

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PAUL J. WEBSTER, SR.

APPELLANT

VERSUS

CAUSE NO. 2008-CA-00518

REBECCA J. WEBSTER

APPELLEE

BRIEF OF APPELLANT

G. CHARLES BORDIS, IV
ATTORNEY AT LAW
POST OFFICE BOX 803
OCEAN SPRINGS, MS 39566-0803
228/875-1904

TABLE OF CONTENTS

	Page(s)
Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii
Statement of Issues	1
Statement of Facts	2
Issue 1	6
Issue 2	10
Issue 3	13
Conclusion	17
Certificate of Service	19

STATEMENT OF ISSUES

ISSUE 1:

DID THE LOWER COURT ERR IN ORDERING
PAUL TO PAY ONE-HALF OF THE COLLEGE AND
SCHOOL EXPENSES OF THE CHILD

ISSUE 2:

DID THE LOWER COURT ERR IN ADJUDICATING
PAUL TO BE IN CONTEMPT OF COURT AND
ORDERING PAUL TO PAY \$1,083.02 TO REBECCA

ISSUE 3:

DID THE LOWER COURT ERR IN ORDERING
PAUL TO PAY REBECCA'S ATTORNEYS
FEES AND EXPENSES IN THE AMOUNT OF \$2,142.00

On July 9, 2007, Rebecca filed a Complaint for Citation of Contempt, Modification of Final Judgment of Divorce and Other Relief. (CP 27-41) Rebecca alleged that Paul failed to comply with the terms of the Final Judgment of Divorce by failing to pay for the minor children's clothing and school expenses and extracurricular expenses. Specifically, Rebecca claimed that Paul owed her a total of \$800.00. Rebecca further alleged that a material and substantial change in circumstances had occurred since the entry of the Final Judgment of Divorce which adversely affected the children. She sought a modification of the Final Judgment of Divorce so as to award her legal and physical custody of the two youngest children. She also sought a modification seeking an order requiring Paul to pay child support and also sought a decree requiring Paul to contribute to the college and attendant expenses of Jordan K. Webster, a minor. (CP 27-31) Paul filed an Answer denying that Rebecca was entitled to the relief she sought and requesting a dismissal of Rebecca's Complaint. (CP 42-44)

On October 12, 2007, the Court issued a Judgment which allowed Rebecca and Paul to retain joint legal and joint physical custody of the two (2) youngest children and all provisions regarding the health, medical and dental care of the children remained as previously ordered in the Final Judgment of Divorce. (CP 49-54) The oldest child is emancipated by age.

Amended Judgment further adjudicated Paul to be in contempt for failure to pay sums due Rebecca under the Property Settlement Agreement and required Paul to pay \$2,142.00 for attorneys fees and expenses within ten (10) days. School expenses and/or college expenses were to be paid within ten (10) days of being incurred. Finally, all other relief prayed for by the parties was denied. (CP 65-66)

Aggrieved by the decision of the lower court, Paul perfected this appeal.

attend college. There was no evidence presented to the Court by Rebecca which indicated that the child was capable of maintaining passing grades in college. In other words, Rebecca failed to offer the child's transcript, report card, ACT or SAT scores or any other evidence which would shed light upon the child's ability to successfully complete college level courses. The lower court was without knowledge of the child's abilities or lack thereof.

Rebecca also failed to provide any proof as to the cost of providing the child with a college education. The record in the lower court has only two (2) references to college expenses. The first is a document which is titled "Unpaid Receipts" which was offered by Rebecca. (Ex. P-1) The document did not include any receipts or proof of payment. The document refers to a \$25.00 registration fee at the University of Mississippi and a \$100.00 orientation fee. The second document is a letter dated April 18, 2007, which Rebecca sent to Paul and which refers to the registration fee orientation fee.

While Rebecca forwarded estimated costs for tuition, room and board, books, etc., for an in-state resident at the University of Mississippi to Paul, there is no proof in the record of whether the child resided in the dormitory, had books available to him, joined fraternities, etc. (Ex. P-6)

The information submitted to Paul by Rebecca were estimates. These estimates

and on behalf of each of the minor children for a total of eight (8) semesters. The lower court further ordered the parties to confer and consult sufficiently in advance of the expenses to attempt to ensure that all expenses are paid in a timely fashion by the parties and that all payments would be exclusive of scholarships, grants and loans obtained by the children. (CP 49-54) Following post trial motions, the lower court entered an Amended Judgment which required Paul to pay one-half (½) of college and school expenses until the child reaches the age of majority. (CP 64-65)

The October 12, 2007, Judgment referred to the children and the Amended Judgment refers to the child, which causes confusion since the Amended Judgment did not incorporate the language of the October 12, 2007, Judgment.

Without any proof of Jordan's ability to complete college level courses and without proof of the actual cost of sending Jordan to college, it was impossible for the lower court to analyze the issue of college expenses in accordance with prevailing case law. Since this evidence was not presented by Rebecca, she has failed to meet her burden of proof. This fact, coupled with financial inability of Paul to contribute to college costs, requires that the lower court's judgment be reversed and rendered. At the very least, the case would have to be remanded in order that a record could be developed and with specific instructions to the lower court to prepare a findings of fact and conclusions of law.

or other proof of payment.

