NO. 2008-CA-00813

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

JESSE QUALLS STIGLER III, APPELLANT

VS.

LISA ELAINE STIGLER, APPELLEE

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.

1. Jesse Qualls Stigler III
2. Lisa Elaine Stigler
3. John Robert White, Attorney of Record for Appellant
4. Jerry Wesley Hisaw, Attorney of Record for Appellee
5. Honorable Mitchell M. Lundy, Jr., Chancellor

THIS 3rd day of December, 2008.

JERRY WESLEY HISAW

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STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition

This is an appeal from the Final Judgment of Contempt and Modification entered on April 10, 2008, in the Chancery Court of Desoto County, Mississippi (hereafter "Final Judgment"), determining issues raised by Appellee, Lisa Elaine Stigler (hereafter "Ms. Stigler") and Appellant, Jesse Qualls Stigler III (hereafter "Mr. Stigler"). (R. 229). Ms. Stigler filed a Petition for Contempt on September 6, 2007, based on past child support and failure to provide proof of a life insurance policy. (R. 47). Mr. Stigler filed his Amended Answer and Petition for Contempt and Counterclaim for Modification and Other Relief on November 16, 2007. (R. 196). Mr. Stigler denied the general allegations of the complaint and made numerous allegations in his counterclaims seeking modification of his obligation due to a substantial change in his circumstances, a modification of post-secondary support, along with attorney's fees and all related court costs.

Following the trial on January 23, 2008, the Chancery Court rendered its Findings of Fact and Conclusions of Law on March 13, 2008, and entered its Final Judgment April 10, 2008. (R. 222, 229).

The chancellor properly held Mr. Stigler in contempt of court for non-payment of child support in the amount of Thirty-Eight Thousand Seven Hundred Seventy-One and 98/100 Dollars ($38,771.98) as of February 8, 2008. The chancellor calculated the arrearages based on the language from the original Divorce Judgment; on Mr. Stigler's adjusted gross income for the years 2002 through 2007, and the chancellor added interest thereon for each year to arrive at his

calculated total. The chancellor then credited Mr. Stigler for Nine Thousand Fifty-Seven and 05/100 Dollars ($9,057.05) despite the fact that Mr. Stigler provided no receipts for the amounts he was alleging he should be given credit for except for some handwritten notes he had, leaving an arrearage of Twenty-Nine Thousand Seven Hundred Fourteen and 93/100 Dollars ($29,714.93).

The chancellor then awarded attorney's fees to Ms. Stigler based on Mr. Stigler's contempt, his numerous allegations in his counterclaims which appeared to have little or no basis, and the financial disparity between the parties in the amount of Nine Thousand Nine Hundred Ninety-Eight and 35/100 Dollars ($9,998.35). The total judgment against Mr. Stigler was Thirty-Nine Thousand Seven Hundred Thirteen and 28/100 Dollars ($39,713.28) plus interest at the judgment rate of eight percent (8%). The chancellor declined to incarcerate Mr. Stigler or make any ruling as to the absence of proof of a life insurance policy.

Once the judgment was entered cleansing the hands of Mr. Stigler, the chancellor found a substantial, material change circumstances and granted Mr. Stigler a reduction in child support from Thirteen Hundred Dollars ($1,300.00) per month to Six Hundred Ninety Dollars ($690.00) per month, effective December 1, 2007. The chancellor found there was insufficient proof that Mr. Stigler's drop in income of more than one-hundred thousand dollars ($100,0000.00) was caused by his desire to go live with his fiancée in Madison, Mississippi. (R. 228). The chancellor ordered Mr. Stigler to pay the arrearages and attorney's fees awarded in an amount of One Thousand Dollars ($1,000.00) per month (in addition to the Six Hundred Ninety Dollars ($690.00) per month child support award), beginning on March 10, 2008. The chancellor declined to address Mr. Stigler's request for an amendment regarding a GPA requirement for his children.

B. Statement of the Facts

Mr. Stigler and Ms. Stigler were divorced on December 5, 1994. The parties have two (2) children, Jesse Stigler IV, (hereafter "Jesse"), who turned twenty-one (21) years of age on August 6, 2008, and Bailey Amanda Stigler, (hereafter "Bailey"), who is currently seventeen (17) years of age and who was born on June 24, 1991. Ms. Stigler has both legal and physical custody of the children of the parties.

In September of 2006, the Mr. Stigler lost his job with Storopack. However, in October of 2006, he obtained another job with New-Tech Packaging in the Memphis, Tennessee area making in excess of $80,000.00 per year which is greater than $63,000.00 per year contemplated by the Property Settlement Agreement of the parties. In November of 2006, Mr. Stigler met his fiancée who is an attorney in the Madison, Mississippi area and also attempted to start his own unsuccessful business. During this period, as in years before, Mr. Stigler attempted to justify not paying child support by attempting to offset his obligations with voluntary gifts to the minor children (Tr. 77-79).[1]

Prior to the litigation at hand, Ms. Stigler filed her first Petition for Modification and Motion to Enforce Judgment on June 17, 2002, referencing the clause in the original Divorce Judgment. (R. 40). The clause reads as follows:

> During this calendar year and each year thereafter, should Husband's bonus place the aggregate of Husband's adjusted gross income in excess of the minimum guidelines in effect in the State of Mississippi, the Husband shall pay the amount necessary to bring his child support payments $3,600.00 in excess of the minimum amount of child support as provided by the guidelines then [in] effect for the State of Mississippi based on the Husband's annual income.

