IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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| ROBERT D. EVANS | PLAINTIFF/APPELLANT |
| V. | NUMBER 2007 – CP – 00920 |
| BEVERLY B. EVANS | DEFENDANT/APPELLEE |

ON APPEAL FROM THE CHANCERY COURT
OF WASHINGTON COUNTY MISSISSIPPI

# BRIEF FOR THE APPELLEE

ORAL ARGUMENT NOT REQUESTED

Susan C. Smith, [redacted]
Susan C. Smith, Attorney at Law
P.O. Box 1251
Greenville, MS 38702
telephone: 662 – 378 – 2558
fax: 662 – 378 – 2543

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CERTIFICATE OF INTERESTED PERSONS

The undersigned 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 may evaluate possible disqualification or recusal.

ROBERT D. EVANS, ESQ. PLAINTIFF/APPELLANT/FATHER PRO SE'
ROBERT SHAW, NOBLE, EVANS & ROUNSAVALL
POST OFFICE DRAWER, 1498
GREENVILLE, MS 38702 – 1498

BEVERLY B. EVANS DEFENDANT/APPELLEE/MOTHER
522 WINTERGREEN
GREENVILLE, MS 38702

SUSAN C. SMITH, ESQ. ATTORNEY OF RECORD FOR THE APPELLEE
P.O. BOX 1251
GREENVILLE, MS 38702

This the 16th day of April 2008.

Susan C. Smith, Attorney for the Defendant
Beverly Evans

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## STATEMENT OF THE ISSUES

1. WHETHER THE COURT ERRED IN RULING THAT, EVEN THOUGH THE COURT FOUND THAT THE MATERIAL CHANGES IN CIRCUMSTANCES, IT DID NOT HAVE THE AUTHORITY TO REDUCE THE CHILD SUPPORT.

2. WHETHER THE COURT ERRED WHEN IT ORDERED THE PLAINTIFF TO PAY A PERCENTAGE OF THE YOUNGEST CHILD'S COLLEGE EXPENSES AS THAT ISSUE WAS NOT BEFORE THE COURT.

## STATEMENT OF THE CASE

This newest litigation sets both parties asking the lower Court for Modifications of the final decree citing a material change in circumstances and the Father counter claiming contempt. Because of the pro se' Father's position within Washington County Government, all chancellors recused themselves and the Honorable Billy Bridges, former Appeals Court Judge, was appointed by this Honorable Court to hear the case.

The Senior Status Judge held that there was a material change in circumstance as the older child, Elizabeth Ann, had graduated from high school and was enrolled in college. He modified the final decree, but not in every way requested by either the Plaintiff/Appellant/Father nor the Mother. Judge Bridges ruled that the Father/Attorney and Mother/Receptionist should maintain the same proportional structure 75/25 as designed by the parties in their irreconcilable divorce when they considered the earning capacity of each. He did not find the mother in contempt nor did he lower the global child support award since costs had increased. He ordered that both the Mother and the Father would pay for automobiles and college for both children in a 75/25 split.

The Father/Appellant appeals claiming he never asked the court to consider paying for the younger child's college education; he asked for a reduction in child support. It's not fair.

The lower court's ruling should be affirmed and costs assessed to the Plaintiff/Appellant

including, but not limited to, reasonable attorney's fees and costs of proceedings.

## STATEMENT OF THE FACTS

While the parties were divorced in December of 1998[1], by July 12, 1999 the first of many of the Chancery Court's four pages of docket entries[2] had begun, not including the Justice Court case requiring a special judge (T page 108 26-29), which was appealed to the County Court, then appealed to the Circuit Court[3] over $75 per month in car insurance for their daughter's car. (T page 109 lines 1-12).

At the time of the divorce in 1998, the children of the parties, Elizabeth Ann, age 13, and Robert Evans Jr,. age 7, were to be in the joint physical and legal custody of both parents.(RE 11). The parties further agreed that as appropriate support and maintenance of the minor children, the husband would pay child support of $2000 per month. ( Id. paragraph 2) Out of that $2000 per month, the husband was to pay the first mortgage on the marital home located at 522 Wintergreen, Greenville on or before the first of each month ( Id. paragraph 2), approximately $550, and pay to the wife the remainder. The wife was then to pay the children's tuition at a private school in Greenville. (RE 12). The Separation Agreement, approved by the parties and the Chancery Court, is silent as to what was to be paid with the remaining amount. The Plaintiff, Mr. Evans, agreed to

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1 Final judgment and approved by the Washington County Chancery Court and Separation Agreement located in the plaintiff's record excerpts page 10.

