IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PAUL J. WEBSTER, SR. — APPELLANT

VERSUS — NO. 2008-CA-00518

REBECCA J. WEBSTER — APPELLEE

APPEAL FROM THE CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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(ORAL ARGUMENT NOT REQUESTED)

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PAUL J. WEBSTER, SR.	**APPELLANT**
VERSUS	**NO. 2008-CA-00518**
REBECCA J. WEBSTER	**APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellee, REBECCA J. WEBSTER, hereby certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or recusal.

1. Paul J. Webster, Sr., Appellant
2. Rebecca J. Webster, Appellee
3. G. Charles Bordis, IV
   Attorney for Appellant
4. Gary L. Roberts
   Attorney for Appellee
5. Hon. D. Neil Harris
   Chancellor

Respectfully submitted, on this the 9th day of December, 2008.

GARY L. ROBERTS

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2.

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3.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DIRECTING PAUL J. WEBSTER, SR. TO PAY REBECCA J. WEBSTER'S ATTORNEY'S FEES, COURT COSTS AND PROCESS EXPENSES IN THE AMOUNT OF $2,142.00

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The parties to this proceeding, REBECCA J. WEBSTER and PAUL J. WEBSTER, SR. (Rebecca and Paul respectively), were divorced on the ground of irreconcilable differences in the Chancery Court of Jackson County on June 2, 2000 (CP 13-20). They are the parents of three (3) children. The eldest, Paul, Jr., a male, was born on July 11, 1982. Jordan, another male, was born January 13, 1989, and Sydney, a female was born on February 6, 1995. The parties were awarded the joint physical and legal custody of the minor children, and the Agreed Child Custody and Property Settlement Agreement, which was incorporated into the Judgment of Divorce, directed each party to pay child support of $200.00 bi-weekly to the other. The agreement notes that "...the parties earning power is approximately the same". (CP 17).

The agreement (although not perfect in grammar, syntax or punctuation) goes further to direct that Paul was to be responsible for

> "...all of the children's daycare, however the parties shall be equally responsible for one-half of the other expenses related to the children whether medical, dental, ocular and other health related expense. Should the parties obtain health insurance, then each will be responsible for one-half of the premium and any remainder after insurance has paid on the above will be split equally along with the clothing and school expenses for the children, extracurricular lessons to include dance lessons and guitar lessons or other lessons should the children so choose..."

reasonable sums of money for Jordan in connection with his college education, even though the original agreement referred specifically to "school expenses". She also asked for attorney's fees and all costs.

Paul filed a timely Answer, denying the material allegations of Rebecca's Complaint (CP 42-44).

After a continuance, the matter came on for trial on September 10, 2007 (after Jordan had already begun his college career), with the Honorable Neil Harris, Chancellor, presiding. The parties announced to the Court that they had amicably resolved certain issues between them and the remaining issues were submitted to the Court for adjudication following a trial. A Judgment was entered, incorporating the agreements reached by the parties and delineating the issues adjudicated by the Court. The agreed portion of the Judgment (CP 49-55), reflects the following:

1. That within thirty days from and after September 10, 2007, Paul would pay Rebecca $1,451.50, representing reimbursement by Paul to Rebecca for one-half of the direct Fall Semester college expenses for Jordan, all of which had subsequently been advanced by Rebecca.
2. That within thirty days from and after September 10, 2007, Paul would reimburse Rebecca another $894.15 for one-half of the miscellaneous college related expenses paid by Rebecca in connection with Jordan's enrollment and attendance in college for the Fall 2007 Semester.
3. That each of the parties, by no later than January 1, 2008, would pay to the University of Mississippi

$1,451.50, representing each portion's share (one-half each) of the Spring 2008 semester college expenses for Jordan, exclusive of grants, scholarships and loans already obtained and/or awarded.

4. That commencing October 1, 2007, each party would forward to Jordan $100.00 per month for miscellaneous expenses.

5. That the parties would retain joint legal and physical custody of Jordan and Sydney.

6. That all provisions pertaining to the health, medical and dental care for Jordan and Sydney in the original Judgment of Divorce are to remain in full force and effect. However, for Sydney, the parties set aside the requirement that they split equally her clothing, school and extracurricular expenses, and instead each party would be solely responsible for the day-to-day care expenses for Sydney when she is in the care of each of them respectively.