[1] Citations to the trial testimony of witnesses shall be designated as "Tr. __."

In response to such action, an Agreed Order on Petition for Modification and Motion to Enforce Judgment was entered on March 13, 2003, (hereafter "2003 Order"). Mr. Stigler did not challenge any clause of the divorce decree at that time and stipulated pursuant to the agreed order of the parties that he would provide an automobile to the one of the minor children of the parties in exchange for Ms. Stigler not pursuing Mr. Stigler for additional arrearages from years prior to the entry of the order.

Following the entry of the Agreed Order on Petition for Modification and Motion to Enforce Judgment, Mr. Stigler continued to attempt to avoid paying Ms. Stigler child support by claiming that anything he gave the children was child support. Ms. Stigler finally had enough and filed a Petition for Contempt on September 9, 2007, seeking arrearages for the amounts Mr. Stigler had refused to pay her and that Mr. Stigler be incarcerated for contempt.

Pursuant to this action, the Final Judgment of Contempt and Modification was entered on April 10, 2008, which held Mr. Stigler in contempt of court and ordered him to pay Thirty-Nine Thousand Seven Hundred Thirteen and 28/100 Dollars ($39,713.28) at a rate of One Thousand Dollars ($1,000.00) per month. The chancellor properly viewed the clause of the Property Settlement Agreement concerning child support as a valid and enforceable contract in light of recent case law and based on the fact the Mr. Stigler never challenged the enforceability of the clause at any time at the trial level.

The chancellor found there was insufficient proof that Mr. Stigler's drop in income of more than one-hundred thousand dollars ($100,0000.00) was caused by his desire to go live with his fiancée in Madison, Mississippi. (R. 228). As such, the chancellor found a substantial and material change in circumstances justifying Mr. Stigler's child support obligation to be reduced to Six Hundred Ninety Dollars ($690.00) per month.

SUMMARY OF THE ARGUMENT

There was clear and convincing evidence to support finding Mr. Stigler in contempt of court for failure to pay his court ordered child support. Mr. Stigler chose not to pay his child support as ordered by the Court and instead attempted to claim everything from Teddy bears to Christmas presents as child support. The chancellor properly ordered Mr. Stigler to repay his arrearages at the amount of $1,000.00 per month which is supported by statute and also supported by the fact that he lives in a home in which he pays no bills and no rent.

Mr. Stigler never raised the enforceability of the escalation clause at the trial level and is therefore barred from raising it on appeal. However, even under the current case law, the clause would still be enforceable as written. The interest on the arrearages was calculated properly based on a date contemplated by the property settlement agreement and within the chancellor's discretion.

The chancellor properly did not address the issue of a minimum 2.0 GPA requirement for Mr. Stigler's children based on the property settlement agreement as written and based upon the increase in the grades of the minor child who was in college. The award of Ms. Stigler's attorney's fees was properly based on the finding of contempt by the Court and was additionally supported by the financial position of Ms. Stigler.

Ms. Stigler was properly awarded attorney's fees at the trial level based on the contempt of Mr. Stigler and her financial position. Due to Ms. Stigler's financial position and the contempt of Mr. Stigler, she should be awarded attorney's fees on appeal in the amount of one-half (1/2) of the amount awarded at the trial level.

ARGUMENT

STANDARD OF REVIEW

The scope of review in domestic relations matters is strictly limited. *Brawdy v. Howell,* 841 So.2d 1175,1178 (Miss.Ct.App.2003). "The Court will not disturb the chancellor's findings unless the court's actions were manifestly wrong, the court abused its discretion, or the court applied an erroneous legal standard." *Andrews v. Williams,* 723 So.2d 1175, 1177 (Miss.Ct.App.1998) (citing *Sandlin v. Sandlin,* 699 So.2d 1198, 1203 (Miss.1997); *Johnson v. Johnson,* 650 So.2d 1281, 1285 (Miss.1994); *Crow v. Crow,* 622 So.2d 1226, 1228 (Miss.1993); *Gregg v. Montgomery,* 587 So.2d 928, 931 (Miss.1991)). A chancellor's decision, particularly in the areas of alimony, divorce, or child support, will not be disturbed on appeal unless his findings are manifestly in error. *Lahmann v. Hallmon,* 722 So.2d 614, 618 (Miss.1998).