2 Four pages of docket entries beginning on page 4 in the plaintiff's record excerpts.

3 Plaintiff's record excerpts, transcript of October 16, 2006, page 109, lines 13 through 28.

the wording of the child support award within the Separation Agreement in the irreconcilable differences divorce. (T page 101, lines 13 through 15). In 2005 the mortgage was $591 and the tuition for Elizabeth Ann was $320, the Tuition for Robert Jr. $322.50. The child support is diminished by $1,233.50 per month to what the Plaintiff claims is a windfall of $766.50 for the needs of two teenagers who have attended private schools throughout all of their education.

Also within the Settlement Agreement, the Plaintiff was ordered to pay any home equity loan on the residence[4], which was outstanding at the time of the divorce. There remained $11,000 at the time of the hearing in 2006. (T page 96 line 5). There was no testimony as to how many years remained on the first mortgage. Dad was ordered to keep the children covered and insured with health insurance.[5] In exchange, the Dad/Plaintiff was entitled to carry the children as his dependents and take them as income tax deductions.[6]

When Elizabeth Ann graduated from high school in May of 2005, the Plaintiff took it upon himself to unilaterally stop forwarding to the Defendant the portion of the $2000 left over after paying the mortgage. He did pay the son's tuition directly. (T page 102 lines 11-18.)

The Mother/Defendant filed her motion for modification of child support on December 5, 2005; she alleged that Mr. Evans was $4500 behind on his child support. She also alleged Mr. Evans accumulated resources since they were divorced in 1998 and that her earning power had not kept pace with the increase in expenses. She asked that Mr. Evans be ordered to pay an increase in the

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4 Final judgment and approved by the Washington County Chancery Court and Separation Agreement located in the Plaintiff's record excerpts page 13 paragraph 8.

5 Id page 12 paragraph 6.

6 Id page 13 paragraph 10.

monthly amount of child support, pay all of college expenses of Elizabeth Ann, pay her back child support, reimburse her for reasonable attorneys fees and general relief. (RE 15-17).

The Plaintiff Mr. Evans filed his answer and a counter motion for modification as well as a motion for contempt. He agreed that a material change in circumstances had occurred, but because of the fact that the minor son now lived with him one half of the time, he believed the child support should be terminated. (RE 18-21). He failed to bring forward to the Court that the minor son and daughter were to live with him one half of the time since the Divorce; he had joint physical custody. (RE 11 paragraph 1) The Plaintiff/Father further asked to be awarded all amounts paid for the son's expenses while in his care, a lowering of the life insurance and reimbursement children's dental and medical bills not paid by insurance and general relief.

Throughout the 114 pages of transcripts, the Judge was privy to the testimony from the current Mrs. Evans(Susan), that she and Mr. Evans have a joint checking account opened shortly after they were married. The testimony was that they commingle their funds and from the same account pay Mr. Evans' child support. (T page 6 line 29 through page 12 line 8.) The Judge heard about the $23,225 earned by the Plaintiff/ Father in rental income, his earnings through his private law firm, the earnings paid to the Father/Appellant by Washington County for prosecutorial services which had only increased $150 per month since 1998 and the additional $1300 monthly reimbursement received as a prosecutor presumably for office space or secretarial help, when he didn't maintain a separate office for his prosecutorial work.(T page 35 line 1 through page 40 line 6).

Mr. Evans testified that he has just settled a case which, after paying the IRS, the State, sundry bills, he had an additional $20,000 left over to choose how to spend. (T page 96 lines 14-19).

He asked the court to believe that his life was that of a regular Delta Joe, "we don't do anything. We live, go to work, and go home." (T110 lines 1-2.) Mr. Evans later testified that he had been to Cancun. Upon further examination, it was learned that he went to Hawaii in April 2005. (110 lines 22-28). He admitted to buying a new Tahoe in December of 2004 for the main purpose of taking the total exemption on his taxes for the total retail price. This is the same vehicle, which he later traded to his current wife and which she traded in, in December. (Page 111 lines 15-21).

