

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SIDNEY KELTON PACE

APPELLANT

VERSUS

NO. 2008-CA-00380

MELANIE JEAN PACE

APPELLEE

APPEAL FROM THE CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

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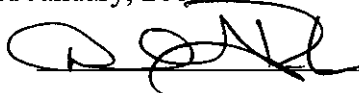
Hon. Randy G. Pierce, Chancellor

Jackson County Chancery Court

P.O. Box 998

Pascagoula, MS 39568-0998

Certified this the 22nd day of January, 2009.



DAVID A. ROBERTS

ATTORNEY OR RECORD FOR APPELLANT.

DR. SIDNEY KELTON PACE.

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STATEMENT OF ISSUES

1. STANDARD OF REVIEW
2. WHETHER THE COURT ERRED IN NOT FINDING THE WRITTEN AGREEMENT TO BE UNENFORCEABLE DUE TO UNCONSONABILITY AND AMBIGUITY.
3. WHETHER THE COURT WAS IN ERROR FOR AWARDED A JUDGMENT FOR UNPAID HOUSE NOTE, INSURANCE AND TAXES IN THAT A CONDITION PRECEDENT TO THE AGREEMENT WAS NOT MET TO INCREASE ALIMONY
4. WHETHER THE COURT FAILED TO MODIFY THE AGREEMENT BY CLARIFYING AMBIGUOUS TERMS CONTAINED THEREIN CONTRARY TO LAW.
5. THE COURT WAS IN ERROR FOR AWARDED JUDGMENT FOR UNPAID HOUSE NOTE, INSURANCE AND TAXES. THE COURT ERRED IN ITS RULING OF CONTINUING DR. PACE'S OBLIGATION TO PAY FOR THE FORMER MARITAL DOMICILE INCLUDING INSURANCE AND TAXES AS SAID RULING IS AMBIGUOUS AND UNENFORCEABLE.

STATEMENT OF THE CASE

A. Nature of the Case

This case arises out of a dispute as the enforceability of the Written Agreement for Custody and Property Settlement. The Agreement is so onerous that no person in his senses and not under a delusion would make on the one hand, and as no honest and fair person would accept on the other. The contempt action centers on whether or not the Agreement entered by the parties requires alimony to be paid by Dr. Pace in the amount of \$1,500.00 or \$4,500.00. The increase in alimony occurs upon a condition precedent and whether said condition was met. The court failed to reform or modify the Agreement in a manner that would be equitable to all parties. The condition precedent was not met and no judgment for arrearage should have been awarded. The court's failure to modify the terms of the Agreement which contain vague and ambiguous provisions make the same Agreement unenforceable and the court's denial to modify same is error.

Melanie Jean Ward Pace (hereinafter "Ms. Pace") and Dr. Sidney Kelton Pace (hereinafter "Dr. Pace") were married on June 7, 1986 (Complaint for Divorce, Rec. Excerpt. p. 1) and divorced December 14, 2002 upon the ground of Irreconcilable differences which included a Written Agreement for Custody and Property Settlement (hereinafter "Agreement"). (T. p.3, Exh. 6.).

On August 19, 2005, Dr. Pace filed his Answer and Counterclaim alleging that the Agreement was unconscionable and therefore unenforceable in that same awarded unto the Ms. Pace 100% of all the assets and income of Dr. Pace. It is further alleged that the terms and conditions of the Agreement are impossible to perform and a financial commitment that cannot

be met. Further, that the terms of the Agreement are ambiguous in that unreasonable obligations are set forth without limitations. (Rec. Excerpt. pp. 26-31).

Trial was had on October 19, 2007. (Rec. Excerpt. p. 49).

Ruling and Judgment of the Court on Complaint for Contempt was issued on January 25, 2008. (Rec. Excerpt. p. 48).

Notice of Appeal filed on February 22, 2008 was timely filed. (Rec. Excerpt. p. 56).

B. FACTS

Melanie Jean Ward Pace (hereinafter "Ms. Pace") and Dr. Sidney Kelton Pace (hereinafter "Dr. Pace") were married on June 7, 1986 (Complaint for Divorce, Rec. Excerpt. p. 1) and divorced December 14, 2002 upon the ground of Irreconcilable differences which included a Written Agreement for Custody and Property Settlement (hereinafter "Agreement"). (T 3, Exh. 6).

The Agreement provided as follows:

1. That Dr. Pace would pay as child support the sum of \$1,500.00 per month, or 20% of his adjusted gross income, whichever is greater, to Ms. Pace, for the use and benefit of the three (3) minor children.
2. That Dr. Pace would maintain major medical, health, dental, and optical insurance, if available through his employer, for Ms. Pace and the three (3) minor children. Further, that Dr. Pace shall be responsible for the payment of any and all necessary medical, health, dental, orthodontic, optical, drug, hospital, and doctor expenses of Ms. Pace and the children which were not covered by insurance.
3. That Dr. Pace would be responsible for any and all school uniform costs of the

children.