Whether a party is in contempt of court is left to the chancellor's substantial discretion. *Cumberland v. Cumberland,* 564 So.2d 839, 845 (Miss.1990). However, clear and convincing proof is required. *Id.* When a party is unable to pay court ordered support, the proper action for him to take is to promptly file for a modification of support. When this course of action is followed, a finding of contempt is not proper. *Cumberland,* 564 So.2d at 847; *Thurman v. Thurman,* 559 So.2d 1014, 1016-17 (Miss.1990). When a party fails to take this course of action, he must "make out a clear case of inability." *Duncan v. Duncan,* 417 So.2d 908, 908 (Miss.1982). Where substantial evidence supports the chancellor's finding that payments could have been made, the Court will not reverse on appeal. *Rainwater v. Rainwater,* 236 Miss. 412, 421, 110 So.2d 608, 611 (1959).

1. The chancellor properly held Mr. Stigler in contempt of court which was proved by clear and convincing evidence.

Civil contempt is a vehicle used to enforce or coerce obedience to a court's order. *Lahmann,* 722 So.2d at 620. Contempt matters are committed to the substantial discretion of the chancellor. *Lahmann v. Hallmon,* 722 So.2d 614, 620 (Miss.1998) (citing *Shelton v. Shelton,* 653 So.2d 283, 286 (Miss.1995))

In a contempt action involving unpaid child support, when the party entitled to receive support introduces evidence that the party charged with paying has failed to pay, a prima facie case of contempt has been made. *Lahmann,* 722 So.2d at 620 (citing *Guthrie v. Guthrie,* 537 So.2d 886, 888 (Miss.1989)). The burden then shifts to the paying party to show, by clear and convincing evidence, an inability to pay or any other defense. *Id.* (citing *Duncan v. Duncan,* 417 So.2d 908, 909-10 (Miss.1982)). "[C]hild support payments vest in the child as they accrue, [and] once they have become vested, just as they cannot be contracted away by the parents, they cannot be modified or forgiven by the courts." *Houck v. Ousterhout,* 861 So.2d 1000, 1002(Miss.2003). See also *Baier v. Baier 2003 –CA-01274-COA* (Miss. Ct. App. 2003).

"Each payment that becomes due and remains unpaid 'becomes a judgment' against the supporting parent.' " *Tanner v. Roland,* 598 So.2d 783, 786 (Miss.1992). **"The only defense thereto is payment."** *Id.* (emphasis added). The Mississippi Supreme Court has stated that once child support payments become past due they become vested and cannot be modified. *Thurman v. Thurman,* 559 So.2d 1014, 1016 (Miss.1990); *Brand v. Brand,* 482 So.2d 236, 237 (Miss.1986). A chancellor's finding on conflicting evidence will not be disturbed on appeal unless it is manifestly wrong. *Milam,* 509 So.2d at 866.

The evidence produced at trial showed that Mr. Stigler repeatedly ignored the order of the

Court to pay his Court ordered child support and chose to pay it in his own way. (Tr. 76-79), (R. 152-169), (Ex. 45-56). Mr. Stigler would repeatedly attempt to "offset" anything he could attempt to claim as child support. He repeatedly attempted to claim Christmas presents, teddy bears for his daughter, and miscellaneous other non-necessary items as child support. (R. 152-169). Mr. Stigler offered conflicting testimony in his examination concerning what he felt the provisions of the divorce decree meant but his own handwritten notes entered as exhibits directly conflicted his testimony. (Tr. 14-17)(Ex. 32-33).

Regular child support refers to sums of money which a parent is ordered to pay for the child's basic, necessary living expenses, namely food, clothing, and shelter. *Nichols v. Tedder,* 547 So. 2d 766 (Miss. 1989). Mr. Stigler provided no receipts or other proof of the amounts he allegedly paid relying only upon his own testimony and a list of self-serving typed payments he allegedly prepared from receipts and checks but the receipts and checks were never produced for the Court. As such, the veracity of his statements is very much in question and the purported summary of expenses carries no evidentiary value. "No party obligated by a judicial decree to provide support for minor children may resort to self help and modify his or her obligation with impunity." *Cumberland v. Cumberland,* 564 So.2d 839, 847 (Miss.1990). A party making an extra-judicial modification does so at his own peril. *Alexander v. Alexander,* 494 So.2d 365, 367-68 (Miss.1986). Based on the evidence presented, it cannot be said that the chancellor abused his discretion in holding Mr. Stigler in contempt of Court.

2. The Judgment of Divorce was very specific and there was clear evidence that the parties had been abiding by the Judgment for years with Mr. Stigler attempting to avoid payment.

It is a well established principal in Mississippi that "... a true and genuine property settlement agreement is not different than any other contract, and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character." *West v. West,* 891 So.2d 203, 210 (Miss. 2004). The Mississippi Supreme Court has further noted that "[W]hen parties in a divorce proceeding have reached an agreement that a chancery court has approved, we will enforce it, absent fraud or overreaching, and we take a dim view of efforts to modify it just as we do when persons seek relief from improvident contracts." *Ivison,* 762 So.2d at (14) (citing Bell v. Bell, 572 So.2d 841, 844 (Miss. 1990)).

