

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 Circuit Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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This, the 19th day of March, 2008.



ROBERT D. EVANS, 

2007-CP-00920
SCT-T

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STATEMENT OF THE ISSUES

1. THE COURT ERRED IN RULING THAT, EVEN THOUGH THE COURT FOUND THE MATERIAL CHANGES IN CIRCUMSTANCES, IT DID NOT HAVE THE AUTHORITY TO REDUCE THE CHILD SUPPORT.
2. 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 case deals with a Motion for Modification filed by the mother, Beverly Evans, along with a Counter Motion for Modification filed by the father, Robert D. Evans. This matter was held in the Chancery Court of Washington County, Mississippi by Special Chancellor Billy Bridges. The mother's Motion for Modification was denied, which has not been appealed. That, even though the Court ruled that the father had shown a material change in circumstances, the Court felt it did not have the authority to reduce the child support based on the language of the Final Decree.

The Lower Court also ruled that the father was to pay seventy five percent (75%) of the youngest child's college expenses, which father contends was not at issue in the pleadings or testimony at the trial.

STATEMENT OF THE FACTS

The parties were divorced in December of 1998. At the time of the divorce, the oldest child, Elizabeth Ann, was thirteen (13) and the youngest child, Robert was seven (7). (RE, p.9).

At the time of the hearing in the cause, October 16, 2006, Elizabeth Ann was twenty (20) and Robert was fifteen (15). (RE, p.25).

The Final Decree (RE, p.9-14) provides that the father is to pay Two Thousand Dollars

(\$2,000.00) per month for child support. Out of that amount the father was to pay the house note of Five Hundred Ninety One Dollars and 95/100 (\$591.95). Out of the balance thereto, the mother was to pay the children's tuition at Washington School with the father being responsible for any increase. (RE, p.9-14). The oldest child, at the time of the hearing, had graduated from Washington School. Her tuition during her last year was Three Hundred Dollars and 83/100 (\$300.83) per month. (T, p.55, l 1-15).

The Court having heard testimony, found that the father's earnings have, in fact, not increased while the mother's income has increased.¹ (RE, p.29). That the minor child, Robert, Jr., now lives with him half the time and that father is paying certain expenses for said child, i.e. expenses for sporting activities. The oldest child is attending the University of Mississippi. (RE, p.27). That the mother, from the mother's testimony and the Court's finding, has contributed nothing toward either child's clothing nor Elizabeth Ann's college expenses. (RE, p.28).

The Court found that plaintiff did produce evidence of a material change in circumstances, but felt, under *Varner v Varner*, 588 So. 2d 428 (MS. 1991) he could not reduce the child support. (RE, p. 29-30). This is further supported in the court's denying the father's Motion to Reconsider where the court felt it did not have the authority to reduce the child support as set forth in it's original Conclusions of Law. (RE, p. 40).

Further, the mother's initial Motion for Modification (Cp, p.15), which was denied and not appealed, asked for an increase in support based on the oldest child being in college and the youngest being a high school student. No request was made for college expenses of the younger child. At the trial of this case, there was no testimony with regard to the youngest child's college expenses, his

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Increase of approximately 400% (T, p.72, l 24-30)

plan to go to college, aptitude nor father's ability to pay. Absent any request or proof, the court ordered the father to pay seventy five percent (75%) of Robert's college expenses. (RE, p.31).

SUMMARY OF THE ARGUMENT

The Court's reliance on Varner and not having the authority to reduce the child support was error.

Without any request in the pleadings on proof thereof, the Court erred in ordering the father to pay a percentage of the youngest child's college expenses.

ARGUMENT

The Court erred and applied the wrong legal standard on Ruling he did not have the authority to reduce the child support even though the Court found a material and substantial change in circumstances.

The Court based it's ruling on *Varner v Varner* 588 So. 2d 428 (MS. 1991). This was error. Varner stands for the proposition that under 'Global' child support Orders, "that the emancipation of one (1) child does not automatically reduce the child support pro rata, but saddling the parent obligated to pay child support with the burden of obtaining judicial relief" Id at 433-434 (¶ 3). The Chancellor can modify child support provisions of divorce decree only when there has been material and substantial change in circumstances of one of the parties, and this is true for divorces granted due to irreconcilable differences. *Bruce v. Bruce* 687 So. 2d 1199, 1202 (¶ 1) (Miss. 1996).² Although, at the time of the hearing, the oldest child was not emancipated, she had gone off to college and the father was paying these expenses. Here, the mother, in her testimony, claims that while the child was in high school, she paid all the daughter's expenses and no longer had these

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Section 93-5-2 MS Code Annot. allows for modification of the Child Maintenance Agreement as any other Judgments.

expenses when she left for college. Another point is that in the Martial Settlement Agreement, which was incorporated in the Final Judgment, provides that out of the Two Thousand Dollars (\$2,000.00) child support, the father was to pay the monthly indebtedness on the home (\$591.95). In addition, from that amount the mother is to pay the children's tuition. The oldest child no longer incurs this tuition (\$300.83). Following the Chancellor's ruling, this gives the mother a windfall of Three Hundred Dollars and 83/100 (\$300.83). (T, p. 55, 11-17). Further analogy; assume the home is paid off in two (2) months, is the Five Ninety One Ninety Five (\$591.95) another windfall to the mother. I think not. It is obvious the amount of the child support agreed upon by the parties took into account the house note and the children's tuition. As a result of the lower court's opinion, the mother no longer has the high school tuition yet she continues to receive this payment. She no longer has the expenses of the oldest child who is off at college as the father was paying these expenses, yet the mother is to continue receiving these sums.³ Nothing could be more unfair.

The Court also erred in Ordering the father to pay seventy five percent (75%) of the youngest child's college expenses. The Pleadings are void with regard to college expenses of the youngest child who is fifteen at the time of the hearing. The transcripts of the proceedings and the Pleading are absent any request or testimony regarding the college expenses of the youngest child. Specifically, there was no evidence of the this fifteen (15) year old wish to go college, his aptitude or that the father was financially able to meet these expenses. *Pass v Pass* 118 So. 2d 769, 773, 917 (MS 1960).

Without a request in the Pleadings or supported by the testimony, a Chancellor cannot award specific type of child support. *Massey v. Huggins* 799 So. 2d 902, 909 (¶ 26), (MS App. 2001);

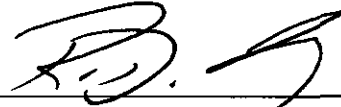
³ The Final Decree is absent any agreement for college expenses.

Fortinberry v. Fortinberry, 338 So. 2d 806, 807 (MS 1976).

CONCLUSION

As a result of the aforesaid, as to the reduction in child support, this matter should be reversed and remanded to the Special Chancellor as he did have the authority to reduce the child support. As to the college expenses of the youngest child, that matter should be annulled.

Respectfully submitted, this the 19th day of March, 2008.



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CERTIFICATE OF SERVICE

I, Robert D. Evans, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing document to:

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This, the 19th day of March, 2008.



ROBERT D. EVANS