SUPREME COURT OF MISSISSIPPI
Case # 2011-CA-01096

WILLIAM ANDREW SHORT — APPELLANT

VS.

KATHRYN TAYLOR SHORT — APPELLEE

APPEAL FROM THE CHANCERY COURT OF LEE COUNTY, MISSISSIPPI

LEE COUNTY CHANCERY CAUSE NO. 2007-0094-41-L

BRIEF OF APPELLEE

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SUPREME COURT OF MISSISSIPPI
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellee, Kathryn Taylor Short, hereby 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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

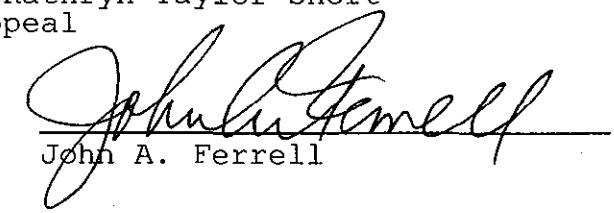
1. Talmadge D. Littlejohn, Chancery Court Judge
   First Chancery District, State of Mississippi
   and presiding Judge in this case

2. Kathryn Taylor Short,
   Plaintiff/Appellee

3. William Andrew Short,
   Defendant/Appellant

4. Honorable David Rozier, Jr., and
   Honorable Jenessa Carter Hicks,
   Attorneys representing William Andrew Short
   at trial and in the Appeal

5. John A. Ferrell of Ferrell & Martin, P.A.,
   Attorneys representing Kathryn Taylor Short
   at trial and in this Appeal



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I.

RESPONSE TO STATEMENT OF THE CASE

In his brief, Appellant, William Andrew Short (William), includes therein, though not denoted as such, certain statement of facts which he contends are pertinent to this appeal. In this her brief, Appellee, Kathryn Taylor Short (K.T.), will not respond specifically to each of the set of facts relative to the proceedings below, but is compelled to state facts which are pertinent to the case on appeal and to correct misstatements contained in the statement of the case relative to the ruling of Chancellor Littlejohn.

At the time of the entry of the Final Decree in this matter on March 21, 2007, there was incorporated therein a Property Settlement Agreement executed by the parties on January 16, 2007.(C.P. 25-26; 27-40) In addition to making provision for the custody of the minor child of the parties, Ethan Andrew Short (Ethan), date of birth February 19, 2004, various other financial obligations were placed upon William pertaining to K.T. and Ethan.

The child support was originally set at $50,000.00 per year, payable at the rate of $4,166.00 per month. (C.P. 29) In addition to various other expenses that William voluntarily agreed to pay on behalf of Ethan, he was ordered to pay for the major medical, dental, optical and general health insurance on K.T. for a period of five years from the date of the execution of the agreement, was ordered to make all house payments on the marital home in Tupelo, Mississippi, where K.T. and the child were residing until that lien was paid in full or until she remarried, whichever occurred first (Tr. 31-32), and was ordered to pay all payments on K.T.'s automobile, the 2005 Lexus RX330. (C.P. 34-35) Subsequently, in addition to failing to comply with other provisions of the Final Decree, William failed to make the payments on the house where his son and ex-wife were living ($3,000.00 per month) and ultimately the house was foreclosed. (Tr. 54, 75) Further, William no longer had a car payment for K.T. at the time of the entry of the Judgment by Chancellor Littlejohn and his support was $3,000.00 per month. (Tr. 55)

In order to pursue gainful employment, K.T. moved to Birmingham, Alabama and purchased a home, $100,000.00 being paid down on that home by K.T.'s parents. (Tr. 74) As noted in William's brief, he relocated to Oxford, Mississippi and at some point in time purchased a condominium which had a monthly payment of $3,200.00. William filed bankruptcy but did not include the condominium and the payment thereon in his bankruptcy but

reaffirmed that debt and continued to show the $3,200.00 on his 8.05 Financial Statement at the time of the hearing below. (Tr. 59; Ex. 2)