A property settlement agreement is akin to any other contractual obligation. *In re Estate of Hodges*, 807 So.2d 438 (Miss. 2002). Therefore, it must be analyzed under those same principles applied to contract interpretation. The Mississippi Supreme Court has set out a three-tiered analysis for contract interpretation. *Tupelo Redevelopment Agency v. Abernathy*, 913 So.2d 278 (Miss. 2005).

First, the "four corners" test is applied, wherein the reviewing court looks to the language that the parties used in expressing their agreement. Second, if the court is unable to translate a clear understanding of the parties' intent, the court should apply the discretionary "canons" of contract construction. Finally, if the contract continues to evade clarity as to the parties' intent, the court should consider extrinsic or parol evidence. It is only when the review of a contract reaches this point that prior negotiations, agreements and conversations might be considered in determining the parties' intentions in the construction of the contract. *Id.* (internal citations omitted). However, this is not a rigid step-by-step approach to contract interpretation, and

overlapping of steps is not prohibited. *West v. West*, 891 So.2d 203 (Miss. 2004). Finally, a reviewing court must keep in mind that "[t]he primary purpose of all contract construction principles and methods is to determine and record the intent of the contracting parties." *Abernathy*, 913 So.2d at (¶12). When questions arise concerning the meaning of a "judgment decree or opinion of court, . . . answers are sought by the same rules of construction which appertain to other legal documents." *Wilson v. Freeland,* 773 So.2d 305 (Miss. 2000). "[W]here ambiguities may be found, the agreement should be construed much as is done in the case of a contract, with the court seeking to gather the intent of the parties and render its clauses harmonious in the light of that intent." *Switzer v. Switzer,* 460 So.2d 843, 846 (Miss. 1984). Where the express language of the property settlement agreement is unambiguous, the agreement should be enforced. *Carite v. Carite,* 841 So.2d 1148 (Miss.Ct.App.2002).

Paragraph D in the Property Settlement between the parties provided that

> **" D. The husband shall pay child support to the wife in the amount of $1,300.00 per month beginning January 1, 1997, and due and payable the first day of each month thereafter. During this calendar year and each year thereafter should Husband's bonus place the aggregate of Husband's adjusted gross income in excess of the minimum guidelines in effect in the State of Mississippi, the Husband shall pay the amount necessary to bring his child support payments $3,600.00 in excess of the minimum amount of child support as provided by the guidelines then effect for the State of Mississippi based on the Husband's annual income."**

Mr. Stigler has been in the sales industry for almost thirty years. (Tr. 3). The parties recognized when entering into their property agreement that Mr. Stigler would get a salary plus additional compensation of some kind each year due to the nature of his job. The parties were seeking to create an agreement that would result in Jesse Qualls Stigler III having to pay $3,600.00 above the statutory guidelines for child support based on his adjusted gross annual income. (R. 224) (Tr. 110). The language of the provision is clear on it's face. One simply

calculates the total income of Mr. Stigler by adding his salary plus his additional compensation, calculate the statutory amount of child support, and then add thirty-six hundred dollars ($3,600.00). Mr. Stigler understood that and just grumbled about his agreement every year. (Ex. 33-37). Based on some of the testimony presented, this agreement was possibly the result of some astute tax planning to allow Ms. Stigler to receive a form of alimony with Mr. Stigler receiving certain tax advantages by paying increased child support. (Tr. 110).

Mr. Stigler alleges that he was only obligated to pay $1,300.00 per month for the years in question. However, he engaged in a heated dispute every year over what he thought he should be able to claim as child support. (Ex. 33-37). It is completely illogical for Mr. Stigler to come now and try to say that he was not obligated to pay these payments after he so heavily disputed the previous years with Ms. Stigler. If that had been the case, he would not have even argued with his ex-wife about the offset amounts he was claiming. The exhibits offered at trial in Mr. Stigler's own handwriting showed that he clearly understood the provision and just felt the amount he was paying was too much. (Ex.33-37). For Mr. Stigler to attempt to argue on appeal that he did not understand the provision he violated is disingenuous at best.

The chancellor additionally found that the specific and obvious intent of the parties was to compute the total adjusted gross income of the parties and then pay an additional $3,600.00 above that amount. (R. 224). The Court on appeal is not to reweigh the evidence or reconsider the credibility of the witnesses. The chancellor is in "a better position then the Court to judge the veracity of witnesses and credibility of evidence." *Lee v. Lee*, 798 So.2d 1284, 1291 (Miss. 2001). The chancellor weighed the testimony of the parties and found the intent of the parties despite Mr. Stigler's attempt to rewrite his divorce decree fourteen years later. Based on the evidence presented, it cannot be said that the chancellor abused his discretion in holding Mr.

Stigler in contempt of Court based on the language as written.

(3) The clause in the divorce decree is valid and enforceable and the enforceability of the provision was never raised at the trial level.