4. That Dr. Pace would be responsible for any and all daycare expenses of the children.

5. That Dr. Pace would be responsible for the payment of any and all college expenses, including, but not limited to, tuition, books, room and board, matriculation expenses and extracurricular activity expenses of the minor children.

6. That Dr. Pace would maintain a life insurance policy in the amount of \$500,000.00 and list Ms. Pace and the minor children as the primary beneficiaries of said policy of life insurance.

7. That Ms. Pace all contents and appliances of the house as well as her personal property and the personal property of the minor children.

8. That Ms. Pace shall be awarded all assets and interest that Dr. Pace may have now or may after acquire in the following businesses, professional associations, and corporations: (A) S. K. Pace, P.A.; (B) Acute Care Clinic, P.A.; and (C) Mobile Family Care Center, Inc. Dr. Pace was further responsible for any and all tax consequences as a result of the award of the aforementioned businesses.

9. Ms. Pace was awarded exclusive use, possession, and title to the marital home which has a monthly house note of \$1,077.00 per month (T. p.4). Dr. Pace was also required to pay the taxes and insurance on the former marital home. Additionally, Dr. Pace was to quitclaim any and all interest in the marital home.

10. Ms. Pace was awarded the 1999 GMC Suburban vehicle and dr. Pace ordered to

pay the note associated with said vehicle, insurance and tax. Dr. Pace was ordered to purchase Ms. Pace a new automobile of her choice every four years and be responsible for payments, taxes, and insurance on the new vehicles.

11. Each party was ordered to pay their own credit card debt.

12. Dr. Pace was awarded a home and ordered to be responsible for all payment. taxes and insurance on same. Ms. Pace was ordered to quitclaim the non-marital home to Dr. Pace.

13. Dr. Pace was awarded the 1999 Jeep Wrangler and ordered to pay all indebtedness on said vehicle including taxes and insurance.

14. All personal property was acknowledged as having been divided.

15. Each party waived any and all interest in the retirement accounts and financial accounts of the other.

16. Ms. Pace waived all interest Dr. Pace's medical practice and business.

17. Dr. Pace was ordered to pay permanent periodic alimony in the amount of \$1,500.00 per month. Dr. Pace's alimony obligation continued upon his death or Ms. Pace's subsequent remarriage. In the event that Ms. Pace is fired, quit, was laid off, or her position of employment with Dr. Pace and/or company is terminated for any reason whatsoever, the permanent periodic alimony increased to \$4,500.00 per month. Further, the increased alimony payment would continue after the death of Dr. Pace or the remarriage of Ms. Pace.

On June 7, 2005, Ms. Pace filed a Complaint for Contempt of Court. She alleged that Dr. Pace was in contempt for the following: 1. willfully failed to pay the house note, insurance and taxes; 2. failure to pay daycare and uniform expenses of the children; 3. failure to provide life insurance as previously ordered. (Rec. Excerpt. p. 19).

On August 19, 2005, Dr. Pace filed his Answer and Counterclaim alleging that the Agreement was unconscionable and therefore unenforceable in that same awarded unto the Ms. Pace 100% of all the assets and income of Dr. Pace. It is further alleged that the terms and conditions of the Agreement are impossible to perform and a financial commitment that cannot be met. Further, that the terms of the Agreement are ambiguous in that unreasonable obligations are set forth without limitations. (Rec. Excerpt. pp. 26-31).

At the trial of this matter which was had on October 19, 2007, Ms. Pace testified that the monthly house note was \$1,077.00 and the monthly insurance was \$360.00 per month. (T. p 4). She stated that the yearly ad valorem taxes were \$2,100 per year. She later testified that the home insurance had increased from \$2,100.00 per year to \$4,300.00 per year. (T. pp 5-6).

Ms. Pace testified that Dr. Pace had not made any of the martial home payments , the insurance payments or the taxes. She testified that the Statement of Arrearages introduced as Exhibit 2 reflected insurance at the rate of \$3,060 per year. (T. p. 7) and acknowledged that same had increased. She testified that the House note at the time of filing her Complaint was \$1,077.00 per month but had been reduced to \$1,009.00 per month. The cause of the reduction was due to her refinancing the marital home approximately two months prior to trial. (T. p. 8). The previous mortgage on family home was for 25 years on which there had been twelve (12) years of payment. (T. p. 29). She received \$38,000.00 out of the house at refinancing. (T. p.28). She refinanced the home for 30 years. (T. p.19). Of the \$38,000 she refinanced all funds had been expended. (T. p. 46).

Ms Pace alleged a breach of Dr. Pace's obligation to pay daycare expenses in the amount of \$900.00 but admitted the children were not currently in daycare being eight. thirteen and

sixteen years of age. She further claimed that Dr. Pace had failed to pay the expenses of the children's school uniforms. Ms. Pace set the amount of school uniforms at \$1,500.00. (T. pp. 11-12). Upon cross examination Ms. Pace admitted that she had never sent Dr. Pace a bill for the daycare expenses. (T. p. 27). She also failed to send Dr. Pace any medical bills for the children. (T. p.40).