William remarried on October 10, 2010, in Florida and spent some $10,000.00 he was given by his Grandmother as a wedding gift to help pay for that Florida trip, one of several trips made in connection with his marriage. (Tr. 56-57) During the time that he was in Florida spending that money on himself and his wife to be, he was in arrears in the payment of child support and other Court ordered expenses and paid nothing of that money towards the support of his child and ex-wife. (Tr. 86) Finally, his child support of $4,166.00 was reduced to $3,000.00 per month upon Ethan entering kindergarten which occurred well before the entry of the Judgment in this case by Judge Littlejohn. (Tr. 55)

In his opinion, Chancellor Littlejohn made note of the clause in the Final Judgment, appearing on page 29 of the Clerk's Papers, "However, in no circumstances shall the support payments of 15% of the husband's adjusted gross income fall below $36,000.00 per year.". However, Chancellor Littlejohn did not base his decision in refusing to award a reduction in child support to William solely on this clause as noted in his opinion wherein he stated "Therefore, I come back after considering the factors as noted as I've already prescribed and noted in the Pipkin case, based upon those factors and my full consideration of the same as well as exhibits offered in evidence here today, the Court finds

that in the best interest of this child under the language of his own writing, the Defendant is bound by it, Cross-Complainant here today, and accordingly the child support will remain at $3,000.00 per month effective immediately." (Tr. 99-100) This portion of the opinion was rendered after the Court had painstakingly reviewed all of the facts and considered the factors set forth in the case of Pipkin case. Therefore, William's statement on page 3 and 4 of his brief that the minimum of $3,000.00 was the sole basis of the Chancellor's decision is clearly a misstatement thereof.

II.

SUMMARY OF THE ARGUMENT

William complains of the Lower Court's failure to reduce his child support payments contending that Chancellor Littlejohn erred by enforcing the $3,000.00 minimum set forth in the Final Decree of Divorce. This Court has long held that parties will be bound by the contracts in which they engage freely and voluntarily and that on the issue of child support, the Courts will enforce an individual voluntarily agreeing to pay more support than what may be called for by the statutory guideline. The only time the Court gives relief is when the appropriate circumstances exist to grant that relief. Here, Chancellor Littlejohn carefully considered all of the appropriate factors as to whether or not the appropriate factors were proven by William and held that they were not.

The Court further properly applied the adjusted gross income of William in his decision which is evident by a reading of his entire opinion. The Court did not ignore the statutory guidelines but merely enforced what the parties voluntarily agreed to at the time of the entry of the Final Decree of Divorce. It was incumbent

upon William to show the appropriate circumstances on that enforceable provision in order to warrant a modification downward of his child support obligation which he obviously did not do. The Chancellor's findings of fact are based upon credible evidence, his application of the law was appropriate and his decision denying a reduction in William's child support should be affirmed.

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III.

ARGUMENT

A. STANDARD OF REVIEW

The standard of review that the Appellate Court must apply in this case is well settled by numerous cases. The Court cannot disturb the findings of the Chancellor when supported by substantial credible evidence unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard. Sanderson v. Sanderson 824 So. 2d 623, ¶8, (Miss. App. 2002) In this case, Chancellor Littlejohn committed no error and his decision should be affirmed.

B. BRIEF OF THE ARGUMENT

1. The Lower Court Applied the Proper Legal Standard to the Facts of This Case.

William alleges one error as the basis for reversal and discusses same in three sub-parts. The primary issue that he raises is whether or not the Chancellor erred in determining that the Property Settlement Agreement disallowed modification of child support to a sum of less than $3,000.00 per month. The effort of

William to limit that inquiry on appeal, as has already been noted, failed to recognize that Chancellor Littlejohn applied the proper legal standard when determining whether or not to award a downward modification of child support to William in this case. He seeks to limit the Chancellor's ruling to the portion of the Decree which contains the pertinent language and characterizes this as "de-escalation clause". Chancellor Littlejohn's opinion was not so limited but his decision was based on the proper legal standard in determining whether or not William met his burden of proof as to his entitlement of a reduction in support which he agreed to pay.