The Appellant attempts to argue now on appeal that the provision for which he was held in contempt is an unenforceable escalation clause. At no point at the trial level did Mr. Stigler ever object to the child support provision of the divorce decree in question as an unenforceable escalation clause. This issue was not raised in the chancery court proceedings; therefore, it cannot be raised on appeal. Failure to raise an issue in a trial court procedurally bars the issue on appeal. *Daniels v. Bains,* 967 So. 2d 77, 81 (Miss. Ct. App. 2007).

Procedural bar notwithstanding, this issue is without merit. The parties may in fact agree of their own volition to do more than the law requires of them. Where such a valid agreement is made, it may be enforced just as any other contract. *East v. East,* 493 So.2d 927, 931-32 (Miss.1986). In 2005 the Court of Appeals altered the approach to escalation clauses in child support agreements, enforcing a father's agreement to pay fourteen percent of his adjusted gross income or $600.00 a month. The Court rejected the father's argument that the provision was an unenforceable escalation clause stating that the parties "may agree of their own volition to do more than the law requires of them." *Rogers v. Rogers,* 919 So.2d 184, 189 (Miss. Ct. App. 2005). Mr. Stigler agreed to pay the amount of child support as set forth in the parties' decree of divorce. While the amount was outside of the child support guidelines, this was what Mr. Stigler agreed to do.

Even under the Court's law prior to 2005, the clause would still be enforceable. An escalation clause can be enforced in an arrearage action to avoid excusing a payor. To do otherwise "could prove detrimental to innocent children." *Carter v. Carter,* 735 So.2d 1109,

1116 (Miss. Ct. App. 1999). As such, Mr. Stigler is completely barred from raising this issue now on appeal. However, even if the issue was properly preserved, the clause would still be enforceable under the law post *Rogers* or even pre-*Rogers*.

4. Mr. Stigler received regular additional compensation which triggered the enforcement of the escalation clause.

It is a well established principal in Mississippi that "... a true and genuine property settlement agreement is not different than any other contract, and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character." *West v. West,* 891 So.2d 203, 210 (Miss. 2004). The Mississippi Supreme Court has further noted that "[W]hen parties in a divorce proceeding have reached an agreement that a chancery court has approved, we will enforce it, absent fraud or overreaching, and we take a dim view of efforts to modify it just as we do when persons seek relief from improvident contracts." *Ivison,* 762 So.2d at (14) (citing Bell v. Bell, 572 So.2d 841, 844 (Miss. 1990)).

Therefore, it must be analyzed under those same principles applied to contract interpretation. The Mississippi Supreme Court has set out a three-tiered analysis for contract interpretation. *Tupelo Redevelopment Agency v. Abernathy*, 913 So.2d 278 (Miss. 2005). First, the "four corners" test is applied, wherein the reviewing court looks to the language that the parties used in expressing their agreement. Second, if the court is unable to translate a clear understanding of the parties' intent, the court should apply the discretionary "canons" of contract construction. Finally, if the contract continues to evade clarity as to the parties' intent, the court should consider extrinsic or parol evidence. It is only when the review of a contract reaches this point that prior negotiations, agreements and conversations might be considered in determining the parties' intentions in the construction of the contract. *Id.* (internal citations omitted).

However, this is not a rigid step-by-step approach to contract interpretation, and overlapping of steps is not prohibited. *West v. West*, 891 So.2d 203 (Miss. 2004). Finally, a reviewing court must keep in mind that "[t]he primary purpose of all contract construction principles and methods is to determine and record the intent of the contracting parties." *Abernathy*, 913 So.2d at (¶12).

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The parties were seeking to create an agreement that would result in Mr. Stigler having to pay $3,600.00 above the statutory guidelines for child support based on his gross annual income. Based on the evidence presented, this additional $3,600.00 was used as a form of tax planning to lower the tax liability of Mr. Stigler in lieu of alimony. (Tr. 110).

In the sales industry, bonus and commission are used interchangeably. Merriam-Webster's Collegiate Dictionary defines a bonus as money or an equivalent given in addition to an employee's usual compensation. *Merriam-Webster's Collegiate Dictionary,* 10 ed. 2002. Burton's Legal Thesaurus lists a bonus as being synonymous with "something over and above". *Burton's Legal Thesaurus,* 4th ed. McGraw Hill Publishing, 2007. Additionally the terms bonus and commission are synonyms for each other as pointed out by most thesauri including Burton's legal thesaurus. *Burton's Legal Thesaurus,* 4th ed. McGraw Hill Publishing, 2007. The

argument of Mr. Stigler that the agreed support calculations applied to this one job only has been rejected in a similar case by the Mississippi Supreme Court. In the absence of language which limits the support obligation to a specific source of income, the arrangement for the support obligation will apply to all future employers or other sources of income. *D'Avignon v. D'Avignon,* 2004 –CA002215-COA (Miss. Ct. App. 2005). As such, the language was clear and unambiguous as written.

Further, Mr. Stigler did not challenge the language of the support clause in the 2003 litigation when he was working for Storopack, a different employer than the employer he worked for at the entry of the Property Settlement. (Tr. 164-166) The Appellant never alleged that the support calculation did not apply during the course of dealing with parties, and the Appellant never alleged the support payment was improper in his current pleadings. As such, it is without merit to allege any alternate meaning of the agreement now on appeal in an attempt to avoid what the Respondent agreed to do in the original property settlement agreement.