Ms. Pace had requested and received proof of life insurance in the amount of \$1,000,000.00 with the designated beneficiaries being Dr. Pace's child and the three children from the Pace marriage but that she was not listed as a beneficiary. (T. pp 12-13.)

She testified that the yearly tax burden on the marital home is \$2,141.20. (T. p. 14., Exh. 4).

Dr. Pace was still employed as a physician and that during the marriage Dr. Pace had worked extra hours in the emergency to increase his income. (T. p.15).

Dr. Pace owed \$87,889.33 due to his failure to pay the house note, taxes, and insurance. (Exh. 2). Dr. Pace had made his child support payment and alimony payment monthly. (T. p. 17). Dr. Pace had paid unto Ms. Pace the sum of \$6,000.00 per month since the divorce in 2002. (T. p. 34).

Dr. Pace purchased a home and Ms. Pace had to sign the "papers" for him to do so. Dr. Pace sold the home he was awarded in the Agreement. (T. p. 20). Ms. Pace signed a waiver of homestead and never received any bill from the mortgage company. (T. p. 30).

Ms. Pace then testified that she was willing to modify the Agreement to remove Dr. Pace's obligation to purchase her a new vehicle every four (4) years although such a

modification had not be pled by Ms. Pace. She Further testified that she was willing to modify the Agreement to remove the obligation to provide medical insurance on her depending on the income stream she would have after the trial. (T. pp. 20-22).

Ms. Pace stated that at the time of trial the total amount owed from Dr. Pace to her was \$94,079.00 including house note, insurance, taxes, school uniforms, daycare expenses and attorney fees of \$2,500.00. (T. 25).

The Agreement was signed on September 24, 2002 by Ms. Pace and September 17, 2002 by Dr. Pace. (T. p. 31). At the time she entered into the agreement she was not working for Dr. Pace nor did she work for him after signing the agreement. She has not worked anywhere after the divorce because "he said he would take care of me and that's what I expected him to do." (T. pp. 32, 33, 36-38). Although she had employable skills that she could utilize. (T. p. 45).

She testified that after the refinancing, including insurance, property taxes and escrowed income taxes in the amount of \$800.00 per month, her monthly burden for the marital home was \$2,415.00 leaving \$3,585.00 for other expenses. (T. pp. 38-39). She testified that she utilized some of the funds for medical expenses that were never sent to Dr. Pace. (T. p. 40).

The Agreement was dictated to her attorney and Dr. Pace had no input into the creation of said document. (T. p. 42). Additionally, she was unaware of whether he read the document or not. (T. p. 49)

She never signed the waiver of interest in the retirement accounts as required by the Agreement. She was provided same but has never executed it. (T. p. 43).

Dr. Pace is employed as an internist at Baptist Memorial Hospital of North Mississippi in Oxford, Mississippi. He is not allowed to "moonlight" according to his contract of employment. (T. pp.. 51, 64). In September, 2002, at the time of the Agreement. he was employed in Pascagoula, in private practice and had a clinic in Mobile, Alabama. He was not receiving any income from the Mobile clinic and barely breaking even on his practice income. (T. p. 52).

Dr. Pace denies that he had the Agreement with him for "quite some time" (T. p. 52) or that he and Ms. Pace discussed the specific terms of the Agreement. He never told Ms. Pace that he would care for her financial needs for the rest of his life. He read the Agreement before he signed it but not thoroughly. (T. pp. 54, 67). Although he did not recall reading the provision regarding the marital home but did remember the alimony provision. She never worked for him. (T. p. 54). He had no attorney representing him in the divorce due to the amount of hours he was working and personal issues. (T. p. 68). He felt as if he had no choice time wise in signing the agreement. (T. p. 68.) He had no appraisals of the assets that he was giving to Ms. Pace. He had no documents in his possession to judge the fairness of the Agreement. (T. p. 70-71)

His practiced struggled until the hurricane (Katrina) and the hurricane was the end of it. Dr. Pace's monthly net income from S. Kelton Pace, P.C. as of July 7, 2005, was \$6,000.00 per month. Dr. Pace was significantly delinquent on employee withholding taxes to the IRS and the State Tax office. The entire \$6,000.00 he received from the medical practice the entire amount went to Ms. Pace. (T. p. 56). At the time of execution of the Agreement. Dr. Pace was paying 100% of his income to Ms. Pace. In addition to his entire income, Dr. Pace was ordered to pay the house note, insurance, taxes for a total additional amount of \$1,622.00 over and above his income. (T. p. 60).

Dr. Pace was moonlighting to make his financial situation better at the time the agreement was entered. Dr. Pace was working seven (7) days a week in excess of 80 to 90 hours per week. (T. p.57)

At trial, Dr. Pace's net income was \$9,906.24. (T. p. 61). His total net pay per Exhibit 6 (financial declaration) is \$13,292.12. He derives his \$9,906.24 income by deducting the \$3,800 mortgage on the rental property from his income. (T. 64). If Dr. Pace were to pay Ms. Pace the sum of \$7,622.00 he would retain \$2,284.24 to cover his personal expenses. (T. p. 61). The alimony, child support, house payment, house insurance and house taxes comprise 77% of Dr. Pace's net income. (T. p..62). At \$6,000.00 per month, he retains approximately \$3,900.00 per month for his living expenses. He has a rental home in Mobile, Alabama, from a building he rents to the Clinic of Mobile (T. p. 64) that he receives \$3,800 a month in rent but said property has a \$3,800.00 per month note. (T. p. 62.)