In the Court's opinion, Chancellor Littlejohn discusses all of the factors set forth in the case of Pipkin v. Dolan, 788 So. 2d 834, ¶7 (Miss. App. 2001) as applied to the facts of this case. In that case, the Supreme Court set forth certain factors that the trial courts are to consider in deciding whether or not to modify child support. Chancellor Littlejohn properly noted that the inquiry is whether or not there has been a material change in circumstances in either the circumstance of the father, the mother or the child warranting a modification of child support. (Tr. 91) The Lower Court also noted in his decision the time honored rule that in any child support matter, the paramount consideration is the best interest of the child. Brawdy v. Howell, 841 So. 2d 1175,¶16 (Miss. App. 2003)

In reviewing the Pipkin factors, the Court notes the first one is the increased needs of the child due to advanced age and

maturity. The Lower Court found that the needs of the child were well set forth on the 8.05 Financial Statement provided by K.T. as Exhibit #1 and the fact that as children grow older their needs increase. (Tr. 91) K.T. and Ethan lost their home in Tupelo, Mississippi due to the failure of William to comply with the mandates of the Final Decree. She had no choice but to seek residence elsewhere. But for the benevolence of her parents in their investing $100,000.00 towards the purchase of a home for her in Birmingham, she would not have been able to purchase that home for she and Ethan. (Tr. 75) The added expense of a home for herself and the child is the fault of William because of his conduct in allowing the Tupelo home to be lost through foreclosure. (Tr. 75)

The second factor the Chancellor discussed under Pipkin was increased expenses. (Tr. 91-92) This somewhat relates to the first factor and again the Court noted that the expenses of K.T. as set forth in her 8.05 Financial Statement (Ex. 1) verify her need for continued substantial support from William. Though she is now gainfully employed, her total net income is only some $3,250.00 per month which is insufficient to support her and Ethan in Birmingham, Alabama where her job is located. (Tr. 79; Ex. 1)

The third factor, inflation, he also found relevant. The Court made note of the increase in the cost of gas and everyday living expenses as being obvious to everyone, noting an increase in her expenses. (Tr. 92)

The fourth factor, the relative financial condition and earning capacity of the parties was thoroughly considered by Chancellor Littlejohn. (Tr. 92-93) While William did have a reduction in income from 2007 to 2010, as an appraiser, he still had a great earning capacity, significantly more than K.T. (Tr. 69, 71, 79 and 93) William's net income per month according to his 8.05 Financial Statement was $8,279.06 per month as compared to K.T. of $3,250.00 per month. (Tr. 71, 79) Chancellor Littlejohn thoroughly considered this as related to the fourth factor and determined that keeping the child support at the same level that William agreed to was appropriate considering the parties' respective income and earning capacities. (Tr. 93-94)

The Chancellor found that the fifth and sixth factors of the Pipkin case did not apply. (Tr. 94)

The seventh factor, the necessary living expenses of the father, was of paramount importance in this case. The key word here is *necessary*. In the case of Lane v. Lane 850 So. 2d 122, ¶9 (Miss. App. 2002), the Court held that the party seeking modification in that case "failed to show with particularity that he was earning all he could, that he lived economically, and paid all surplus money above living expenses to Dixie and Heather". William admitted that he had filed for bankruptcy and that he could have rid himself of any debts that he wanted to in that bankruptcy proceeding including the $3,200.00 condominium payment. He did not. (Tr. 59-60) Chancellor Littlejohn, found that the $3,200.00

per month mortgage payment was "exorbitant" whether in Tupelo, Oxford, Booneville or wherever. (Tr. 94) William chose to keep that payment which was clearly not necessary but was exorbitant and decided to take away support money from his child to be able to continue in that lifestyle. (Tr. 59) In addition, he chose to take on the expense of a new wife in October, 2010, at a time when he was not paying his financial obligations to his child. (Tr. 56, 86) While this may not fit exactly the situation where an obligor cannot be exonerated from responsibilities by his bad acts as in the case of McGee v. McGee, 755 So. 2d 1057, ¶9 (Miss. App. 2000) it is certainly close. Such financial decisions by William to the detriment of his child was a strong factor in denying his request to reduce that to which he agreed.

