

**NO. 2008-CA-00813**

**IN THE SUPREME COURT OF THE  
STATE OF MISSISSIPPI**

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**JESSE QUALLS STIGLER III, APPELLANT**

**VS.**

**LISA ELAINE STIGLER, APPELLEE**

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**ON APPEAL FROM  
THE CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI**

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**BRIEF OF APPELLANT**

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**JOHN ROBERT WHITE, PA  
ATTORNEYS AT LAW  
POST OFFICE BOX 824  
RIDGELAND, MS 39158-0824  
TELEPHONE: (601) 605-9811  
FACSIMILE: (601) 605-9836  
E-MAIL: [jrw@jrwlaw.com](mailto:jrw@jrwlaw.com)  
JOHN ROBERT WHITE, BAR NO. [REDACTED]  
ATTORNEYS FOR APPELLANT**

**ORAL ARGUMENT NOT REQUESTED**

IN THE SUPREME COURT OF THE  
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JESSE QUALLS STIGLER III, APPELLANT

VS.

LISA ELAINE STIGLER, APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

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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. J. Wesley Hisaw, Attorney of Record for Appellee
5. Honorable Mitchell M. Lundy, Jr., Chancellor

THIS 28<sup>th</sup> day of October, 2008.

  
JOHN ROBERT WHITE

IN THE SUPREME COURT OF THE  
STATE OF MISSISSIPPI

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## STATEMENT OF THE ISSUES

1. The chancellor committed manifest error by holding Jay in contempt of court without clear and convincing evidence of Jay's willful, obstinate, or intentional disregard of a court order.
2. The chancellor committed manifest error by holding Jay in contempt of court for unknowing noncompliance with language in the Divorce Judgment which was not sufficiently specific and which had never previously been enforced.
3. The chancellor committed manifest error in applying a novel interpretation of the Divorce Judgment in direct opposition to the previous chancery court order and by invoking an unenforceable escalation clause that cannot support a finding of contempt.
4. The chancellor committed manifest error when he invoked an escalation clause without the occurrence of a condition precedent.
5. The chancellor committed manifest error by placing Jay in hopeless, continuous contempt of court by requiring him to pay an unreasonable proportion of his income to his ex-wife.
6. The chancellor committed manifest error by miscalculating the interest owed to Lisa under the chancellor's interpretation of the escalation clause.
7. The chancellor abused his discretion by granting Lisa's request for attorney's fees and committed manifest error by awarding attorney's fees without there having been evidence presented under the *McKee* factors.
8. The chancellor abused his discretion by failing to state with particularity the factual findings used to support an award outside the statutory guidelines.
9. The chancellor abused his discretion by failing to address the issue of Jay's obligation for post-secondary education being predicated upon his children's maintaining a minimum 2.0 grade point average.

## **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 "Lisa") and Appellant, Jesse Qualls Stigler III (hereafter "Jay"). (R. 229). Lisa filed a Petition for Contempt on September 6, 2007, seeking alleged past child support based on an escalation clause that had never been invoked or interpreted as valid, seeking contempt for failure to provide proof of a life insurance policy, and further seeking Jay's incarceration. (R. 47). Lisa also sought attorney's fees and all court costs.

Jay filed his Amended Answer and Petition for Contempt and Counterclaim for Modification and Other Relief on November 16, 2007. (R. 196). Jay sought modification of his obligation due to a substantial change in his circumstances, a modification that would obligate his children to maintain a minimum 2.0 GPA (C average) to receive post-secondary support, as well as 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 held that Jay was 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 by invoking an escalation clause from the original Divorce Judgment based on Jay's adjusted gross income for the years 2002 through 2007, and he added interest thereon for each year to arrive at his calculated total. The chancellor then credited Jay for Nine Thousand Fifty-

Seven and 05/100 Dollars (\$9,057.05) in surplus support payments made directly to Lisa (uncontested by Lisa at trial and uncontested herein on appeal), without removing the interest that had been calculated thereon, leaving an arrearage of Twenty-Nine Thousand Seven Hundred Fourteen and 93/100 Dollars (\$29,714.93). In other words, he charged Jay interest on the amount he credited to Jay.