At his current income of \$9,906.24, the \$6,000.00 he is currently paying is 61% of his net income. (T. p. 68). Dr. Pace requested that the Court modify the alimony provision have same end upon Ms. Pace's remarriage or his death. He states that medical insurance is not available through his employer for Ms. Pace. Ms Pace has not signed the retirement waiver. He provided a life insurance policy on the children but had not made her a beneficiary. (T. p. 69.)

Dr. Pace agrees that he will be responsible for the college education of the children but cannot meet an unlimited responsibility in regards to the school and extracurricular activities in which the children wish to participate. (T. p. 71). He requested the Court to limit the college to a public school and university fees. (T. p. 72).

He requested to be relieved of the obligation to pay Ms. Pace's medical expenses. He requested that the Court delete the provision requiring him to pay 22% of his adjusted income and order \$1,500.00 per month in Child Support. He requested that the provision regarding paying Ms Pace 100% of his business earnings be deleted in that there is a statement that she waives her interest in same. If he has to pay her his business income he would be paying literally all of his income to Ms. Pace. (T. p, 73).

On cross-examination, Dr. Pace admitted he went to college and could read. He admitted that Ms. Pace provided him the Agreement. He admitted that he signed the affidavit attached to the Agreement acknowledging that he agreed to the contents. (T. p. 76.) He admitted that his signature was notarized. He states that he did not thoroughly read the Agreement. He never discussed with Ms. Pace the house note. (T.p. 77). He stated that at the time he signed the agreement he was having an affair and the women was pregnant. (T. 107.

In July 2004, Dr. Pace received a letter from attorney Mark Watts advising him that he was in arrears on the house note, insurance, taxes, daycare expenses and uniform expenses. The letter also inquired about the life insurance policy. He offered no excuse or defense as to why Ms. Pace was not listed on the life insurance policy. (T. p. 78-82). Dr Pace stated that he felt that he had paid sufficient monies to cover the house note, insurance and taxes and did not understand why his obligation could be interpreted any differently. (T. p. 82-83).

Dr. Pace is believes the document states that he has to pay her \$4,500.00 in alimony if she quits or is terminated from his employment with him. As she was never employed by him, never received a check and was never an employee, his obligation for alimony was for \$1,500

per month. (T. 88-91) Dr. Pace paid \$1,500.00 for child support. \$1,500.00 for alimony and \$3,000.00 for extra expenses. (T. 92)

In 2004 Dr. Pace's tax return reflects his income at \$101,354.00.)T. 95)Dr. Pace gets paid every two weeks and his gross income would be \$218,004.80 plus \$45,600 in rental income for a total gross income of \$263,604.80. (T. 98-99) Dr. Pace has a wife and child residing with him in Oxford, a 2006 Charger vehicle, a 1999 Jeep Wrangler, and a 1965 Chevelle. He pays rent for the house he resides. (T. 100).

The trial court issued its Ruling and Judgment of the Court on Complaint for Contempt on January 25, 2008, holding as follows:

1. Ms. Pace waived in Dr. Pace's business;
2. Ms. Pace waived the requirement that Dr. Pace purchase a vehicle of her choosing every four (4) years;
3. The court found that the Agreement was not unconscionable and therefore unenforceable;
4. The found that Dr. Pace was not unable to perform the terms of the Agreement;
5. The court found that there was not overreaching or coercion utilized in obtaining the Agreement;
6. Dr. Pace was intelligent with the ability to retain counsel in the matter of the Agreement;
7. That the Agreement was a contract of adhesion;
8. The court found child support in the amount of \$1,500.00 per month to be adequate and sufficient;

9. The court denied Dr. Pace's request to modify the requirement to maintain medical insurance on Ms. Pace and the children and to be responsible for all costs of medical expenses not covered by insurance;
10. The court denied Dr. Pace's request to modify his requirements of college expenses, and the terms of the life insurance provision of the Agreement;
11. The court denied Dr. Pace's request that his obligations pertaining to the marital domicile be modified.
12. The court modified the alimony requirements of Dr. Pace by ending same upon his death or Ms. Pace's remarriage or cohabitation;
13. The court awarded a judgment in the amount of \$87,889.33 against Dr. Pace and in favor of Ms. Pace for outstanding house note, insurance and taxes;
14. Ms. Pace was denied her request to hold Dr. Pace responsible for daycare and uniform expense;
15. The court did not find Dr. Pace to be in willful contumacious contempt.
16. The court found that there had not been a material change in circumstances to warrant a reduction the provisions of the Agreement;
17. The court awarded attorney's fees in the amount of \$2,500.00 to Ms. Pace.

(Rec. Excerpt. P. 48-54).