Judge Bridges also heard how the Defendant/Mother Mrs. Evans attempted to re-enter the work force from a stay at home mom, starting as a part-time secretary. He was informed of how many times her job changed, that she attempted to keep steady employment through the worsening economy of Greenville, through layoffs, having to draw down her 401 (k) and to finally attain full time position with a Certified Public Accounting firm earning $15.89 per hour or $1682.47 a month after taxes. (T page 14 line 1 through page 22 line 4).

It was Mr. Evans who brought out through his own testimony that his son Robert was very conscientious, you couldn't ask for a better son. (T page 98 lines 1-8). Mr. Evans testified he planned to ear mark money for a vehicle for Robert on his 16th birthday because he deserves it; he is such a good kid. (T page 98 lines 11- 18). Attorney Evans also elicited from Mrs. Evans upon her Cross examination that although Robert has s bit of a problem with Geometry; he was going to a tutor and Robert generally does very well with his grades. He never causes a problem. (T 62 line 20 line 28.)

Mrs. Evan's attorney through direct testimony asked her to compare Elizabeth and Robert. More specifically she was asked, ' are you saying "the same thing will happen with Robert. He will be an older College student, so to speak?"' She responded, "yes, he will." [RE transcripts page 27

lines 17-24].

The Appellant/Attorney claims he was ambushed by the issue of providing for Robert's college and car. Nothing could be farther from the truth when MRCP Rule 15 permits trial by consent. It was also Mr. Evans who elicited from his ex-wife that Robert should get some type of used vehicle but that she was not financially able to provide same. (T page 63 lines 1-9). Judge Bridges even went to the point of asking if Mr. Evans wanted to summarize what he thought the trial had been about. (T page 113 lines 18-25).

While each parent thought they spent the same amount on the children, various examples of disparity arose. Mother was buying clothes, (T Page 74 lines 5-19). Father buying a car and doling out $300, later $400 a month in allowance to Elizabeth Ann, the older child in college. (T page 90 lines 13-15). The only extravagant thing Mother bought was a $85 per month (or $1020 per year) membership to the Tennis Club for son which benefitted the entire family. Father complained about buying two sets of tennis shoes over a two year period which cost him $70 each. The Transcript, four pages of Dockets from the Chancery Court and a Justice Court case which was appealed, support the proposition that these two parents will usually never agree.

The lower court accepted the difficult task to adjudicate the aforementioned controversies.[7] The Specially Appointed Judge found that a material and substantial change in circumstances had occurred.[8] The lower court did not find Mr. Evans in contempt for failure to pay child support but gave credit to the Plaintiff for having paid his child support and more, through the payment of the

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7 Findings as facts, conclusions of law, opinion of the Court and order, Plaintiff's record excerpts page 28 paragraph 2.

8 Findings as facts, conclusions of law, opinion of the Court and order, Plaintiff's record excerpts page 29 paragraph 2.

daughter's college expenses and automobile.

Judge Bridges ordered further modifications: first, both parents should share in the college expenses and automobile expenses for both children[9] in accordance with the percentages established by the parties separation agreement[10] that of 75% payable by the Plaintiff and 25% payable by the Defendant;[11] second, the face amount of life insurance was to be reduced upon the emancipation of Elizabeth Ann. To all other effects Judge Bridges denied the Plaintiff's motion to modify, Plaintiff's motion for contempt and Defendant's motion to modify and both parties request for attorney's fees. (RE: pages 30-31).

While the Findings of Fact, Conclusions of Law, Opinion of the Court and Order and the Order Granting Clarification are clear on their face, there is a secretarial error which bothers the Plaintiff/Appellant but does not change the content. The words "to all other effects" is left out of both the statements of denial of the Plaintiff's and Defendant's motions.

## SUMMARY OF THE ARGUMENT

Both parties asked for Modifications based upon a material change in circumstance; the older

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9 Findings as facts, conclusions of law, opinion of the Court and order, Plaintiff's record excerpts page 29 first full paragraph.

10 Final judgment and approved by the Washington County Chancery Court and Separation Agreement located in the Plaintiff's record excerpts page 13, first three lines.