On the issues that the parties did not amicably resolve, the October 12, 2007 Judgment reflects, after a hearing before the Chancellor, that:

(1) Each party will be responsible for one-half of the normal and customary college and college related expenses incurred for or on behalf of each of the minor children for a total of eight semesters. The parties were directed to confer and consult with one another sufficiently in advance of such expenses to attempt to

ensure that they are all paid in a timely fashion by each parent. All such payments are exclusive of loans, scholarships and grants; and

(2) Within sixty (60) days from and after September 10, 2007, Paul would pay to Rebecca $1,083.01 representing reimbursement to her for half of the expenses incurred by her for the two children from June 2006 through the date of the hearing, as evidenced by Exhibit 1 in evidence; and

(3) Paul was also to pay to Rebecca, within sixty days, $2,142.00 representing reimbursement to Rebecca for her attorney's fees, filing fees and process fees in connection with the case.

Paul filed a timely post-trial Motion (CP 57-59). Rebecca responded with a Motion for the Assessment of Additional Attorney's Fees (CP 60-61).

Following a hearing, the Court entered its Amended Judgment on March 5, 2008, which was effective nunc pro tunc to October 12, 2007 (CP 65-66). The Amended Judgment specifically includes language that Paul was found in contempt for failure to pay Rebecca the sums that were due under the Property Settlement Agreement, and the Chancellor directed Paul to pay Rebecca the $2,142.00 in attorney's fees and expenses previously ordered within ten days from and after March 5, 2008.

The Court also acknowledged committing error in its October 12, 2007 Judgment by requiring Paul to contribute half of the

college expenses for his children for "eight semesters". Accordingly, the March 5, 2008 Amended Judgment reflects that Paul owes half of the college and school expenses until the children respectively reach the age of majority, and that such expenses shall be paid by him within ten days of them being incurred.

Being aggrieved by the Judgment and the Amended Judgment, Paul has appealed to this Court.

B. FACTUAL HISTORY

The case came on for trial on September 10, 2007, although the Judgment was not entered until October 12, 2007. The transcript of the testimony is brief and straight-forward. The parties first announced to the Court the terms and provisions of the issues upon which they had reached agreement. Those terms were dictated into the record and are encompassed in the October 12 Judgment. (T 4-9)

The parties then tried the unresolved issues.

Rebecca Webster was called as the first witness and Exhibit 1, entitled "UNPAID RECEIPTS" was admitted into evidence without objection (T 10). That document summarizes the sums of money Rebecca claims are owed to her by Paul for expenditures that she incurred on behalf of the minor children, and which, under the terms of the property settlement agreement are the financial responsibility of both parties equally. Rebecca testified that she had previously provided copies of all of the receipts to Paul (T 11), but got no payment. She asserted that, from the time the parties were first divorced up until approximately June of 2006,

she experienced no problems in getting reimbursement, but beginning in June of 2006, she could get no further payments from Paul.

Rebecca went on to testify about her efforts to notify Paul regarding Jordan's upcoming college expenses, and that she also always talked in advance to Paul before incurring any expenses for Sydney for which she (Rebecca) expected reimbursement (T 15-16).

Each of the parties respective Uniform Chancery Court Financial Declarations were admitted into evidence by agreement (T 17).

Paul Webster was called as an adverse witness. He confirmed that he was self-employed and paid himself a salary of $4,000.00 per month, as shown on his Financial Declaration. (T 17) He testified that he has $130,000.00 worth of equity in his home, and $39,000.00 in the bank in savings and checking accounts (T 18). He admitted that he agreed to reimburse Rebecca for his portion of the college expenses, but stated that he

> "didn't find out he (Jordan) was going to college until like about a month ago. August 18, I believe, is when I first got a letter" (T 18).

Paul acknowledged that of the approximate $16,000.00 to $17,000.00 per year for college costs at the University of Mississippi, exclusive of books, there was less than $3,000.00 for he and Rebecca to share per semester (T 25).

However, Paul later acknowledged that he had received three written communications from Rebecca (Exs P-4, P-5 and P-6), setting out Jordan's plans to attend the University of Mississippi and describing the expenses, exclusive of scholarships, grants and

loans (T 20-29). He acknowledged receiving each of those letters well prior to Rebecca filing suit.

The attorney's contract of employment with Rebecca was admitted into evidence without objection (T 20, Ex P-3). At the conclusion of the brief hearing, the Court ruled from the Bench (T 29-31).

SUMMARY OF THE ARGUMENT

ISSUE ONE

The trial court did not commit reversible error when it directed Paul to pay for half of his minor son's college education, exclusive of scholarships, grants, and other financial aid. The expenses for Jordan's first two semesters at Ole Miss were resolved by agreement and are embodied in Paragraphs 2 A., 2 B. and 3 of the October 12, 2007 Judgment. He cannot now object to payments which he agreed to make. Further, case law is abundantly clear that Paul has a legal obligation to contribute to Jordan's college education for the remainder of Jordan's minority.