SUMMARY OF THE ARGUMENT

1. STANDARD OF REVIEW.

The standard of review for all appeals involving domestic relations is that this Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.

2. WHETHER THE COURT ERRED IN NOT FINDING THE WRITTEN AGREEMENT TO BE UNENFORCEABLE DUE TO SUBSTANTIVE UNCONSONABILITY AND AMBIGUITY.

The Agreement is one such as no person in his senses and not under a delusion would make on the one hand, and as no honest and fair person would accept on the other. A review of the four corners of the Agreement clearly show an Agreement that when reviewed in its entirety was one that no one would enter. The Agreement therefore is unenforceable.

3. WHETHER THE COURT WAS IN ERROR FOR AWARDING A JUDGMENT FOR UNPAID HOUSE NOTE, INSURANCE AND TAXES IN THAT A CONDITION PRECEDENT TO THE AGREEMENT WAS NOT MET TO INCREASE ALIMONY.

The Court ruled that the alimony provision would not be modified but failed to address the proper amount to be paid under the agreement. The Agreement required Dr. Pace to pay \$1,500.00 in alimony. In the event that Ms. Pace's employment with Dr. Pace ended then alimony increased to \$4,500.00 per month. At the time of the signing of the agreement and at no time during the marriage was Ms. Pace employed by Dr. Pace. Since the condition precedent never arose, the alimony payment due by Dr. Pace was \$1,500.00. Dr. Pace paid, \$6,000.00 per month which met all the requirements of the Agreement including, but not limited to, child, support, alimony and the house note, insurance and taxes. Accordingly, Dr. Pace had met all his financial obligations, was not in arrears and a judgment should not have entered.

4. WHETHER THE COURT FAILED TO MODIFY THE AGREEMENT BY CLARIFYING AMBIGUOUS TERMS CONTAINED THEREIN CONTRARY TO LAW.

The Agreement provided that Dr. Pace was to provide medical insurance on Ms. Pace and

pay all medical expenses of Ms. Pace and the children not covered by insurance. Additionally, the Agreement provided that Dr. Pace was responsible for all college expenses of the minor children including extra-curricular activities. No limitations as to the type of school or cap on the costs was expressed in the Agreement. Open-ended requirements such as those contained in the Agreement are contrary to law in that they put the payer in a position to be unable to plan for the future. Further, such provisions are equivalent to an automatic modification without establishing the factors required by law to obtain same. Accordingly, the Court was in error for not modifying the disputed provisions.

5. WHETHER THE COURT ERRED IN ITS RULING OF CONTINUING DR. PACE'S OBLIGATION TO PAY FOR THE FORMER MARITAL DOMICILE INCLUDING INSURANCE AND TAXES AS SAID RULING IS AMBIGUOUS AND UNENFORCEABLE.

The Chancellor in his ruling ordered Dr. Pace to continue to make the payments on the house on the amount due at the time of the divorce including insurance and taxes. The Court failed to recognize that Ms. Pace's refinancing of the home cancelled the indebtedness accrued during the marriage. Ms. Pace received \$38,000.00 cash out of the home after refinancing same. Additionally the home was refinanced for a longer period. The Chancellor's judgment allows Ms. Pace to continually refinance the home and receive a higher payment. Further, she can continue to refinance the property extending in perpetuity Dr. Pace's obligation to pay same. The judgment is ambiguous and unenforceable as worded. Accordingly the issue should be remanded to the lower court for clarification.

ARGUMENT

1. STANDARD OF REVIEW

The standard of review for all appeals involving domestic relations matters is limited. This Court will not disturb the findings of a chancellor unless the chancellor was "manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *Perkins v. Perkins*, 787 So.2d 1256, 1260 (Miss. 2001).

2. WHETHER THE COURT ERRED IN NOT FINDING THE WRITTEN AGREEMENT TO BE UNENFORCEABLE DUE TO UNCONSCIONABILITY AND AMBIGUITY.

Divorces upon the grounds of Irreconcilable differences are controlled by §93-5-2, Miss. Code Ann. (1972) and subject to contract law as pertaining to the property divisions . Divorce decrees are viewed as quasi-contracts. *Grier v. Grier*, 616 So.2d 337, 340 (Miss.1993). "[W]here a property settlement agreement is entered into in contemplation of a divorce on the grounds of irreconcilable differences, there is more at work than general contract law." *Grier*, 616 So.2d at 340. While a properly drafted agreement may be binding on the parties, the chancellor is within his discretion to modify the terms in a divorce decree where he finds it is necessary to protect the parties because the courts are not used as tools "for implementing unconscionable contracts which are not fair to either party." See *Miss. Const. art. IV, § 94*.

In *Lowery v. Lowery*, 919 So.2d 1112 (Miss 2005), the Mississippi Supreme Court addressed the issue of whether a property settlement agreement, admittedly signed by both parties and containing the usual boilerplate language with respect to voluntariness and freedom from coercion, could be set aside upon the motion of an aggrieved party. After addressing specific issues in the property settlement agreement, the discussed overreaching in the procurement of the agreement. The Court defined overreaching as

“...that which results from an inequity of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties. Overreaching involves the situation where one party, having the ability to force the other into an unfair

agreement, does so..." Citing Schreiber v. Schreiber, 795 So.2d 1054 , 1057 (Fla.Ct.App. 2001).

