. 24) At the time, Patrick had not paid child support to Doris or anyone else for that matter in a year. (Tr. 79;



Ex. 3) Alise called Patrick and asked him to send her money for school clothes. (Ex. 24)  
Without consulting Doris, Patrick sent Alise \$400.00. (Ex. 24-25)

Patrick owed Doris \$12,854.20 at the time of the hearing on January 28, 2008. She gave him credit for the first check sent to Dona to pay the child support. (Tr. 25) However, Patrick still owes Doris for the \$3,528.00 paid to Dona without her permission and which is included in the above amount. (Tr. 11) Doris did not ask him to send any payments after the first one to Dona. (Tr. 25) At the least and giving Patrick credit for the money paid to Dona, Patrick owes child support in the amount of \$9,326.20 as of January 31, 2008. (Ex. 3)

After a hearing on January 28, 2008, the court reduced Patrick's child support effective retroactively to June of 2005 and found that he was in arrears in the amount of \$4,154.67 as of January 31, 2008. (R.E. 7)

Feeling aggrieved by the judgement of the court and believing that Patrick should not be granted a retroactive reduction in child support or any relief whatsoever for his violation of the clean hands doctrine, Doris filed this appeal.

### SUMMARY OF THE ARGUMENT

On May 23, 2008, the Chancery Court of Harrison County, First Judicial District, entered an order reducing the amount of child support paid by Patrick T. Andres from \$504.00 per month to \$424.00 per month and making said reduction in child support retroactive to June 2005. At the time this relief was granted to him, Patrick was in arrears in the amount of \$4,154.67 as of January 31, 2008 by the court's calculations. Doris believes that the arrearage is \$12,854.20 as January 31, 2008. Since Patrick has failed to comply with the judgment of the court, he has violated the clean hands doctrine by his own actions or omissions and is not entitled to any relief whatsoever.

It is respectfully submitted that the learned chancellor committed manifest and reversible error by granting Patrick any relief whatsoever because of his failure to pay child support. Doris respectfully submits that the court erred in granting a retroactive reduction in child support, believing any amount owed for child support is vested when due. Doris also respectfully disagrees with the credit given Patrick for child support to anyone other than Doris when it was done without her permission.

## ARGUMENT

### I. WHETHER THE COURT COMMITTED MANIFEST ERROR AND ABUSED ITS DISCRETION IN RETROACTIVELY MODIFYING THE CHILD SUPPORT OWED BY PATRICK.

DORIS A. ANDRES, as Appellant in this case, accepts the well-established law concerning this court's role in reviewing a decision of a Chancellor. In cases involving alimony and child support the court will afford the chancellor considerable discretion. "The chancellor's findings will not be reversed unless manifestly in error or an abuse of discretion." *Tanner v. Roland*, 598 So. 2d 783, 786 (Miss. 1992). "Our familiar rule of deference prohibits us from disturbing the factual finding of a chancellor unless it is manifestly wrong or clearly erroneous." *Bowers Window & Door Co. v. Dearman*, 549 So. 2d 1309, 1313 (Miss. 1989). "For questions of law, our standard of review is de novo." *Harrison County v. City of Gulfport*, 557 So. 2d 780, 784 (Miss. 1990).

A child support judgment is awarded to the custodial parent for the benefit and protection of the child. *Thrift v. Thrift*, 760 So.2d 732 (Miss. 2000), citing *Miller v. Miller*, 29 Ore. App. 723, 565 P.2d 382, 100 A.L.R.3d 1120 (1977). The underlying principle here is the legal duty owed to the child for the child's maintenance and best interest. *Id.* citing *McManus v. McManus*, 428 So. 2d 854 (La. Ct. App. 1983).

In Mississippi judicial interpretation of this legal duty to support minor children has firmly established that, once ordered, installments of child support become fixed and vested when due and unpaid. *Cunliffe v. Swartzfager*, 437 So.2d 43 (Miss. 1983); *Duncan v. Duncan*, 417 So.2d 908 (Miss. 1982); *Hambrick v. Prestwood*, 382 So.2d 474 (Miss. 1980); *Howard v. Howard*, 191 So.2d 528 (Miss. 1966); *Thrift supra*. A court cannot relieve

the civil liability for support payments that have already accrued. *Cunliffe, supra; Duncan, supra; Howard, supra; Thrift supra. Hailey v. Holden*, 457 So. 2d 947 (Miss. 1984).