The principals of contract construction aside, any attempt to alter the child support calculation is res judicata as it was not raised in the original 2003 contempt proceedings and would further be barred by laches. Final judgment implicates the bedrock doctrine of res judicata, which "reflects the refusal of the law to tolerate a multiplicity of litigation." *Franklin Collection Servs., Inc. v. Stewart,* 863 So. 2d 925, 929 (Miss. 2003) (citing *Little v. V & G Welding Supply,* 704 So. 2d 1336, 1337 (Miss. 1997)). The public policy of res judicata is "designed to avoid the `expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibilities of inconsistent decisions.'" *Id.* Mr. Stigler never challenged the provision in his earlier legal proceedings in 2002. As such, he is barred now from trying to relitigate an issue he never raised in 2002 nor

even in the 2007 proceedings.

Equitable estoppel is defined generally as the principle by which a party is precluded from denying any material fact, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed. The doctrine of estoppel is based upon the ground of public policy, fair dealing, good faith and justice, and its purpose is to forbid one to speak against his own act, representations, or commitments to the injury of one to whom they were directed and who reasonably relied thereon. *Koval v. Koval,* 576 So.2d 134, 137 (Miss. 1991).

Additionally, the chancellor found that the specific and obvious intent of the parties was to compute the total adjusted gross income of the parties and then pay an additional $3,600.00 above that amount since that is how Mr. Stigler had always been paid and how he continued to be paid at trial. (R. 224). By Mr. Stigler's own admission the only difference in the pay structure was that Mr. Stigler received his additional compensation every month instead of only once a year. (Tr. 164-168). The Court on appeal is not to reweigh the evidence or reconsider the credibility of the witnesses. The chancellor is in "a better position then the Court to judge the veracity of witnesses and credibility of evidence." *Lee v. Lee*, 798 So.2d 1284, 1291 (Miss. 2001). The chancellor weighed the testimony of the parties and found what the intent of the parties was despite Mr. Stigler's attempt to rewrite his divorce decree fourteen years later. Based on the evidence presented, it cannot be said that the chancellor abused his discretion in holding Mr. Stigler in contempt of Court based on the language as written.

5. The chancellor properly ordered Mr. Stigler to repay his arrearages.

The Appellant contends that the chancellor committed manifest error by ordering him to repay his child support arrearages in the amount of $1000.00 per month. All of the cases he cites deal with inequitable property division at the initial entry of the decree of divorce. The case at hand deals with a contempt action post-divorce.

A payor may have arrearages withheld in the amount of 65% of the disposable income of a payor not supporting other dependants. Miss. Code Ann. §85-3-4(3)(b)(iii) 1999. Based on the record as a whole, Mr. Stigler by his own admissions is living with his fiancée who is a practicing attorney. At her residence, he pays no bills, pays no utilities, pays no mortgage, and pays no rent. (Tr. 154-155). As such, he really has no expenses. Additionally, by his own testimony, he stated that he was going to pay his attorney's fee allegedly in the amount of almost $30,000.00 in a few weeks after trial..(Tr. 181). Considering all of this as a whole, it cannot be said that the chancellor abused in discretion in ordering the Appellant to pay the amount of $1,000.00 per month toward the child support arrearages he owed.

6. The chancellor properly calculated the arrearage interest owed to Ms. Stigler.

Each unpaid month of child support is viewed as its own little judgment against the responsible party. "A judgment, by law, accrues interest from the time it is entered." *Dorr v. Dorr,* 797 So.2d 1008, 1015 (Miss.Ct.App.2001). Mississippi law does permit a noncustodial parent to "receive credit for having paid child support where, in fact, he paid the support directly to or for the benefit, where to hold otherwise would unjustly enrich the mother." *Alexander v. Alexander,* 494 So.2d 365, 368 (Miss. 1986) and *Johnston v. Parham,* 758 So. 2d 443, 445 (Miss. Ct. App. 2000). Although a parent is entitled to receive child support credit for expenses he paid directly for the necessities of the children, the evidence must be clear and convincing.

Lahmann v. Hallmon, 722 So.2d 614, 620 (Miss. 1998); and *Baier v. Baier,* 897 So. 202, 205 (Miss. 2003)). However, these credits must consist of credits for amounts that were contemplated by the support order namely food, clothing, shelter, and other necessities for the children. *Crow v. Crow,* 622 So. 2d 1226, 1230 (Miss. 1993).

Child support vests when it becomes due. *Setser v. Piazza,* 644 So.2d 1211, 1215 (Miss.1994). The law in Mississippi concerning credit for child support payments has always referred to the payments as a credit ***against*** arrearages. *Department of Human Services, State of Miss. v. Fillingane,* 761 So.2d 869 (Miss.2000) (emphasis added) (allowing the Court discretion to allow a credit against an arrearage if one of several children becomes emancipated prior to an action for modification of child support being brought.) As such, the proper method for calculating child support arrearages would be to calculate the total arrearages due with interest and then apply the credits against that arrearage amount since the payments were not made in the manner as ordered by the Court.