The Court went on to note that, despite the finding in the Chancellor's judgment that the property settlement agreement was "...adequate and sufficient", the record before the Court in Lowery at ¶29, presented a very "one sided agreement, which on its face appears inequitable". The Court opined that the principles of equitable distribution apply in all divorce cases whether based on fault grounds or irreconcilable differences. Id., at ¶29.

"An unconscionable contract is said to be an agreement by which "one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other..." In re Will of Johnson, 351 So.2d 1339, 1341 (Miss.1977)."

In Warren v. Warren, 815 So.2d 457 (¶14) (Miss. Ct. App. 2002, the Court ruled that a Chancellor is within his discretion to modify the terms in a divorce decree where he finds it necessary to protect the parties because the courts are not used as tools "for implementing unconscionable contracts which are not fair to either party."

Dr. Pace testified a trial, that when confronted with Agreement prepared by his wife's lawyer, he felt he had no choice but to sign it. He had no input into the agreement. He had little time to study it and did not read it carefully. He was in the unfortunate position of having a pregnant girlfriend and a hostile wife.

The property agreement in this case is upon review an unconscionable contract. Dr. Pace entered into an agreement that required him to pay \$1,500.00 in child support, \$1,500.00 in alimony with an escalation clause increasing the alimony to \$4,500.00 in the event she ceased to work for him. The testimony of Ms. Pace was clear that she had never worked for him and was not employed in any capacity by Dr. Pace at the time the Agreement was entered. Additionally, he was required to maintain medical insurance on Ms. Pace and be responsible for all medical and associated expenses not covered by insurance. He was required to purchase a new vehicle of her choice with no limit on cost and be responsible for the insurance and taxes associated with

same. He was required to maintain insurance on the minor children and be responsible for all costs of the medical and associated expenses not covered by insurance. He was required to pay all college expenses of the minor children including extracurricular activities without limitation as to the type of school or the expenses incurred. The Agreement required him to maintain life insurance for the benefit of Ms. Pace and the children in the amount of \$500,000.00. It required him to waive all equitable interest in the marital home but to be responsible for the note, insurance and taxes associated with same. She received all contents of the marital home. It required the alimony obligation to continue even if Ms. Pace remarried or he died. It required him to give him all interest in his business with him bearing all tax consequences associated with same and to pay his entire income at the time of entry into the Agreement to Ms. Pace. In exchange for all of the financial burden, he received a house, his clothes, tools, and each party retained their interest in their respective retirement accounts. In summary, he assumed all the expenses of Ms. Pace where she received the majority of the estate and he got an onerous burden that is impossible to meet.

If the Agreement is strictly construed then Dr. Pace at the time of entry into the Agreement was bound to pay \$1,622.00 over his actual income. Compliance with the Agreement is impossible. Dr. Pace is required to pay 77% of his net income by his calculation to Ms. Pace. At best, in addition to all the assets she received in the divorce Dr. Pace is required to pay 61% of his current adjusted income in just \$1,500.00 in child support. \$1,500.00 in alimony, and \$3,000.00 in expenses associated with the house note, insurance and taxes. The calculation as to the portion of his income does not include open-ended medical expenses on the minor children and Ms. Pace. It does not include the open-ended daycare and school expenses. It does not include the unrestricted costs associated with the purchase of a new vehicle for Ms. Pace. It does not include the unrestricted and open-ended expenses associated with the costs of a college education of the children.

The Court of Appeals has previously found that that a periodic alimony award that, in combination, commits him to pay out \$6,700 of his anticipated monthly pre-tax income of \$11,000 is excessive. Duncan v. Duncan, 815 So.2d 480 (¶13) (Miss.Ct.App 2002).

A Property Settlement Agreement which includes child custody and support terms when viewed from a substantial perspective has to be equitable and not shock the conscious of the court. In the instant case the document is so onerous and outlandish that same should not have passed judicial review at entry of the judgment of divorce.

The trial court having found the Agreement not to be unconscionable then undertook to modify certain aspects. It required alimony to end upon the death of Dr. Pace or Ms. Pace's subsequent remarriage or cohabitation. It dissolved Ms. Pace's interest in Dr. Pace's businesses. It removed from Dr. Pace the obligation to purchase a new vehicle of her choice every four (4) years. The Court however did not remove the obligation to pay for the Ms. Pace's medical expenses not covered by insurance or the vague requirements required by the college expense provision.

When read as a whole the Agreement is unconscionable and therefore unenforceable. The Court erred by not modifying or reforming the Agreement in a manner that was equitable to all parties and the terms of which were possible to accomplish.. This Court should reverse the Chancellor's ruling and remand this cause to the trial court to reform/modify the Agreement.