11 Findings as facts, conclusions of law, opinion of the Court and order, Plaintiff's record excerpts page 30 third full paragraph and confirmed by the order granting clarification. Located in the same record excerpts paragraph 1.

child was in college. Mom asked for an increase in child support, Dad asked that the child support be terminated. It was the Plaintiff/Appellant/Father who had unilaterally changed his payment of the child support. The Court had the arduous task of sorting out the unilateral decision and determining that if enough child support had been paid then whether the child support should be modified. Plaintiff alleges he was ambushed because the mother never asked in her pleadings for college expenses for the younger child. Nothing could be farther from the truth when MRCP Rule 15 permits trial by consent. Plaintiff/Appellant's appeal is without merit and is not supported through the case law established for the best interest of minor children. The Court heard testimony of the father's trips to Cancun, and Hawaii, his eye lift and his brand new four bedroom home (T: page 82 lines 22-27) as well as how the younger child followed in the footsteps of his sister, took college preparatory classes, his grades were generally very good and he was a great kid, very conscientious and he was going to college. (T page 27 lines 22-24).

The court found that a material change in circumstances had occurred, the older child was now a college student, and that Dad had paid the child support although in a different manner than ordered. The court also reduced the amount of life insurance to be maintained upon the Father, ordered the Father to pay the original amount of obligated child support to the Mother in the manner of the 1998 divorce decree and ordered both parents to pay for college and vehicles for both children in the same proportion as designated by the parties in their original Irreconcilable Differences divorce 75/25 split. The court found that the child support order was a global order and that it was appropriate under the facts. To all else he denied the Motions for Modification and Motion for Contempt.

While the Findings of Fact, Conclusions of Law, Opinion of the Court and Order and the

Order Granting Clarification are clear on their face, there is a secretarial error which bothers the Plaintiff/appellant but does not change the content. The words "to all other effects" is left out of both statements of denial of the Plaintiff's and Defendant's motions.

The lower court's ruling should be affirmed and the appellee should be awarded her attorney's fees and the Appellant should be charged with the costs of the Court.

## ARGUMENT

The Father/Appellant/Attorney Mr. Evans changed the child support order through self help. The Mother prayed for a Modification increasing the child support, repayment of the back child support and general relief. (RE: pages 15-16). The Father answered and counter pled for modification lowering the child support amount and contempt. (RE: pages 18-21). The court had to first determine if the adequate amount of child support had been paid and second if there should be a modification of the child support order. Then if a modification was in order, to look at the disparity in income and the type of modification needed.

THE LAW: "Equity demands, the child support provisions agreed to by the parties are subject to modification upon a showing of a material change in circumstances not contemplated at the time of the divorce decree."[12] and "the Chancellor is to judge the credibility of witnesses..." *Massey v. Huggins,* 799 So.2d 902, No. 2000-CA-00929-COA, ¶ 19 (Miss Ct App 2001). "[E]quity may at times suggest *ex-post facto*, approval of extra-judicial adjustments in the manner and form in which support payments have been made. *Varner v. Varner,* 588 So.2d 428, 433, No.

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§93-5-2 MCA 1972 and amendments; notes of decisions #22 modification, agreement or stipulation citing *Pullis v. Lindzey*, 753 So.2d 480, (Miss 1999).

90-CA-0287 (Miss, 1991). In the end, the Court found that Mr. Varner had provided substantial support for his children although not in the manner originally decreed and reversed his contempt. Id. at 430.

"An appellate court does not re-weigh the evidence considered in the Chancery Court. If [the Supreme Court finds] substantial evidence to support the findings of fact that are made by the Chancellor, even if [the Supreme Court's] evaluation might have been different, and unless [The Supreme Court finds] that the Chancellor applied erroneous legal standard," the Supreme Court affirms. *Massey v. Huggins*, 799 So.2d 902, No. 2000-CA-00929-COA, ¶ 8 (Miss Ct App 2001) citing *Williams v. Williams*, 656 So.2d 325, 330 (Miss. 1995).

"Submission of the issue of child support to a chancellor necessarily entails submission of all matters touching on that subject." *Stinson v. Stinson* 738 So.2d 1259, 1263, No. 98-CA-00619-COA¶20 (Miss 1999). "The basic child-support award is intended to cover ordinary living expenses such as food, clothing, shelter." Deborah H. Bell, *Bell on Mississippi Family Law.* §10.07 Add-ons to base of support, page 309. "In addition to the basic support award a court may order payment of expenses not considered to be covered by the basic award, including health insurance, out-of- pocket medical expenses, life insurance, and college expenses." Deborah H. Bell, *Bell on Mississippi Family Law.* §10.01[3][a] steps in determining basic support, page 290. "A party need not specifically request each form of child-support ultimately awarded by Chancellor if child-support in general is requested." *Massey v. Huggins,* 799 So.2d 902 No. 2000-CA-00929-COA, ¶ 30 (Miss Ct App 200) citing *Stinson v. Stinson,* 738 So.2d 1259, 1263-64 [¶ 20] (Miss Ct. App. 1999).