The chancellor also incorporated the faulty escalation clause from the original Divorce Judgment for future child support payments and awarded Lisa attorney's fees in the amount of Nine Thousand Nine Hundred Ninety-Eight and 35/100 Dollars (\$9,998.35). The total judgment against Jay was Thirty-Nine Thousand Seven Hundred Thirteen and 28/100 Dollars (\$39,713.28). The chancellor declined to incarcerate Jay or make any ruling as to the absence of proof of a life insurance policy.

As to Jay's Amended Answer and Petition for Contempt and Counterclaim for Modification and Other Relief, the chancellor found a substantial, material change in Jay's circumstances that entitled Jay to 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 that Jay, through no fault of his own, was unable to continue paying Thirteen Hundred Dollars (\$1,300.00) per month in child support due to a substantial decrease in his income; yet, the chancellor ordered Jay to pay the arrearage 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 judgment leaves Jay with a monthly payment to Lisa of Sixteen Hundred Ninety Dollars (\$1,690.00). The chancellor declined to address Jay's request for an amendment regarding a GPA requirement for his children.

Aggrieved, Jay now appeals the Chancery Court Judgment.

## **B. Statement of the Facts**

Jay and Lisa 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. Lisa has physical custody of the children, and Jay has provided financial support for both children every month (usually on a bi-monthly basis at a minimum) since December of 1994.

Despite Jay's having lost his job in October of 2005, and having suffered periods of unemployment, ultimately being forced to take a lesser-paying job, Jay has consistently paid his child support, and has, as stipulated in the record, spent thousands of dollars buying gifts, paying for various lessons, and purchasing many other items for his children's pleasure and comfort well over the statutory guidelines. (Tr. 84-87).<sup>1</sup> Jay has provided Jesse with two automobiles. Jay has paid for all medical, dental, optical, and pharmaceutical insurance, including deductibles, all of which is undisputed in the record and acknowledged by Lisa and the chancellor. When asked for additional monies by Lisa, Jay promptly wrote her a check.

Irrespective of Jay's consistent and substantial payment history to Lisa, to and for the benefit of both of his children, Lisa filed her first Petition for Modification and Motion to Enforce Judgment on June 17, 2002, referencing an escalation 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

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<sup>1</sup> Citations to the trial testimony of witnesses shall be designated as "Tr. \_\_\_."

the guidelines then [in] effect for the State of Mississippi based on the Husband's annual income.

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"). The chancellor in the 2003 Order declined to enforce or make mention of the escalation clause Lisa sought to enforce. The chancery court simply ordered Jay and Lisa to provide a truck for Jesse as a gift from both parties and to pay Lisa's attorney's fees of Seven Hundred Fifty Dollars (\$750.00). (R. 45). Jay paid for the truck in its entirety. The chancellor did not invoke the escalation clause or make any reference to a modified calculation of child support.

Consistent with the chancellor's 2003 Order, Jay continued to make child support payments to Lisa. Jay has always taken his responsibility for his children seriously, as shown by his consistent payment record, and his responsiveness to their additional requests for clothing, sporting equipment, a computer, money for activities, automobile insurance, and other items. Jay has paid not only his child support payments to Lisa, but additional, substantial amounts to insure that his children have the opportunity to engage in athletic and extra-curricular activities in order that they be able to enjoy things that their mother does not or cannot provide for them. (See Exhibits 45-56).