3. WHETHER THE COURT WAS IN ERROR FOR AWARDING A JUDGMENT FOR UNPAID HOUSE NOTE, INSURANCE AND TAXES IN THAT A CONDITION PRECEDENT TO THE AGREEMENT WAS NOT MET TO INCREASE ALIMONY.

A condition precedent has been defined as a "condition which must be performed before the agreement of the parties shall become a binding contract or ... a condition which must be fulfilled before the duty to perform an existing contract arises." Mid-Continent Telephone Corp. v. Home Telephone Co., 319 F.Supp 1176 (N.D. Miss 1970); (citing 17A C.J.S. Contracts §338, pp. 318-319; 17 Am.Jur.2d, Contracts, § 321, p. 751; Restatement. Contracts, § 250; 3A Corbin

on Contracts, § 628, p. 16). "If a fact or event is a condition precedent to a promisor's duty to render the performance promised, its absence or non-occurrence is a 'defense' in an action brought against him for breach of his promise." Corrigan Dispatch Co. v. Casa Guzman, 696 F.2d 359, 363 (5th Circ. 1983 (quoting 3A A. Corbin, Contracts § 632 (1960))).

The Agreement provided that Dr. Pace was to pay \$1,500.00 in alimony which would automatically increase to \$4,500.00 in the event that she quits or is terminated from her position of employment with Dr. Pace. Ms. Pace testified that she was never an employee of Dr. Pace and was not an employee of Dr. Pace when she entered into the Agreement. Dr. Pace paid \$6,000 per month to cover child support, alimony and expenses of the house, insurance and taxes. The testimony showed that the amount paid was sufficient to cover the expenses of the agreement if the alimony due was \$1,500.00. In fact the testimony showed that Ms. Pace was receiving money that far exceeded all of her expenses.

The real issue is whether or not Dr. Pace owed \$1,500.00 or \$4,500.00 per month in alimony. Dr. Pace contends that he owed \$1,500.00 per month. The increase in alimony only arises in the event that Ms. Pace's employment with Dr. Pace is ended. She testified that she was never an employee nor received a check for services rendered to any business of Dr. Pace. In order for the additional alimony to be paid, Ms. Pace had to meet the condition precedent of employment by Dr. Pace. As she was never an employee of Dr. Pace it is impossible for her to meet the criterion to automatically increase her alimony.

Further it is a well settled principle of law that when interpreting a contract said contract will be narrowly construed in favor of the non-drafter of the agreement when the terms are ambiguous. In Stampley v. Gilbert, 332 So.2d 61 (Miss. 1976), this Court stated:

There is also the universal rule of construction that when the terms of a contract are vague or ambiguous, they are always construed more strongly against the party preparing it. Globe Music Corp. v. Johnson, 226 Miss. 329, 84 So.2d 509 (1956); Love Petroleum Co. v. Atlantic Oil Producing Co., 169 Miss. 259, 152 So. 829 (1934).

332 So.2d at 63. This Court recently adhered to this long standing principle in Merchants Nat. Bank v. Stewart, 608 So.2d 1120 (Miss.1992), stating:

We have construed written instruments narrowly against the drafter when there is uncertainty or ambiguity as to the intent of the parties. Clark v. Carter, 351 So.2d 1333 (Miss.1977); Stampley v. Gilbert, 332 So.2d 61 (Miss.1976); Miss. State, etc. v. Dixie Contractors, 375 So.2d 1202 (Miss.1979); accord, Baton Rouge Contracting, Co. v. West Hatchie Drainage Dist., 304 F.Supp. 580 (N.D.Miss.1969), aff'd per curiam 436 F.2d 976 (5th Cir.1971); United States v. American National Bank, 255 F.2d 504 (5th Cir.1958).

There is no dispute that the Agreement was drafted by Ms. Pace. Dr. Pace signed the Agreement presented to him which was drafted by Ms. Pace's attorney. Dr. Pace had not input into the creation of the Agreement. Accordingly, any ambiguity as to the amount of alimony awarded should be held against Ms. Pace and in favor of Dr. Pace.

The testimony shows that Ms. Pace credited Dr. Pace's payments of \$6,000.00 to include alimony at \$4,500.00 per month. Dr. Pace intended to pay \$1,500.00 in alimony with the remaining \$3,000.00 to be applied to the house note, insurance, taxes and other expenses incurred. The testimony is uncontradicted that if alimony is \$1,500.00 per month Dr. Pace is in full compliance with the Agreement with no arrearage being owed or due to Ms. Pace. In fact, Dr. Pace has paid more than required by the Agreement.

Since employment by Dr. Pace and Ms. Pace's subsequent termination of said employment are conditions precedent to an increase in the award of alimony, the trial court was in error to award a judgment against Dr. Pace. Further, all ambiguities in the alimony provision must be construed in favor of Dr. Pace. Accordingly, the Court erred in not ruling that Dr. Pace was required to pay \$1,500.00 in alimony and therefore in full compliance with the Agreement. This Court should reverse the Chancellor and establish the amount of alimony at \$1,500.00 per month.