"[A]n existing support order may be modified to require a parent to provide college support..." Deborah H. Bell, *Bell on Mississippi Family Law.* §10.11[5][c] college expenses, page

327. "Similarly, a court did not err in ordering a father with an excellent record of providing for his children to pay the costs of college..." Deborah H. Bell, *Bell on Mississippi Family Law.* §10.11[5][c] college expenses, page 327.

Even "when issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings... [Failure to amend] does not affect the results of the trial of these issues." Rule 15(b) MRCP

WHETHER THE COURT ERRED IN NOT LOWERING THE CHILD SUPPORT,

PLAINTIFF'S POSITION: Mr. Evans claimed that he paid all of the child support although not to Mrs. Evans. Mr. Evans prayed for a modification because his daughter was now in college and his minor son now lived with him 50% of the time and child support should be terminated. He believes the lower court erred in relying upon the Varner case.

DEFENDANT'S POSITION: Defendant agrees that a material change in circumstances occurred when the older child entered college. But for the fact that Robert, Jr. and Elizabeth should have lived with their father 50% of the time since the divorce in 1998,(RE: 11) the Varner case is very similar the instant case. Susie Varner petitioned the lower court for back child support and to have the father held in contempt for his failure to pay. The Father was held in contempt and this Honorable Court reversed and remanded. The Supreme Court found the Varner case, demanded a sensitivity and insight, as well as equity and fairness, without compromising the established law of support and care of children. *Varner v. Varner,* 588 So.2d 428, 430, No. 90-CA-0287 (Miss, 1991). Varner was one of the first cases to deviate from the absolute position child-support once due is vested and cannot be forgiven or credited. "It follows that, from time to time, adjustments can and should be made without burdening the courts... The law remains firm that court ordered child

support payments vest in the child as they are and may not thereafter be modified..." without order of the Court. *Varner v. Varner,* 588 So.2d 428, 432 ; No. 90-CA-0287 (Miss, 1991). ) " No party obligated by judicial decree to provide support for minor children may resort to self help and modify his or her obligation with impunity. The interest of the children weighs in the judicial mind far heavier than those of the parent." Id. at 433, citing *Cumberland,* 564 So.2d at 847. In particular, "child-support orders... for a single lump sum amounts for the benefits of two or more children, are subject to these same rules but have unique features. For one thing, the emancipation of one child does not automatically reduce the supporting parent's periodic payment." *Varner v. Varner,* 588 So.2d 428, 433 ; No. 90-CA-0287 (Miss, 1991), citing *Wilson v. Wilson,* 464 So.2d 496, 497-498 (Miss 1985). "Second, a child support order is not based solely on the needs of the minor children, but takes into account the ability of a parent to pay child support. " Id. at 433.

As the 114 pages of transcripts in the instant case show, the Judge was privy to the testimony that Dad had resources from which to pay his child support. From the testimony of the current Mrs. Evans(Susan), she and Mr. Evans have a joint checking account, they commingle their funds in the joint checking account and from that account pay Mr. Evans' child support. (T page 6 line 29 through page 12 line 8.). From Mr. Evans' testimony the Plaintiff/ Father earned $23, 225 in rental income, earnings paid by Washington County as a prosecutor and the additional $1300 monthly reimbursement received as a prosecutor presumably for office space or secretarial help. (T page 35 line 1 through page 40 line 6.) Mr. Evans also testified that as a private attorney, he has just settled a case which after paying the IRS, the State, sundry bills, he has an additional $20,000 left over to choose how to spend. (T page 96 lines 14-19.) He asked the court to believe that his life was that of a regular Delta Joe, "we don't do anything. We live, go to work, and go home." (T110 lines 1-2).

Mr. Evans later testified that he had been to Cancun. Upon further examination it was learned that he went to Hawaii in April 2005. (110 lines 22-28) He admitted to buying new a Tahoe in December of 2004 for the main purpose of taking the total exemption on his taxes for the total retail price. This is the same vehicle which he later traded to his current wife, which she traded for a new Toyota Avalon in December. (Page 111 lines 15-29). He'd like the Court to suppose that there are only two months left on the mortgage of the home where his ex-wife and children live but the exact amount is never mentioned in the transcripts. He does admit there is at least $11,000 owing. (T page 96 line 5).