The eighth factor under Pipkin was also discussed by Chancellor Littlejohn pertaining to the obligation for income taxes and was also considered by the Chancellor as noted in his opinion. (Tr. 95-96)

The ninth factor, the free use of a residence, furnishings, an automobile, etc., has already been touched on to some extent. But for the benevolence of her parents, K.T. would not have been able to purchase a home for herself and Ethan. (Tr. 75) Again, but for the failure of William to comply with the mandates of the Final Decree, K.T. would have continued to have free access to a home, but because of his misconduct, this was lost. The Chancellor properly noted this in his opinion. (Tr. 96)

As to factor number ten, any other facts and circumstances bearing on support, is also a very important factor. First and foremost, since the entry of the Final Decree of Divorce, William had already been relieved of a substantial amount of financial obligation to K.T. and Ethan. Through his own misconduct, he was saving some $3,000.00 per month on the house in Tupelo, Mississippi, that was foreclosed. (Tr. 54) His child support was already reduced by some $1,166.00 per month and had been for some time. (Tr. 55) Further, he was no longer obligated to make a car payment for K.T., which further saved him several hundred dollars per month. (Tr. 55) The Chancellor also noted that his new wife was paying some $4,900.00 per month in rent for a business in Oxford. (Tr. 96) While William denied that he was making any of those payments for her, this certainly must have a bearing on the financial resources of that family for such a large financial obligation to be owed each month. As noted in the case of Bailey v. Bailey 724 So. 2d 335, ¶11 (Miss. 1998) the non-custodial parent cannot be relieved of support by conceiving additional children, nor by making additions to one's family. Turner v. Turner 744 So. 2d 332, ¶21 (Miss. App. 1999)

2. The Lower Court Did Not Fail to Apply the Appropriate Statutory Mandates to the Case.

William's assertions that Chancellor Littlejohn failed to properly consider the statutory mandates on child support is

misplaced and to insinuate that he blindly applied the $3,000.00 child support minimum as set forth in the Final Decree of Divorce is similarly wrong.

It has long been held that Courts will enforce agreements included in Final Divorce Judgments to provide more support for children than the child support guidelines require and the Court will not allow a subsequent modification unless there is a showing of "appropriate circumstances" that justify the modification. Seeley v. Stafford 840 So. 2d 111, ¶16 (Miss. App. 2003) The Court in Seeley noted that the parties have a right to provide more support for their children than the guidelines require and that same will be enforced by the Courts. The Court in Seeley further noted that the Courts will enforce an agreement that has been reached by the parties and approved by the Chancery Court and "this Court will enforce it and takes a dim view of efforts to modify it, just as when parties seek relief from their contractual obligations." Seeley at ¶10 Here, Chancellor Littlejohn held that William agreed to the $3,000.00 minimum and failed to prove the "appropriate circumstances" to justify a modification.

The assumption by William that the Court found a material change in circumstances is also misplaced. The Court did note that William had incurred a loss of income from 2007 to 2010 (Tr. 93) but in his decision applied the Pipkin factors to the facts to determine if that change was material enough to justify a modification of child support in this case. The Chancellor found

that the facts of this case did not warrant a downward modification. In reviewing this decision, this Court must respect the findings of facts of the Chancellor below. Sumrall v. Munguia 757 So. 2d 279, ¶12 (Miss. 2000) The Court in Sumrall held: "In other words, on appeal we are required to respect the findings of fact made by a Chancellor supported by credible evidence and not manifestly wrong...this is particularly true in the areas of divorce, alimony and child support.... the word manifest as defined in this context means unmistakably, clear, plain or indisputable." The Court determined that the application of the appropriate factors to the facts of this case as set forth above did not warrant a reduction of child support herein, (Tr. 99-100) and that decision should be affirmed.