Despite losing a high-paying job in 2005, and suffering serious financial setbacks as a result, Jay continued to pay his child support to Lisa. Jay began taking money from his retirement accounts when he became unemployed. Jay continues to do so as a consequence of currently holding a much lower-paying job. The chancellor found, and the record reflects, that Jay's reduction in income was through no fault of his own, and Lisa does not contest this finding on appeal. By Lisa's own admission, Jay has lent Lisa money to keep her and his children comfortable when she was unable or unwilling to earn enough money to keep her

home in proper repair. The entire record reflects a man who has consistently and diligently cared for and substantially provided for his children for fourteen (14) years.

Nonetheless, Lisa again (having been unsuccessful the first time) filed a Petition for Contempt on September 9, 2007, seeking Thirty-Nine Thousand Five Hundred Sixty-Three and 62/100 Dollars (\$39,563.62) for amounts allegedly owed to Lisa, and again seeking to enforce the escalation clause, having never asked Jay for these amounts before filing her Petition for Contempt. Lisa also sought in her prayer for relief that Jay be incarcerated for contempt.

Pursuant to this action, the Final Judgment was entered on April 10, 2008, which held Jay 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 viewed the escalation clause as a valid and enforceable contract against binding authority in the state of Mississippi and only considered one portion of the necessary factors required by law. The chancellor also ignored the condition precedent in the escalation clause which required a bonus be distributed to Jay in order for the clause to take effect. When the Divorce Judgment was entered, Jay received annual bonuses; however, during the years in question, Jay no longer received bonuses but was paid only a salary plus commission. (R. 115-117).

The chancellor left open the issue of child support obligations for 2007, although he levied arrearages and interest thereon, not even knowing Jay's adjusted gross income for 2007, as federal income tax was not yet due and payable at the time of the trial.

For the years at issue, 2002 through 2007, Jay has paid One Hundred Thirteen Thousand Four Hundred Fifty Four and 18/100 Dollars (\$113,454.18) in child support

payments directly to Lisa.<sup>2</sup> (See Exhibits 22-27 and 29). The chancellor correctly found that Jay should receive credit for payments made directly to Lisa by cash or check that were uncontradicted in the pleadings and at trial and correctly held that to do so otherwise would unjustly enrich Lisa. Lisa did not contest this credit by cross-appeal, and this credit is not at issue before the Court.

The chancellor, finding a substantial and material change in Jay's circumstances, reduced Jay's child support obligation to Six Hundred Ninety Dollars (\$690.00) per month. Lisa has not cross-appealed the modification, and the modification is not before the Court. Jay's income was stipulated to be Fifty Thousand Dollars (\$50,000) per year, which, when calculated, leaves Jay an adjusted gross income, after only deducting mandatory taxes, of Three Thousand Five Hundred Eighty-Two and 91/100 Dollars (\$3,582.91) per month. The Final Judgment did not consider Jay's expenses, which are documented to be Five Thousand Nine Hundred Seventy-Three and 07/100 Dollars (\$5,973.07) per month, an amount in excess of his current salary. The chancellor declined to inquire into Lisa's financial status, her employment status, or her contributions to her children as required by Mississippi law when a chancellor deviates from the statutory guidelines for child support. The other factors of the mandatory *Tedford* test were similarly ignored.

The chancellor, in his payment schedule for Jay, has burdened Jay with an obligation to pay over forty-nine percent (49%) of his income to Lisa, which leaves Jay destitute and unable to meet his own financial obligations and places Jay in a negative income bracket.

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<sup>2</sup> The sum of child support payments made by Jay for the years 2002 through 2007 that are not under contention is \$113,454.18. (This figure does not include the thousands of dollars of offsets that were ignored by the chancellor and reflects only amounts that went uncontradicted in the record and on which Lisa has not cross-appealed).