In comparison Defendant/ Mother, Mrs. Evans testified she attempted to re-enter the work force in 1998, starting as a part-time secretary. Now she earns 400% more. Her take home pay is now a whopping $1,682.47 a month after taxes. (T page 14 line 1 through page 22 line 4.)

After using sensitivity and insight, as well as equity and fairness without compromising the established law of support and care of children as required by Varner, the court found that the father/appellant had paid child support although not to the mother, the court did not feel the court had the authority to reduce child support. The Lower Court did find that a material and substantial change had occurred in that the older child was now in college. The chancellor cited § 93 – 11– 65 Mississippi code 1972 annotated as amended and supplemented wherein he considered not just the material and substantial change in the older child's enrollment in college but the emancipation of the older child by age, within several months of the date of his order. [RE 29 ]. The Special Chancellor modified the child support award to include a 75/25 split in the obligations of the parents to pay for college and vehicles of the minor children.

Defendant agrees with the ruling of the lower court, "allowing an automatic reduction of an

undivided order would ignore the realities... Considering an undivided child support order as equally divisible among the children overlooked the possibility that the requirement of the individual children may vary widely, depending upon the circumstances of each child." Varner at 433.

WHETHER THE COURT ERRED WHEN IT ORDERED THE Plaintiff TO PAY A PERCENTAGE OF THE YOUNGER CHILD' COLLEGE EXPENSES

PLAINTIFF'S POSITION: In the instant case, Mr. Evans, Father/Appellant/Attorney believed that his child-support should have been decreased, he was ambushed, and that he was wrongly assessed 75 % of the obligation to pay for both of his children's college education and vehicles as the issue of paying for the younger child's college expenses was never pled by the Defendant His arguments are without merit.

DEFENDANT'S POSITION: "Submission of the issue of child support to a chancellor necessarily entails submission of all matters touching on that subject." *Stinson v. Stinson,* 738 So.2d 1259, 1263, No. 98-CA-00619-COA¶20 (Miss 1999). Both Massey and Fortenberry cited by the Plaintiff are distinguishable from the instant case. In the instant case the Mother pled for a modification of child support and a general prayer for all other relief deemed equitable. A "party need not specifically request each form of child-support ultimately awarded by Chancellor if child-support in general is requested." *Massey v. Huggins,* 799 So.2d 902, No. 2000-CA-00929-COA, ¶ 30 (Miss Ct App 200) citing *Stinson v. Stinson,* 738 So.2d 1259, 1263-64 (Miss Ct. App. 1999). The Plaintiff's quote of Massey in his brief page 4 is a misquoting of Massey. In the Massey case, just as in the Fortenberry[13], no prayer for child-support was contained in the initial pleadings. In the Massey divorce decree no child support had ever been ordered; the Massey parties agreed to joint

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13 *Fortenberry v. Fortenberry,* 338 So.2d 806 (Miss 1976).

physical custody of their children. Later both parties re-married, and the father moved a considerable distance away for his job responsibilities. The issue of custody was brought before the court by the father and the mother pled that if she were to obtain full custody she should be provided child support. The father did not request child-support of any type, not even a general plea for child support. The father was eventually awarded custody of the three minor children, and the mother was ordered to pay child support. The mother appealed pleading deprivation of due process. This Honorable Court found she had been denied due process, reversed and remanded.

In determining the Massey case, the Court contrasted and compared the Massey's facts with *Stinson v. Stinson*, 738 So.2d 1259, 1263-64 (Miss Ct. App. 1999) wherein Mr. Stinson was served with process of a complaint for divorce which included a plea for modification of a previously awarded child support award and he failed to appear or plead. Mrs. Stinson pled for an increase in the previously awarded child-support order and "such other general relief as the court deems appropriate" *Massey v. Huggins* at ¶30. When Mr. Stinson argued that she had not specifically plead the types of support that were eventually ordered, the Stinson court held that the awards relating to the children were properly made based upon her request for an increase in child support. Stinson at ¶21. In the Massey case this Honorable Court affirmed its prior decision, this Honorable Court drew from the case of Stinson that "child-support can include life and health insurance, college tuition, and other related needs... A party need not specifically request each form of child-support ultimately awarded by Chancellor if child-support in general is requested." *Massey v. Huggins* at ¶30. Like the instant case, Stinson asked for a modification of child support and other general relief and from there the Court held that college tuition can be awarded. *Massey v. Huggins* at ¶30.