Therefore, under Mississippi law, none of the interested entities or parties, including a Mississippi court, Patrick, or Doris, can alter the amount of arrearage that had accrued since the entry of the chancery court's judgment which ordered Patrick to pay \$504.00 per month in child support. See *Thrift* at 737. Even an error in calculations do not relieve Patrick of his liability for the accrued arrearage. *Id.*

Patrick did nothing to influence the amount he owed Doris until the hearing on January 28, 2008. He could have done several things to alter this amount owed Doris from June 2005, when he claimed A.J. was emancipated, until January 28, 2008 at the time of the hearing. Most significantly, Patrick could have petitioned the court for temporary relief. However, Patrick did nothing.

For ever so long, the rule in Mississippi has been that "the law favors the diligent and is against the careless . . ." *Mccain v. Dauzat*, 791 So.2d 839 (Miss. 2001), citing *Southwestern Sur. Ins. Co. v. Treadway*, 113 Miss. 189, 196, 74 So.143, 145 (1916). Doris further contends that any order entered by the court is only effective as of the date of the order. Since the court entered its order four months after the hearing, a reduction in child support cannot be effective until May 23, 2008. (R.E. 7)

Doris suggests to this Court that the amount owed by Patrick is increasing every day. If Doris is successful in this argument, then a reduction in child support cannot be effective until the date another order is entered which should be sometime after this Court enters its opinion in this case. Patrick will owe all the arrearage, including what has

accumulated since the hearing on January 28, 2008, until such time as a proper order reduces his child support obligation.

Patrick owes an arrearage that cannot be forgiven and the only person responsible for that is Patrick himself. He sat on his hands and did nothing. He was served with process of this court in February 2007 and did not ask for a modification until October 27, 2007 when he finally answered. (R.E. 6) Doris respectfully submits that the chancery court erred as a matter of law in granting Patrick a retroactive reduction in child support.

II. WHETHER THE COURT ABUSED ITS DISCRETION AND WAS MANIFESTLY IN ERROR GRANTING PATRICK CREDIT FOR SEVEN MONTHS OF CHILD SUPPORT PAYMENTS PAID TO DORIS' SISTER INSTEAD OF DORIS AS ORDERED BY THE COURT.

Doris respectfully suggests that the court abused its discretion and was manifestly wrong giving Patrick credit for the money paid Dona for the child support owed Doris. "No party obligated by a judicial decree to provide support for minor children may resort to self help and modify his or her obligation with impunity. *Cumberland v. Cumberland*, 564 So.2d 839, 847 (Miss. 1990). A party making an extra-judicial modification does so at his own peril. *Crow v. Crow*, 622 So. 2d 1226, 1231 (Miss. 1993); *Alexander v. Alexander*, 494 So.2d 365, 367-68 (Miss. 1986); *McDonald v. McDonald*, 698 So. 2d 1079 (Miss. 1997).

"An obligation owed by one spouse to the other becomes fixed and vested when due and unpaid. This obligation will not be discharged or amended in an agreement between the parties unless it is explicitly plead [sic] before an informed court. To amend a prior decree, even a temporary one, the parties hereafter should recite the change and present the same to the Court, otherwise we are in the inexplicable position of having an order of the Court changed by the parties without consideration for or by the Court." *Baier*

*v. Baier*, 897 So. 2d 202 (Miss. App. 2005) *citing* *Lewis v. Lewis*, 586 So. 2d 740 (Miss. 1991).

Doris asked Patrick to send only one check to Dona. The other seven checks were set to Dona without Doris' approval. Patrick should not receive credit for them.

Another check for \$400.00 that was sent to Alise is also at issue. In July 2007, Alise called Patrick on her own and asked for money for school clothes. (Tr. 24-25) Doris never had any knowledge of this check. (Tr. 24-25) It can only be considered a gift to Alise from Patrick and not child support. Patrick should not receive credit for this amount.

Doris therefore respectfully suggests that the Chancellor committed reversible error when he allowed Patrick to modify the court's order without the approval of the court. Doris prays that this court will reverse the decision of the Chancellor and award her a judgment for child support for the seven months he paid Dona without Doris' consent and for the \$400.00 paid to Alise without Doris' knowledge.