### SUMMARY OF THE ARGUMENT

There is no clear and convincing evidence to support such a severe punitive action as holding Jay in willful contempt of court. The chancellor erred grievously when he held Jay in contempt after Jay had consistently provided child support payments, which in the aggregate exceeded the statutory guidelines, totaling an uncontested \$113,454.18, for the six-year period in question. Additionally, Jay has paid tens of thousands of dollars to third parties during this time for the children's benefit (for medical services, insurance, and the like) and contributed thousands of dollars in other support and assistance to and for his children. To find Jay in contempt of court is appalling, shocks the conscience, and is squarely against precedent and public policy. Such a finding is not supported in the record. The chancellor has committed manifest error and placed Jay in hopeless, continuous contempt of court, although Jay has consistently paid child support for, now, fourteen years. Contempt of court is only appropriate when the defendant obstinately and willfully disregards a court's order, which Jay has never done. The chancellor's finding of contempt should be reversed.

Further, when an order is ambiguous, or there is an escalation clause tied solely to a defendant's income, contempt cannot stand under Mississippi law. The language in the original Divorce Judgment has never been interpreted in the manner that the chancellor did herein, and the escalation clause upon which the arrearages were calculated is unenforceable because it rests solely on Jay's adjusted gross income. Adjusted gross income alone does not meet the four-part test required by law, and the escalation clause is, therefore, void *ab initio*. Mississippi law makes clear that such escalation clauses or ambiguous language under contention, both of which are present in the instant case, cannot become a basis for contempt. The escalation clause rested upon a condition precedent, the non-occurrence of which

rendered the clause moot and, therefore, unenforceable. The interest on the arrearages calculated on the escalation clause is likewise in error, and the judgment awarding Lisa the arrearages and interest should be reversed.

Further, the payment schedule levied against Jay is excessive and requires him to pay an unreasonable portion of his income (forty-nine percent (49%)), leaving Jay without the possibility of leading a normal life with a decent standard of living. That result runs counter to Mississippi case law and public policy. The arrearages calculated by the chancellor are in error even under the invalid escalation clause utilized by the chancellor. The chancellor calculated arrearages and then added interest thereon for six one-year periods; at the end of his calculation, the chancellor correctly credited Jay for surplus monies paid to Lisa, yet he failed to remove the interest he had already tacked onto those amounts, resulting in a double penalty for Jay. The payment schedule is unreasonable *per se*, improperly calculated, and should be reversed.

Under both Mississippi law and public policy, children must earn the right to support for post-secondary education, both by maintaining some semblance of a relationship with their non-custodial parent, and by maintaining a minimum level of achievement in college that reflects a combination of aptitude and effort. The chancellor was in error when he failed to address the issue of a minimum 2.0 GPA requirement for Jay's children in order that the payment of their college expenses continue.

Because the award of Lisa's attorney's fees was based on a finding of contempt that is clear error, because the arrearages and interest were calculated on an ambiguous and unenforceable escalation clause, and because Lisa was unsuccessful on two of her claims, Lisa's award of attorney's fees should be reversed.

## ARGUMENT

1. **The chancellor committed manifest error by holding Jay in contempt of court without clear and convincing evidence of Jay's willful, obstinate, or intentional disregard of a court order.**

Contempt of court must be proven by "clear and convincing evidence." *Cossitt v. Cossitt*, 975 So. 2d 274, 277 (Miss. Ct. App. 2008)(holding that the husband, although he whited out information on his tax stubs, interfered with his ex-wife's privacy, and failed to report his correct income, was not in contempt of court); *Shelton v. Shelton*, 653 So. 2d 283 (Miss. 1985). As noted in the *Cossitt* case, "A finding of contempt is a very serious matter . . . and is proper when 'the contemnor has willfully and deliberately ignored the order of the court.'" *Cossitt*, 975 So. 2d at 277 (citing *Bredemeier v. Jackson*, 689 So. 2d 770, 777 (Miss. 1997)). The facts in the case at bar do not support a finding of contempt under any standard, let alone the higher standard of clear and convincing evidence.