In the instant case, the Divorce Decree gave Mr. and Mrs. Evans joint physical custody and

still granted $2,000 per month in child support. (RE: 11-12). Mr. Evans can not claim unfair surprise in not lowering the child support and ordering him to pay 75% of the payment of the college and vehicle expenses. He acquiesced in the discussion. Rule 15 MRCP. It was Mr. Evans who brought out through his own testimony that his son Robert was very conscientious, you couldn't ask for a better son. (T page 98 lines 1-8). Mr. Evans testified he planned to ear mark money for a vehicle for Robert on his 16th birthday because Robert deserves it; Robert is such a good kid. (T page 98 lines 11- 18). Attorney Evans also elicited from Mrs. Evans upon her cross examination that Robert is a college preparatory student. They discussed Roberts aptitude: although Robert had a bit of a problem with Geometry; he was going to a tutor and Robert generally does very well with his grades. He never causes a problem. (T 62 lines 20- 28.) Through Mrs. Evans direct testimony she was asked to compare Elizabeth and Robert. More specifically, Mrs. Evans' attorney asked if she was saying "the same thing will happen with Robert. He will be an older college student, so to speak?" She responded, "yes, he will." [RE transcripts page 27 lines 17-24].

Instead of considering what is in the best interest of his children, Mr. Evans argues that this Court must reverse the Chancellor's decision based upon a 1960's case *Pass v. Pass*,118 So.2d 769,773,917 (Miss 1960), when the age of emancipation was 18 years of age. In the instant case, Mr. Evans participated in and raised the issue of the discussion of Robert's future academics. (T 62 lines 20- 28.) He even agreed that the fair estimate of a child at Ole Miss per semester was $4650. (T 103 lines 14-30). Even though Judge Bridges asked Mr. Evans if he wanted to summarize what he thought the trial had been about, (T page 113 lines 18 - 25) Mr. Evans did not prepare a written document. He only asked to introduce copies of documents not provided within his record excerpts to this Honorable Court. He knowingly, voluntarily and without coercion waived his right to object

to the issue of college expenses for both children. He was already paying Elizabeth's. He did not raise objection to the questions surrounding Robert's college or his grades or the comparison to his sister who was then in college. Mr. Evans, father and attorney, even elicited from Mrs. Evans, that Robert should get some type of used automobile but that she was not financially able to provide same. (T63 lines 1-9).

As to whether the father was financially able to meet these expenses, this is the same father who claimed he spent $30,000 in expenses for the children over the past year. (T106 line 22-26). He admits to giving Elizabeth Ann $300 and later $400 per month in allowance without expectation of use.(T page 90 lines 13-15). His position then was, "I am entitled to credit for what I spend for their benefit, which is over and above even the $2000. That's my position, since you asked." (T 107 lines 16-19).

This Honorable Court should find Mr. Evans is responsible for 75% of the college and car expenses. "A court did not err in ordering a father with an excellent record of providing for his children to pay the costs of college..."[14] Let us not forget about the vehicle purchased by the Plaintiff specifically for the purpose of taking the entire purchase price as a tax deduction and then trading the vehicle to his current wife. Deborah H. Bell, *Bell on Mississippi Family Law.* §10.11[5][c] college expenses page 327. "Income diverted to family members... may be imputed to a payor." Deborah H. Bell, *Bell on Mississippi Family Law.* §10.04[4][a], imputing hidden income based upon transfer of income page 302. The gift of the Tahoe after tax deductions was a gift of the Payor's proceeds. "A court may impute income to a payor whose reported income is clearly inadequate to support his or her actual lifestyle. In the Dunn case, a chancellor properly refused to believe the

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[14] Citing *Lazarus v. Lazarus*, 841 So.2d 181 (Miss Ct. App. 2003).

father's, statement of income, based in part on the cost of his various entertainment activities..."[15] In another case, a chancellor was rightfully skeptical of the father's stated monthly income... he managed 28 apartment units and bought a new truck..." Courts are not bound by a Payor's declared taxable income in determining income for child support purposes."[16] Deborah H. Bell, *Bell on Mississippi Family Law.* §10.04[4][c] imputing hidden income based on inconsistent lifestyle page 302. "In the absence of direct evidence of concealment, a court may impute income to a payor, whose lifestyle is clearly inconsistent with his or her or reported income." Deborah H. Bell, *Bell on Mississippi Family Law.* §10.04[4][c] imputing hidden income page 302. The Chancellor rightly required the Father to pay 75% of the college and vehicle costs of both children. Mr. Evans knew, participated in and acquiesced in the discussion of Robert's college. Mr. Evans knowingly, willing and without coercion waived his rights to object to the issue of college expenses when he declined the offer of the Special Chancellor to put into writing what Mr. Evans thought the case was about.