4. WHETHER THE COURT FAILED TO MODIFY THE AGREEMENT BY CLARIFYING AMBIGUOUS TERMS CONTAINED THEREIN CONTRARY TO LAW.

The Agreement required Dr. Pace to maintain medical insurance and be responsible for all costs not covered by insurance on Ms. Pace and the children. The Court refused to modify this provision stating that Dr. Pace had entered into this Agreement.

The Court refused to apply or consider Duncan v. Duncan, 818 So.2d 480 (Miss. Ct.App. 2002) which held that the trial court was in error for ordering payment of a potentially unlimited obligation in the form of unanticipated medical expenses. The Court went further stating

“that any provision regarding provision of health care extending beyond the creation of an obligation to provide health insurance under terms where the costs of coverage are known and can, therefore, be assessed as to reasonableness is an abuse of discretion as an attempt to provide for future automatic modifications of the level of support without regard to the necessary factors that must support a bid to modify alimony. Tillman v. Tillman, 791 So.2d 285, 288(¶ 10) (Miss.Ct.App.2001).

Duncan @ ¶14.

The theory that the Court can not order an automatic modification of the level of support without regard to the necessary factors to support such a modification also applies to the college expenses assigned to Dr. Pace. There is no way to know or plan for extracurricular expenses not specified and which are in fact open-ended. No restricts as to the school or any cap was placed on the college expenses to allow Dr. Pace to be able to plan and prepare for what the future holds. The potential to not be able to meet his own reasonable needs is clearly present.

The Court was in error not to modify the provision regarding medical and college expenses due to the ambiguity of the obligation. The fact that Dr. Pace agreed to same does not relieve the trial court of recognizing the problems associated with such awards or refusing to address same. Unlimited financial obligations are contrary to law and the Chancellor erred in not modifying the contested provisions.

As the provisions concerning medical expenses and college education are open-ended

effectively creating an escalation clause without the necessary proof, this Court should reverse the Chancellor's decision .

5. WHETHER THE COURT ERRED IN ITS RULING OF CONTINUING DR. PACE'S OBLIGATION TO PAY FOR THE FORMER MARITAL DOMICILE INCLUDING INSURANCE AND TAXES AS SAID RULING IS AMBIGUOUS AND UNENFORCEABLE.

The Court ordered that Dr. Pace continue to pay the balance of the marital house payment outstanding at the time of the refinancing along with the insurance and taxes on said property. However, the testimony of Ms. Pace was that she had refinanced the property in order to obtain the equity out of same. Additionally, she had refinanced the loan for a longer term than existed at the time of the divorce.

The refinancing of the property per the testimony cancelled the note existing at the time of the divorce. The Judge failed to state when the obligation would end or the amount due. Accordingly, Ms. Pace can continue to refinance the marital house in perpetuity and thus prevent Dr. Pace from ever reducing or eliminating his obligation in regards to the marital home.

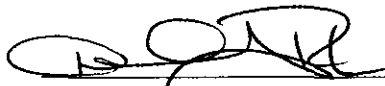
In order to make a judgment enforceable the judgment or order must not be vague or ambiguous as to its terms. However, if the judgment or decree giving rise to the contempt action is overly vague or nonspecific, a finding of contempt is improper. *Moses v. Moses*, 879 So.2d 1036 (¶14) (Miss.2004); (citing *Vockroth v. Vockroth*, 200 So.2d 459, 463 (Miss.1967)); (*Newell v. Hinton*, 556 So.2d 1037, 1044 (Miss. (1990). "[Before a person may be held in contempt of a court judgment. the judgment must be complete within itself-containing no extraneous references, leaving open no matter or description or designation out of which contention may arise as to the meaning." *Moses*, 879 So.2d 1036 at (¶ 15) (citing *Wing v. Wing*, 549 So.2d 944, 947 (Miss. 1989). Further, a judgment should not leave a judicial question open for determination by the parties or those "charged with execution" of a judgment. order or decree. *Wing*, 549 So.2d at 947.


The Court erred in not cancelling the obligation to pay the marital house note, insurance and taxes. At best the court has entered a Judgment that is vague as to the duration and amount. A judgment that is vague is unenforceable. The Court should remand this issue back to the trial court for clarification.

CONCLUSION

For the above stated reasons this court should reverse the Chancellor and determine the Agreement to be unconscionable. This case should be remanded back to the trial court to reform/modify the Agreement. This Court should determine the Agreement as unenforceable and remand the case to the trial court for further proceedings to reform the Agreement. The Court should find that the monetary judgment was in error and reverse the trial court. The Court should find that the condition precedent was not met to gain an increase in the amount of child support and reverse the Chancellor's arrearage judgment. This Court should find that the chancellor erred in not modifying the insurance and college provisions of the Agreement and reverse and render the chancellor or remand for further consideration.

Respectfully submitted, this the 22nd day of January, 2009.



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CERTIFICATE OF SERVICE

I, DAVID A. ROBERTS, Attorney for Appellant, do hereby certify that I have this date provided a true and correct copy of the above and foregoing Brief of Appellant to the following interested parties by U.S. Mail, postage prepaid, to addresses noted:

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CERTIFIED, this the 22nd Day of January, 2009.



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