A careful review of the document identified as “Unpaid Receipts” reveals that Rebecca submitted expenses which were not school, clothing or extracurricular lessons. Examples of such expenditures are haircuts, rear brake job, makeup, Halloween costume, cell phone, tennis grip and re-string of tennis racquet. (Ex. P-1) There is no court order which required Paul to satisfy these expenses and therefore Paul cannot be in contempt of court. A decree must be sufficiently specific as to the duties and responsibilities of a party in order to be enforced by contempt. See Young v. Deaton, 766 So.2d 819 (Miss. Ct. App. 2000)

The expenditures set forth in the document identified as “Unpaid Receipts” were incurred between June, 2006, and May, 2007. Rebecca’s Complaint for Citation of Contempt, Modification of Final Judgment of Divorce and Other Relief was filed on July 9, 2007. (CP 27-31) As such, all of the expenses were incurred prior to the filing of the Complaint. (Ex. P-1) In the Complaint filed by Rebecca, she specifically seeks the sum of \$800.00 as reimbursement for school expenses, clothing and extracurricular lessons. Obviously, the lower court awarded Rebecca a judgment for a sum which exceeds that which she prayed for.

The lower court also failed to take into consideration Paul’s testimony that he purchased many items of clothing for the children and that Rebecca would be

ISSUE 3:

DID THE LOWER COURT ERR IN ORDERING PAUL PAUL TO PAY REBECCA'S ATTORNEYS FEES AND EXPENSES IN THE AMOUNT OF \$2,142.00

The lower court ordered Paul to pay Rebecca the sum of \$2,142.00 as reimbursement for attorneys fees, filing fees and process fees. (CP 53) In the Amended Judgment, the lower court again ordered Paul to pay unto Rebecca the sum of \$2,142.00 for attorneys fees and expenses.

During the trial on the merits, no testimony was offered regarding attorney's fees. Rebecca's attorney introduced into evidence an attorney's fee contract. (T 19, 20) The contract provided that Rebecca would pay her attorney a \$2,000.00 non-refundable retainer to represent her in a modification and contempt action. (Ex. 3)

Neither Rebecca nor her attorney presented any testimony or proof as to the nature of the services rendered by the attorney. Rebecca offered no proof as to skill and standing of her attorney, the novelty or difficulty of the issues, the legal work which would be reasonably required or necessary, the amount of time spent by the attorney on the modification issue and the amount of time spent by the attorney on the contempt issue. (T 10-17)

The issue regarding attorneys fees is one that has been considered by this Court on many occasions. In divorce cases and in cases involving a modification of the

order requiring Paul to pay child support. Paul successfully defended Rebecca's request for modification. The October 12, 2007, Judgment provided that the parties would retain joint legal and joint physical custody of the children and Paul was not required to pay child support to Rebecca. (CP 49-55) It would be inequitable to require Paul to pay Rebecca's attorneys fees on an unsuccessful attempt to modify a prior decree. To require payment of attorneys fees to Rebecca would only encourage her to continue filing requests for modification, even though she knows that she will not prevail.

In the October 12, 2007, Judgment of the lower court, Paul was not held in contempt of court. (CP 49-55) As such, Rebecca should not have been awarded attorneys fees. Cf. Scroggins v. Riley, 758 So.2d 467 (Miss. Ct. App. 2000); Hensarling v. Hensarling, 824 So.2d 583 (Miss. 2002)

In the Amended Judgment of March 5, 2008, the lower court found Paul in contempt and ordered him to pay \$2,142.00 to Rebecca for attorneys fees and expenses. The lower court made no findings as to the reasonableness of the attorneys fees and the reason for such was because no evidence was offered as to reasonableness. This Court has repeatedly held that lower courts must take into consideration the following factors when deciding the issue of attorneys fees:

1. The relative financial abilities of the parties;

CONCLUSION

The Final Judgment of Divorce was silent as to the obligations, if any, of the parties with respect to college costs incurred by the children. Rebecca filed a Complaint in which she sought a modification of the judgment regarding college costs. The lower court ordered Paul and Rebecca to satisfy one-half (½) of college costs owed; however, the Court had no proof of the child's ability to handle college level courses or the college environment in general. Furthermore, the court had only estimates of college costs and no documented proof as to actual costs incurred by the child. Paul was able to show unto the Court that he was unable to financially contribute to the college costs and certainly was not in a position to have an "open checkbook" with respect to college costs which were not specific and which were not limited in any way.

The lower court required Paul to reimburse Rebecca for expenditures that she made without first consulting Paul. The expenditures also included expenses which were not school, clothing or extracurricular activities and therefore, Paul should not be found in contempt. The Judgment of the Court exceeds that which was pled by Rebecca.

Paul has been required to pay all attorneys fees incurred by Rebecca, even though the lower court failed to adjudicate Paul to be in contempt of court.

CERTIFICATE OF SERVICE

I, G. Charles Bordis, IV, of counsel for the Appellant, do hereby certify that I have this day mailed, postage prepaid, by United States Mail, a true and correct copy of the above and foregoing Brief of Appellant, to the Honorable Gary L. Roberts, of counsel for the Appellee, to his usual mailing address of P.O. Box 237, Pascagoula, MS 39568-0237, and to Chancellor D. Neil Harris, to his usual mailing address of P.O. Box 998, Pascagoula, MS 39568-0998.

THIS the 16th day of September, 2008.



G. CHARLES BORDIS, IV

G. CHARLES BORDIS, IV
MS. BAR ID NO. [REDACTED]
P.O. BOX 803
OCEAN SPRINGS, MS 39566-0803
228-875-1904
FAX: 228-875-6481