ISSUE TWO

The trial court did not commit reversible error when it found Paul to be in contempt for failing to reimburse Rebecca for sums of money that he agreed to pay under the terms of the original Judgment of Divorce. Moreover, he cannot object on appeal to a summary of those itemized expenditures when he raised no such objection at trial, and the itemization was admitted into evidence by agreement.

ISSUE THREE

Finally, the trial court certainly did not commit error in directing Paul to pay Rebecca's attorney's fees. The evidence clearly showed that he had been previously provided with copies of all the bills for which reimbursement was sought. The evidence likewise clearly established Paul's long-standing refusal to pay. Moreover, the record is abundantly clear that Paul had more than ample ability to pay his obligations and simply elected not to do so. Such blatant disregard of a Court Order triggers Rebecca's right to attorney's fees.

ARGUMENT

Standard of Review

When it comes to resolving disputed questions of fact, Chancellors are accorded great discretion. They will not be reversed on appeal unless they commit manifest error in findings of fact and the decision is so oppressive, unjust or grossly inadequate as to evidence an abuse of discretion. Powers v. Powers, 568 So.2d 255, 257 (Miss. 1990); Carpenter v. Carpenter, 519 So.2d 891, 894-95 (Miss. 1988); Voda v. Voda, 731 So.2d 1152 (Miss. 1999). It is not the job of the appellate court to reweigh the evidence. Because of his unique position in the courtroom, the Chancellor is the person best equipped to listen to the witnesses, observe their demeanor, determine their credibility, and assign the weight that ought to be ascribed to the evidence. Carter v. Carter, 735 So.2d 1109, 1113 (Miss. Ct. App. 1999); Murphy v. Murphy, 631 So.2d 812, 815 (Miss. 1994).

ISSUE ONE

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DIRECTING PAUL J. WEBSTER TO PAY ONE-HALF OF HIS MINOR SON'S COLLEGE EDUCATION EXPENSES

A parent's duty of support includes the cost of a college education if the child is qualified for higher education and the

parent is financially able to meet the expense. Pass v. Pass, 118 So.2d 769, 773 (Miss. 1960). Support for a college education can include tuition, books, room and board, necessary living expenses and any other necessary or appropriate educational expenses. In fact, the duty of a parent to provide a college education contemplates support in addition to tuition and direct college costs, because without provision for other support, the college education would "be in vain". Wray v. Langston, 380 So.2d 1262, 1264 (Miss. 1980). The child is entitled to an education "commensurate with a parent's station in life". Saliba v. Saliba, 753 So.2d 1095, 1103 (Miss. 2000). It is difficult to comprehend the precise point Paul attempts to make in his Brief. The Judgment of October 12, 2007 reflects that he agreed to pay the enumerated expenses for Jordan's first two semesters at the University of Mississippi. Further, his share of the expenses is minimal, since it is exclusive of Jordan's scholarships, grants, loans and other financial assistance. It is nothing less than pathetic for a father to object to paying less than $3,000.00 a year as a contribution toward his son's college education.

The law favors the settlement of disputes by agreement and, ordinarily, will enforce the agreement which the parties' have made, absent any fraud, mistake or overreaching. McManus v. Howard, 569 So.2d 1213, 1215 (Miss. 1990), citing First National Bank of Vicksburg v. Caruthers, 443 So.2d 861, 864 (Miss. 1983) and Weatherford v. Martin, 418 So.2d 777, 778 (Miss. 1982). This is as

true of agreements made in the process of the termination of the marriage by divorce as of any other kind of negotiated settlement. Newell v. Hinton, 556 So.2d 1037, 1042 (Miss. 1990).

In his Brief, Paul asserts that the Court failed to consider Jordan's aptitude to attend college and that the lower court had no knowledge of the child's abilities. His Brief also asserts that Rebecca failed to provide proof concerning the costs of the college.

If such an assertion were true, why, then, did Paul agree to be responsible for a small portion of Jordan's college expenses for the first two semesters?

The answer lies in the fact that Paul's assertions are couched in untruth, as revealed by the record. For instance, Exhibit P-4, which was delivered to Paul in September of 2006, a year prior to the trial, itemizes certain college prep expenses (for instance ACT testing) and clearly indicates that Jordan wanted to attend the University of Mississippi. The April 18, 2007 letter (Exhibit P-5), which was received by Paul almost three months prior to the initial Complaint filed by Rebecca, attaches a copy of Jordan's acceptance letter at Ole Miss. Under these circumstances, it is incredible that Paul would argue he was unaware that his son was capable of attending college. This is all the more true when considering that Paul himself was a joint legal custodian of Jordan.