## CONCLUSION

The Special Chancellor found that even though Mr. Evans had unilaterally changed the child support order, he had paid the amount ordered by the Court. The Chancellor also found that there had been a substantial change in circumstances necessitating a modification of the child support award; the older child was now in college. The older child would emancipate by age in February of 2007, the younger child would be in college shortly. The Special Chancellor ordered the Father and

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15 Citing *Dunn v. Dunn*, 95 So.2d 1152, 1157 (Miss. 1997).

16 Citing *Gray v. Gray*, 745 So.2d 234, 237 (Miss. 1999).

Mother to split the costs of the children's college and vehicle expenses in the same manner as other expenses agreed to and approved by the court within the parent's 1998 irreconcilable differences divorce in a 75/25 split. "The interests of the children weighs in the judicial mind far heavier than those of the parent." Varner at 433.

The Father/Appellant/Attorney claims he was ambushed by the Court, it is not fair . He claims he is just an average Delta Joe even though he took his current wife and his two kids to Cancun. He also went to Hawaii, bought a new Tahoe and traded it to his current wife, and had an eye lift. (T page 84 lines 22-27 and page 111 lines 15-21). While the court may have found that the numerical figures proven had not shown the father's income to have increased, the court had an obligation to the children to impute income based upon the father's lifestyle which we believe was done. The basic child support award stayed the same and Dad was ordered to pay for 75% of college and vehicles for both children.

Mr. Evans also claims he was ambushed because there was no testimony that the younger child was going to college and the Mother did not plead for such modification. The transcripts say other wise. (T: page 27 lines 22-24). Mother pled that her child support be increased, back support paid and for general relief. (RE: Page 15-16). It was Mr. Evans who began to elicit the information from his ex-wife that the son was taking college preparatory classes and following in the daughter's foot steps to college. He acquiesced in the questioning and implied consent of the discussion of college and vehicles as necessary support for both children. Further, the Judge asked him specifically if he would like to summarize in writing what the trial was about. (T: pages 113 lines 18-25). Mr. Evans chose not to do so thereby voluntarily with knowledge and without coercion waiving his right to object to the issues of college and vehicles for both children.

The court found that the child support order was a global order, and that it was appropriate under the facts. To all else the Special Chancellor denied the Motions for Modification and Motion for Contempt.

While the Findings of Fact, Conclusions of Law, Opinion of the Court and Order and the Order Granting Clarification are clear on their face, there is a secretarial error which bothers the Plaintiff/Appellant but does not change the content. The words "to all other effects" are left out of both the statements of denial; the Plaintiff's and Defendant's motions. The words "in all other respects" is found in a single sentence paragraph stating that "in all other respects, the original judgment of December 29, 1998, shall remain in full force and effect." (RE 30).

The lower court's ruling should be affirmed and costs of the appeal assessed to the Plaintiff/Appellant including, but not limited to, reasonable attorney's fees and costs of proceedings.

CERTIFICATE OF SERVICE

I Susan C. Smith do hereby certify that I have this day mailed a true and correct copy of the forgoing document to the following at there last known address:

Robert Evans, Esq.
Robertshaw, Noble Evans & Rounsavall
P.O. Box 1948
Greenville, MS 38702-1498

This the 16th day of April, 2008.

Susan C. Smith

Susan C. Smith

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**ROBERT D. EVANS** **PLAINTIFF/APPELLANT**

**V.** **NUMBER 2007-CP-00920**

**BEVERLY B. EVANS** **DEFENDANT/APPELLEE**

**FIRST AMENDED CERTIFICATE OF SERVICE**

I Susan C. Smith do hereby certify that I have this day mailed a true and correct copy of the forgoing Brief for Appellee to the following at there last known address:

Robert Evans, Esq.
Robertshaw, Noble Evans & Rounsavall
P.O. Box 1948
Greenville, MS 38702-1498

Honorable Billy Bridges
520 Chuck Wagon Drive
Brandon, MS 39042

This the 2nd day of May, 2008.

Susan C. Smith