3. The References in His Brief to His Not Being Represented by Counsel at the Time of the Divorce is Not Before the Court.

Throughout his brief, William makes reference to the fact that at the time of the entry of the Final Decree of Divorce he was not represented by counsel and insinuates that he should have some consideration on this appeal by that fact. As has been shown previously, a modification can only be considered for a material change in circumstances occurring after the Decree that is being sought to be modified. This negates going behind that Decree, Brawdy at ¶11. In addition, this issue was never raised at the trial level and cannot be raised for the first time on appeal. In

Seeley at ¶10, the Court held "Seeley did not challenge the initial Decree on the basis of fraud or overreaching. Therefore, the initial Decree must be enforced subject to subsequent modification."

4. The Lower Court Properly Considered William's Adjusted Gross Income in his Decision.

Finally, William complains of what he perceives to be a mathematical error on the part of the Chancellor in determining the amount of his adjusted gross income. This, too, evidences a misreading of the Chancellor's decision as he clearly states that he reviewed William's 8.05 Financial Statement as to what his income is and considered that in rendering his decision. (Tr. 93, Ex. 2) In his brief, William points to the Chancellor's discussion concerning the exorbitant housing cost of William. It is clear from a review of his whole opinion that the Chancellor was well aware of what William showed as his adjusted gross income and based his decision thereon. (Tr. 93- 94) It is obvious from the reading of the Chancellor's opinion at Tr. 94-95 that he was merely pointing out the exorbitant amount of the condo payment that William voluntarily continued to incur as being an important factor in considering what his "necessary living expenses" were.

IV.

CONCLUSION

In conclusion, the facts of this case prove that William has not acted in good faith in his obligations to pay child support and to pay agreed upon expenses of his ex-wife, K.T. William spent money on trips to Florida and acquiring a new wife instead of paying his child support obligations. He failed to pay the house payment on the Tupelo home which required K.T. to seek a residence for herself and their minor child, Ethan, elsewhere. She had increased expenses by moving to Birmingham as she now had a house payment which she heretofore did not have. Though she is now gainfully employed her income is not sufficient to sustain her and Ethan in their new residence and the Court properly found that her 8.05 Financial Statement and her testimony verified a continued need of substantial support form William.

William had already saved some $4,200.00 plus per month since the entry of the Divorce Decree by no longer having to pay the $3,000.00 house payment on the Tupelo home and enjoying a reduction of $1,166.00 per month in child support. Further, he was no longer obligated to pay anything on K.T.'s automobile saving him several hundred more dollars per month. These savings are in excess of $54,000.00 per year but yet William wants more. The proof also showed that William did not do all things necessary to

minimize his own living expenses as required by law and that he reaffirmed a $3,200.00 per month condominium payment through his bankruptcy when he could have been relieved of that exorbitant expense. He remarried, spent thousands of dollars on trips for that wedding, all while he was not paying his child support obligations.

Chancellor Littlejohn properly applied the correct legal standard when considering modifications of child support awards and determined that William had failed to prove the appropriate circumstances to justify a reduction in child support. Therefore, there being no reversible error by Chancellor Littlejohn, his decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that I, John A. Ferrell, attorney for Appellee, have this day mailed by United States mail, postage prepaid, the original and three (3) copies of the Appellee's Brief to Kathy Gillis, Clerk, Supreme Court of Mississippi at the address of said Court, P. O. Box 249, Jackson, Mississippi, 39205-0249.

This the 10th day of May, 2012.

JOHN A. FERRELL

CERTIFICATE OF SERVICE

I, John A. Ferrell, do hereby certify that I have this day forwarded by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Appellee's Brief to the following:

Honorable David Rozier, Jr.
Honorable Jenessa Carter Hicks
Rozier Hayes Attorneys at Law
P.O. Box 2388
Oxford, MS 38655

Honorable Talmadge D. Littlejohn
Chancellor
P. O. Box 869
New Albany, MS 38652

THIS the 10th day of May, 2012.

JOHN A. FERRELL