When a defendant continues to pay an amount consistent with a previous order, he does not commit a willful or deliberate violation and cannot be held in contempt. *Hunt v. Asanov*, 975 So. 2d 899 (Miss. Ct. App. 2008) (holding that Dr. Asanov was not in contempt when he continued to make payments under one court order which was not challenged for three years, and finding that it was "entirely reasonable to infer that Dr. Asanov believed he was in compliance" and therefore the good faith payments were a bar to a contempt finding). At no time did Jay willfully and deliberately ignore any order of the court, and there is nothing in the record to indicate intentional disregard or refusal to abide by any court order. In fact, the only previous order that was handed down in 2003, which was based on the original Divorce Judgment, made no reference to any additional calculations or escalations, implying that Jay had been calculating his child support properly. The chancellor, in response to Lisa's first Petition for Contempt and Modification, further barred Lisa from

seeking additional child support for any previous years since the divorce in 1994 through 2001. Jay had every reason to believe he was complying with the standing order of the court when he diligently and consistently paid his child support payments as he had been doing for the previous thirteen years.

The Supreme Court has long held that contempt must be willful, and if a defendant failed to pay child support under advice of counsel, the defendant cannot be held in contempt. *Gray v. Pearson*, 797 So. 2d 387, 396 (Miss. Ct. App. 2001) (holding that the father's failure to pay child support at the advice of counsel defeated the charge of willful contempt). Lisa, Lisa's attorney, Paige Williams, who represented Lisa in her first unsuccessful action for contempt against Jay, and Darrell Baugh of the Mississippi Department of Human Services, each calculated Jay's child support payments in the same manner that Jay had been doing since 1994, without reference to what was clearly an unenforceable, and heretofore unenforced and ambiguous, escalation clause. (See Exhibits 35A, 36A, and 37).

It is manifest injustice and a violation of due process to award a judgment, levy interest on that judgment, and hold Jay in contempt of court for money that he did not have any reasonable belief he might owe. By Lisa's own admissions into evidence, no one in any position of authority to interpret child support awards (i.e., the representatives of the Department of Human Services or Lisa's prior counsel), each of whom were acting on Lisa's behalf, ever indicated any contention that Jay owed additional money based on an escalation clause during the thirteen years he had been timely paying child support. Jay showed no willful or obstinate disregard for any order of the court and is not in contempt of court under any version of the facts in this case. The holding of contempt by the chancellor should be reversed.

**2. The chancellor committed manifest error by holding Jay in contempt of court for unknowing noncompliance with language in the Divorce Judgment which was not sufficiently specific and which had never previously been enforced.**

A finding of contempt cannot stand if there is any matter which is left open to contention. *Davis v. Davis*, 829 So. 2d 712, 714 (Miss Ct. App. 2002); *Wing v. Wing* 549 So. 2d 944, 947 (Miss. 1989). One may defend a contempt proceeding with the defense that the court order was unclear. *Ellis v. Ellis*, 840 So. 2d 806, 811 (Miss. Ct. App. 2003); *Davis*, 829 So. 2d at 714. Lisa had earlier brought a Petition for Contempt and Modification which resulted in no change in calculation of Jay's child support payments as of 2002. The language upon which the chancellor in the instant case has relied to compute arrearages has never been invoked as an enforceable clause, and the clause is subject to a number of interpretations. That fact alone makes the clause ambiguous and bars the chancery court from holding Jay in contempt of court.

The ambiguity of the clause can be illustrated as follows:

A. "[S]hould Husband's bonus<sup>3</sup> place the aggregate of Husband's adjusted gross income in excess of the minimum guidelines for child support<sup>4</sup> in effect in the state of Mississippi" could be interpreted as:

1) Requiring both that a bonus be distributed and that the bonus itself must be the triggering factor that places Jay's adjusted gross income above the minimum guidelines for child support (leaving it unclear as to what the minimum guidelines are); or

2) Requiring both that a bonus be distributed and that the bonus itself must be above the minimum guidelines for child support, the minimum guidelines being the

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<sup>3</sup> The issue of the word bonus and the condition precedent upon which the invocation of the clause itself must be predicated will be addressed in a subsequent argument, *supra*.