In Exhibits 11 through 15 produced at trial, Mr. Stigler knew what his income for each year was by December 31, 2008 by virtue of his year end payment. Clause M. of the Property Settlement of the Parties provided as follows:

"Jay shall provide copies of his tax return each year to Lisa upon the preparation of his taxes and any amounts that may be due will be paid at that time. In the event of the remarriage of Jay, Jay shall provide his W-2, Jay shall provide his W-2 to Lisa by February 15th of each year."

Mr. Stigler would actually know what his adjusted gross income is by the December 31 of the prior tax year for each arrearage payment. As such, the payments could be properly ruled to be due on December 31st of each year. Additionally, Mr. Stigler apparently prepared his own taxes for the years 2002 through 2006. (Ex. 2-10). As such he determined his own fate when

child support payments would become due.

A date had to be selected for payments to be due in determining the arrearage amounts as no exact date was specified by the Property Settlement Agreement. In the absence of an exact time, the law will determine a reasonable time. *Garner v. The Stewart Co.* , 222 Miss. 290 (Miss. 1954). Otherwise, under the clause as written if the Appellant never bothered to do his taxes, he could attempt to avoid child support by not paying taxes. Also, in Exhibits 2-9 that the Appellant provided in discovery, no dates are listed on the tax returns and all of them appear to be self-prepared. Only the year 2006 appears to be prepared by an accountant.

Upon reading the language of the clause, February 15th sets a date certain for payment to be due if Mr. Stigler remarried. As such, it is entirely reasonable to believe that said date would be an appropriate measure of when payments would be due especially in light of the fact that Mr. Stigler prepared almost all of his own tax returns for the years in question. The chancellor used his discretion to determine a day when the payments would be due by for arrearage purposes. In light of the language in the decree and the evidence presented, one cannot say the chancellor abused his discretion in setting the due date as February 15th of each year.

7. The chancellor properly calculated the attorney's fees due to Ms. Stigler.

"[T]he matter of determining attorney's fees in a domestic action is largely entrusted to the discretion of the chancellor." *O'Neill v. O'Neill,* 501 So. 2d 1117, 1119 (Miss. 1987). The Courts are "reluctant to disturb a chancellor's discretionary determination [of] whether or not to award attorney fees and of the amount of the award." *Geiger v. Geiger,* 530 So. 2d 185, 187 (Miss. 1988).

Mr. Stigler argues that the chancellor erred in honoring Ms. Stigler's request for attorney

fees without evaluating that request pursuant to the six factors set forth in *McKee v. McKee,* 418 So.2d 764, 767 (Miss.1982). However, "the establishment of the McKee factors are not necessary for a contemnee to recover attorney fees related to pursuing actions where a contemnor has willfully violated a lawful order of the court. To hold otherwise would cause no peril to those restrained from certain conduct if they violate the orders of a court." *Mixon v. Mixon,* 724 So.2d 956, 964 (Miss.Ct.App.1998). In *Kelley v. Kelley,* 953 So.2d 1139, 1141 (Miss. 2007), the Mississippi Supreme Court upheld a ruling of attorney's fees by the chancellor when the record adequately supported the chancellor's finding despite no specific finding of inability to pay.

The record shows that ample testimony was presented at the hearings on the contempt and modification matters establishing that Ms. Stigler was without ability to pay. (R. 144). While there were no direct questions asked of Ms. Stigler, by Mr. Stigler, as to her ability to pay the attorney's fees, Ms. Stigler's financial status was explored. Ms. Stigler earned a significant amount less than Mr. Stigler, and that she was without financial ability to pay her attorney. The chancellor viewed her 8.05 financial statements pursuant to his standing rule that a trial cannot be set until his Court administrator has a financial declaration of both parties. While there is no steadfast requirement that one must show an absolute inability to pay attorney's fees before an award can be granted, Ms. Stigler's inability to pay was sufficiently demonstrated to the court. Based on a review of the record, it cannot be said that it was error for the chancellor to award attorney's fees to Ms. Stigler.

8. The chancellor properly applied the Mississippi child support guidelines to the amount of child support Mr. Stigler is to pay.

The parties may in fact agree of their own volition to do more than the law requires of them. *Rogers v. Rogers,* 919 So.2d 184, 189 (Miss. 2005). Where such a valid agreement is

made, it may be enforced just as any other contract. *East v. East,* 493 So.2d 927, 931-32 (Miss.1986).

The original agreement as written contained two separate and distinct clauses. One was a child support provision tied directly to the child support guidelines. The other was a provision for the imposition of an additional $3,600.00 per year in compensation should the Husband's income place him in excess of the guidelines. *Lack v. Nash,* 751 So.2d 1078, 1082.