Finally, Exhibit P-6, is the May 21, 2007 letter received by Paul outlining Jordan's financial aid. The exhibit to that letter shows expected college expenses for the first year of $16,206.00.

Yet Paul's portion for the first semester is a mere $1,451.50 (less than ten percent of the year's total). The letter was received by Paul on May 22, 2007, more than six weeks prior to Rebecca filing suit on July 9, 2007.

All of this occurs at a time when Paul, by his own admission, is making $4,000.00 a month, has $39,000.00 in the bank, and $130,000.00 of equity in his home. For him to suggest under these circumstances that the Chancellor committed reversible error by ordering him to pay nominal education costs during Jordan's minority is disingenuous at best, particularly when considering that Paul agreed to pay these very same expenses for Jordan's freshman year.

ISSUE TWO

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN FINDING PAUL J. WEBSTER, SR. TO BE IN CONTEMPT OF COURT AND ORDERING HIM TO PAY $1,083.02 TO REBECCA WEBSTER FOR REIMBURSEMENT OF EXPENDITURES MADE BY HER FOR THE MINOR CHILDREN

Paul next argues that the Chancellor committed reversible error when he found Paul to be in contempt of Court and ordered him to pay $1,083.02 to Rebecca. He asserts in his Brief that Rebecca failed to produce receipts in support of the purchases, and that the best evidence of the expenditures would be cancelled checks and receipts.

The record shows that Exhibit P-1, the document at issue, was admitted into evidence without objection (T 10). In fact, the Chancellor specifically asked Paul's counsel if he had any

objection and the response was: "No, Judge". (T 10, line 10). An issue that was not raised at trial may not be considered on appeal. Ory v Ory, 936 So.2d 405, 410 (Miss. Ct. App. 2006).

Additionally, when Rebecca was asked about the list, her uncontradicted testimony established that she had provided Paul with documentation for every entry on many prior occasions (T 11).

Paul also argues that, when Rebecca mentioned a specific figure of $800.00 in her Complaint, it is erroneous for the Court to award Rebecca a Judgment in excess of that sum. However, Paul cites no authority in support of his argument. In truth, Paragraph 10 of the Complaint filed by Rebecca on July 9, 2007 requests, inter alia, a Judgment against Paul "...for all sums due and owing to her by the Defendant as shown at a hearing hereon, including interest on all sums due and owing, reasonable attorney's fees and all costs;".

The kind of payments at issue here are obviously child support-in-kind. Past due child support payments become a final Judgment when they are due. Brand v. Brand, 482 So.2d 236, 237 (Miss. 1986). In this case, the amount claimed by Rebecca at trial to be due and owing to her by Paul was precise, in fact, to the penny. Much less precise Judgments have been affirmed on appeal. For instance, see Andrews v. Williams, 723 So.2d 1175, 1178 (Miss. Ct. App. 1998), where the exact judgment of arrearage was based primarily on the custodial parent's memory.

Next, as part of this issue, Paul argues that the Chancellor committed reversible error when he refused to allow Paul the

opportunity to introduce evidence about expenses that he himself had incurred, and for which he should be reimbursed by Rebecca (essentially arguing that he is entitled to a credit or set-off). What Paul fails to point out in his Brief, however, is the fact that Paul's request for credit came, not at the time of trial, but after the trial was over and when his new counsel was arguing a Motion for Reconsideration (T 37). Put differently, Paul now argues that the Chancellor should be placed in error for refusing to admit into evidence documents which were not offered at the time of trial.

What Paul tacitly seems to be arguing is that he should not really have been found in contempt. The evidence simply leads to an inescapable conclusion to the contrary. The purpose of civil contempt is to compel a party to obey the orders of a court. Jones v. Hargrove, 516 So.2d 1354, 1357 (Miss. 1987). The finding of contempt is within a Chancellor's discretion, because by institutional circumstances and both temporal and visual proximity, a Chancellor is "infinitely more competent to decide" such matters than an appellate court. Elliott v. Rogers, 775 So.2d 1285, 1291 (Miss. Ct. App. 2000). A prima facie case of contempt is made by showing non-payment. Strack v. Sticklin, 959 So.2d 1, 4 (Miss. Ct. App. 2006). The burden then shifts to the Defendant, who may rebut the prima facie case by proving inability to pay, that the default was not willful, or that the performance was impossible. If the Defendant attempts to prove inability to pay, he must do so with particularity and not in general terms. Morreale v. Morreale, 646

So.2d 1264, 1267 (Miss. 1994). A Defendant failed to show inability to pay, when he admitted buying and renovating a house with his girlfriend and that he had funds for personal pleasure. Wesson v. Wesson, 818 So.2d 1272, 1279-81 (Miss. 2002). In McCardle v. McCardle, 862 So.2d 1290, 1293 (Miss. Ct. App. 2004), our Court of Appeals affirmed a finding of contempt when the evidence showed that the Defendant's savings exceeded the amount owed.