<sup>4</sup> Miss. Code Ann. Sec. 43-19-101,103 (Rev. 2004).

minimum income under the statute (which happens to be Five Thousand Dollars (\$5,000.00)); or

3) Requiring both that a bonus be distributed and that the bonus itself must be above the minimum guidelines for child support, the minimum guidelines being the minimum percentages under the statute (but the guidelines only mention minimum with regard to income, i.e., the minimum being Five Thousand Dollars (\$5,000.00) and the maximum being Fifty Thousand Dollars (\$50,000.00), beyond which other factors must be considered). Should the minimum guidelines actually refer to the percentages, there is no minimum or maximum, but a flat percentage calculated by the number of children to receive support. Therefore, the clause could be interpreted to mean that the bonus must be at least equal to or exceeding the twenty percent (20%) statutory guideline to properly invoke the clause. This factor itself could be interpreted in at least two different ways:

a) The bonus, if it meets or exceeds the twenty percent (20%) of Jay's adjusted gross income, up to Fifty Thousand Dollars (\$50,000.00); or

b) The bonus, if coupled with Jay's salary and commission meets or exceeds twenty percent (20%) of Jay's adjusted gross income in total.

B. "Husband shall pay that 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 [S]tate of Mississippi based on the Husband's annual income for that year" could be interpreted as:

1) Payment of Thirty-Six Hundred Dollars (\$3,600.00) over the minimum amount of child support allowable under the guidelines (which would be twenty percent (20%) of Five Thousand Dollars (\$5,000.00), as that is the **minimum guideline mentioned in the statute**; or

2) Payment of Thirty-Six Hundred Dollars (\$3,600.00) over the minimum amount of child support allowable under the guidelines (and applying the minimum as the percentage up to the amount covered by the statute, i.e., Fifty Thousand Dollars (\$50,000.00)); or

3) Payment of Thirty-Six Hundred Dollars (\$3,600.00) should the annual income be in excess of the minimum guidelines set forth in the statute (i.e., 20% up to \$50,000.00, and then a payment of \$3,600, if annual income exceeds \$50,000.00); or

4) Payment of Thirty-Six Hundred Dollars (\$3,600.00) in addition to the minimum guidelines, the guidelines being the minimum percentages allowable under the statute, irrespective of income.

No doubt there are countless other interpretations that could reasonably be drawn due to the poor wording of the clause and its reference to a minimum guideline which cannot be easily reconciled with the actual language of the statute governing child support awards, Miss. Code Ann. Sec. 43-19-101(1) *et seq.* This escalation clause is ambiguous and cannot be validly enforced.

The chancellor's decision from the first Petition for Contempt and Modification ignored the clause entirely in its order. Both *Davis* and *Ellis* stand for the proposition that any order containing language that can come under contention due to ambiguity cannot be the basis for contempt. *Ellis*, 840 So. 2d at 806; *Davis*, 829 So. 2d at 712. Further, a party cannot be held in contempt for failure to comply with a judgment unless the judgment is complete within itself and does not leave open any matter in which a contention may arise as to its meaning. *Bounds v. Bounds*, 935 So. 2d 407, 410 (Miss. Ct. App. 2006).

The finding of contempt based on the ambiguous and vague clause in the Divorce Judgment that had never before been invoked and was ignored *in toto* by the 2003 Order

unequivocally places the language of the clause under contention. As such, the finding of contempt and the language incorporated into the order meet the test for ambiguity, the language having been ignored by one court when the issue was squarely before it. The language of the clause and its resultant basis for contempt should be reversed.