As such, the Court properly held the $3,600.00 per year applicable to the years in the past that Mr. Stigler had not paid it. That is what he had agreed to do. Since that is what he agreed to do, no factual findings were required for the prior year deviations. *Lack v. Nash,* 751 So.2d 1078, 1082. Prospectively, the chancellor properly calculated the child support of Mr. Stigler at $690.00 per month based upon his adjusted gross income. The chancellor did however leave the remaining portion of the separate clause in affect since that is what Mr. Stigler had originally agreed to do and no evidence was presented that he could not pay the additional $3,600.00 per year above what the statutory guidelines would require of him. As such, the Court properly determined what Mr. Stigler's support was based on the guidelines but kept in place the language he originally agreed to.

This was apparently meant to be a form of spousal support so that Mr. Stigler could obtain some tax advantages by not paying alimony. (Tr. 110). Even if the amount is considered by the court to be a deviation, spousal support to the custodial parent is a proper basis for a deviation. Miss. Code Ann. §43-19-103 (2004). In viewing the record as a whole one cannot say the chancellor erred in leaving the language in place as the portion that was directly tied to the child support guidelines was properly modified.

9. The chancellor properly did not address Mr. Stigler claim that the children of the parties post-secondary education be predicated upon his children maintaining a 2.0 minimum grade point average.

Courts generally favor a parental obligation to pay for a child's college expenses, but it must be balanced with the "child's responsibility and aptitude to exceed at college." *Barnett v. Barnett,* 908 So.2d 833, 846-47 (Miss.Ct.App.2005). At the time of trial, Jesse Stigler who was the son of the parties had originally had some academic issues prior to being treated for attention deficit disorder. However, the testimony at trial showed that once Jesse was properly treated, he obtained a 3.5 grade point average. Mr. Stigler agreed as part of his divorce decree to maintain certain insurance policies in affect to pay for the college education of the parties. Additionally, the daughter of the parties, Bailey Stigler, has not yet started college. As such, the issue is not ripe with regard to Bailey Stigler as she has not started college yet. Additionally, Mr. Stigler agreed in his original Property Settlement of the parties to be responsible for the college expenses of the parties' minor children. As such, the chancellor properly chose not to address the issue.

Ms. Stigler should be awarded attorney's fees for this appeal.

Ms. Stigler is at the time of this appeal financially unable to pay her attorney's fees. She makes approximately $6.00 per hour as a caregiver. "[A]ttorney fees may be awarded on appeal and it [] is our established practice to award one half the amount awarded in the trial court." *Durr v. Durr*, 912 So.2d 1033, 1041 (Miss. Ct. App. 2005). In light of the contempt of Mr. Stigler and pursuant to the Mississippi Supreme Court's holding in *Grant v. Grant*, 765 So.2d 1263 (Miss. 2000), Ms. Stigler requests that this Court award her attorney's fees for defending the appeal in an amount equal to one-half of what was awarded by the Chancery Court.

CONCLUSION

The chancellor's Final Judgment of Contempt and Modification of April 10, 2008, which incorporates the March 13, 2008 Findings of Fact and Conclusions of Law is supported by clear and convincing evidence in the record, the current Mississippi case law, and public policy concerns upon which Mississippi precedents are based.

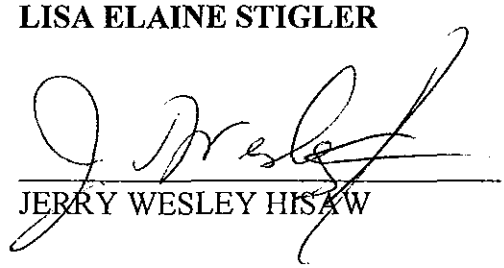
Mr. Stigler took it upon himself to not pay his child support in the manner as ordered by the Court and was accordingly held in contempt for such. The chancellor weighed the testimony, considered the equities involved, and rendered his opinion. Ms. Stigler should be awarded attorney's fees and costs based on the contempt of Mr. Stigler as well as her financial need.

WHEREFORE, PREMISES CONSIDERED, Lisa Elaine Stigler, respectfully prays to this Court to affirm the chancellor's Final Judgment of Contempt and prays to this Court to award one-half (1/2) of her attorney's fees at the trial level as attorney's fees for this appeal and any and all other relief as this Court may deem just and proper.

This the 3rd day of December, 2008.

Respectfully submitted,

LISA ELAINE STIGLER

By: 

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CERTIFICATE OF SERVICE

I, Jerry Wesley Hisaw, hereby certify that I have this day served by United States first-class mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to:

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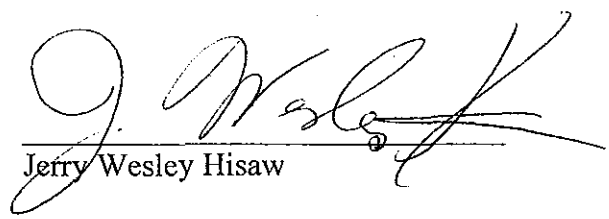
So certified, this the 3rd day of December, 2008.



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