In the instant case, Paul Webster had $39,000.00 in savings and checking accounts in the bank. It is ludicrous to suggest that the Chancellor was in error in finding Paul in contempt for his failure to pay money which Paul himself had agreed to pay in the Property Settlement Agreement.

ISSUE THREE

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DIRECTING PAUL J. WEBSTER, SR., TO PAY REBECCA J. WEBSTER'S ATTORNEY'S FEES, COURT COSTS AND PROCESS EXPENSE IN THE AMOUNT OF $2,142.00

Someone who successfully prosecutes an action for contempt is entitled to attorney's fees without showing of need. "To hold otherwise would cause no peril to those restrained from certain conduct if they violate the orders of a court." Smith v. Little, 843 So.2d 735, 738 (Miss. Ct. App. 2003). In Ladnier v. Logan, 857 So.2d 764, 770-71 (Miss. 2003), our Supreme Court held that a custodial parent may be awarded attorney's fees for prosecuting an arrearage action on behalf of minor children, precisely as Rebecca

has done in the case sub judice. In Faris v. Jernigan, 939 So.2d 835, 840 (Miss. Ct. App. 2006), it was held that a mother, who refused to return a child from visitation in another state, was required to pay $40,000.00 in attorney's fees. In Rushing v. Rushing, 909 So.2d 155, 158-59 (Miss. Ct. App. 2005), a Chancellor was affirmed when he ordered the payment of attorney's fees in a former wife's successful petition for contempt for alimony arrearages. And, in Stribling v. Stribling, 906 So.2d 863, 872 (Miss. Ct. App. 2005), a Chancellor's award of $24,901.00 in attorney's fees in a contempt action was affirmed.

Determining attorney's fees is a matter within the discretion of a chancellor. Magee v. Magee, 66 1 So.2d 1117, 1127 (Miss. 1995). Nonetheless, Paul argues that Rebecca was required at trial to satisfy the requirements of McKee v. McKee, 418 So2d. 764 (Miss. 1982).

In cases of contempt, McKee has been effectively overruled. A Chancellor does not need to engage in a McKee analysis to award fees in a successful contempt action. Bounds v. Bounds, 935 So.2d 407, 412 (Miss. Ct. App. 2006). The attorney's contract of employment showed that Rebecca had paid a $2,000.00 retainer to bring the instant action. The Chancellor determined that it was a reasonable fee.

Finally, Rebecca Webster is also entitled to attorney's fees in connection with this appeal. Although there is no hard and fast rule, fees are customarily awarded to the successful party on appeal, usually half of the amount of trial. Lauro v. Lauro, 924

CONCLUSION

Paul Webster's appeal of the March 5, 2008 Amended Judgment is meritless. He has no legal or factual authority in support of any proposition he advances.

He cannot be heard to complain about college expenses for his son Jordan. He agreed to pay his fair share for Jordan's freshman year. Long-standing and well-established case law clearly directs him to contribute in accordance with his financial abilities for the remainder of Jordan's minority. Particularly is this true where, as here, Paul's out-of-pocket share amounts to less than $3,000.00 per year. He should be grateful he has such a gifted child who qualifies for, and who actually has obtained, a great deal of other financial aid.

All this comes at a time when Paul is clearly and unmistakably in contempt. He simply elected to ignore expenses that the agreed divorce in 2000 directed him to pay. He did so at his own peril.

Rebecca's award of nominal attorney's fees at trial should accordingly be approved. Likewise, Paul should be assessed costs, damages and attorney's fees for his frivolous appeal.

Respectfully submitted,

REBECCA J. WEBSTER

BY: _____
GARY L. ROBERTS

CERTIFICATE OF SERVICE

I, GARY L. ROBERTS, do hereby certify that I have this day mailed by U.S. Mail, postage prepaid and properly addressed, a true and correct copy of the above and foregoing **Brief of Appellee** to Charles Bordis IV, Esq., and hand delivered a copy of same to the Hon. Neil Harris, Chancellor on this the 9th day of December, 2008.

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