III. WHETHER THE COURT WAS MANIFESTLY WRONG IN IGNORING THE CLEAN HANDS DOCTRINE IN GRANTING RELIEF TO PATRICK T. ANDRES.

Doris respectfully submits that the Chancellor was manifestly wrong in ignoring the "clean hands" doctrine in awarding Patrick any relief whatsoever. Because he entered the court with "unclean hands" Patrick was by law prohibited from receiving a child support modification. See *Bailey v. Bailey*, 724 So. 2d 335 (Miss. 1998).

The "clean hands" doctrine prevents a complaining party from obtaining equitable relief in court when he is guilty of willful misconduct in the transaction at issue. *Calcote v. Calcote*, 583 So. 2d 197, 199-200 (Miss. 1991). "[A] husband may not petition for modification of the original decree without showing either that he has performed it or that

his performance has been wholly impossible. . . . However, a husband may exonerate himself from failure to make alimony or child support payments as ordered, because of his inability to pay, but his evidence must be made with particularity and not in general terms." *Hooker v. Hooker*, 205 So. 2d 276, 278 (Miss. 1967). Patrick was in arrears in child support payments when he appeared in court on his motion for modification. He did not present any specific evidence of his inability to pay. Willful refusal to support one's children is not the same as inability to pay and a modification award would be in error. See *Dill v. Dill*, 908 So.2d 198, 202 (Miss. App. 2005), citing *Bailey*, at 337; *Taylor v. Taylor*, 348 So.2d 1341, 1343 (Miss. 1977). The Chancellor found Patrick to be in arrears in the amount of \$4,154.67. (R.E. 7)

Patrick's failure to pay has nothing to do with his ability to pay. He deliberately stopped making child support payments because he did not want Doris to receive the money. This Court should note that Patrick paid child support to Dona religiously for the eight months Alise lived with her in Georgia. But, when Alise returned to Mississippi, Patrick made payments for two months and a one-half payment the third month before he quit paying altogether.

This is a situation that the Court has seen countless times. This is not a matter of Patrick not being able to pay child support. This is a matter of Patrick not wanting to pay child support to Doris. If Alise had stayed with Dona in Georgia, Patrick would probably be paying child support without any problem to this date.

When Patrick gave Alise the aforesaid \$400.00 in July of 2007, Patrick showed that he had money available for child support. That money paid to Alise should have been paid

to Doris. Patrick made the decision not to pay Doris and give money to Alise instead. Patrick's unclean hands are his own doing.

Doris respectfully suggests that the chancellor committed reversible error in granting Patrick a modification of child support when he came before the chancery court without "clean hands" owing back child support.

### CONCLUSION

Doris A. Andres respectfully submits that the trial court committed manifest and reversible error in several ways. First, the Chancellor was manifestly wrong as a matter of law in granting Patrick Andres a reduction in child support retroactively. Once vested child support cannot be forgiven.

Second, it was an abuse of discretion and manifestly wrong for the Chancellor to allow Patrick credit the child support payments that he made to Dona instead of Doris. Doris has given him credit for the one payment that she asked him to send to Dona immediately after Hurricane Katrina. Also, Patrick definitely should not be given credit for the money sent Alise without Doris' knowledge. The order of the court requires Patrick to pay Doris.

Third, the Chancellor erred in ignoring Patrick's violation of the "clean hands" doctrine. Patrick came before the court being in arrears in child support. He offered no explanation for this arrearage as required. The court should have followed the "clean hands" doctrine and not granted him any relief whatsoever.

Therefore, it is respectfully submitted that this case be remanded to the Chancery Court of Harrison County, Mississippi with instructions that Patrick T. Andres be denied his



requested relief and be assessed an arrearage in the amount of \$12,854.20 as of January 28, 2008.

RESPECTFULLY SUBMITTED this the 5 day of December, 2008.

DORIS A. ANDRES

BY:   
WILLIAM W. DREHER, JR.  
FOR APPELLANT

CERTIFICATE OF SERVICE

I, William W. Dreher, Jr., do hereby certify that I have this day mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Honorable James B. Persons  
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P.O. Box 467  
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SO CERTIFIED this the 5<sup>th</sup> day of December, 2008.

  
WILLIAM W. DREHER, JR.  
Attorney for the Appellant