3. **The chancellor committed manifest error in applying a novel interpretation of the Divorce Judgment in direct opposition to the previous chancery court order and by invoking an unenforceable escalation clause that cannot support a finding of contempt.**

Escalation clauses are void when they are “uncertain and indefinite with regard to escalation each year based on net pay.” *Bruce v. Bruce*, 687 So. 2d 1199, 1202 (Miss. 1996) (affirming the trial court’s holding that the escalation clause was invalid because it did not meet the four-part test set forth in *Tedford v. Dempsey*, 437 So. 2d 410, 419 (Miss. 1983) because it did not take into account the custodial parent’s contributions or the children’s needs). To be valid under Mississippi law, an escalation clause must be tied to (1) the inflation rate, (2) the non-custodial parent’s increase or decrease in income, (3) the child’s expenses, **and** (4) the custodial parent’s separate income. *Id.* at 406. The escalation clause that Lisa attempted to enforce and the chancellor in the case at bar did enforce is void, and the chancellor was in manifest error to enforce the clause and make it the foundation for a contempt finding. The escalation clause is based only on the adjusted gross income of Jay. Therefore, it does not meet the required four-part test set forth in *Tedford* and is void *ab initio*. The pertinent language in the escalation clause is:

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.

If a decree is found void in any respect, the party found in contempt of such decree should be released of his or her obligation. *Chasez v. Chasez*, 957 So. 2d 1031, 1037 (Miss. Ct. App. 2007); *Gadson v. Gadson*, 434 So. 2d 1345, (Miss. 1983) (*quoting Cox v. Cox*, 279 So. 2d 615 (Miss. 1973)). Furthermore, a defendant cannot be held in contempt if he or she continues to make unescalated payments. *Ligon v. Ligon*, 743 So. 2d 404, 407 (Miss. Ct. App. 1999) (upholding the trial court's ruling that the escalation clause that was based solely on the husband's adjusted gross income was void, refusing to hold the husband in contempt, and further refusing to grant attorney's fees to the wife). In *Ligon*, the court again set forth the four-part test that must be met to allow an escalation clause to be enforceable.

Therefore, the chancellor committed manifest error, and Jay cannot properly be held in contempt of court. The chancellor's ruling that Jay is in contempt of court for failure to make payments under the escalation clause should be reversed, and the escalation clause should be stricken as void, releasing Jay from any further obligation under the void clause.

**4. The chancellor committed manifest error when he invoked an escalation clause without the occurrence of a condition precedent.**

A condition precedent is one in which the "[p]erformance of a duty subject to a condition cannot become due unless the condition occurs." Rest. 2d Contracts Sec. 225(1) (1981). A bonus being afforded Jay by his employer was the condition precedent intended to trigger the escalation clause under contention. The term "bonus" is customarily used to describe an additional amount, one given in excess of that expected or required. *Bruce v. Bruce*, 687 So. 2d 1199, 1201 (Miss. 1996)(affirming the trial court's ruling that no additional child support should be paid based on the husband's bonus). At the time Jay and Lisa divorced, Jay was receiving annual bonuses from his employer. However, Jay did not receive any bonuses during the years at issue in the case at bar. (Tr. 117). Therefore, the

condition precedent that was necessary in order to trigger the clause did not occur. Jay, for this as well as other numerous reasons, does not owe Lisa any amount calculated by reason of the escalation clause. The chancellor committed manifest error by requiring payment under a circumstance of the non-occurrence of a condition precedent, and his ruling should be reversed.

**5. The chancellor committed manifest error by placing Jay in hopeless, continuous contempt of court by requiring him to pay an unreasonable proportion of his income to his ex-wife.**

The chancery court abuses its discretion if it places a party in “hopeless, continuous contempt” of court. *Yelverton v. Yelverton*, 961 So. 2d 19, 28 (Miss. 2007) (holding that where the husband’s income was \$12,000 per month, leaving him with \$2,000 per month on which to live after paying his alimony and child support was *per se* unreasonable, inequitable, unfair, and leaves the husband destitute). In *Yelverton*, the Court went on to say that the chancellor “should consider the reasonable needs of the husband to lead as normal a life as possible with a decent standard of living.” *Id.* at 29; *Brooks v. Brooks*, 652 So. 2d 1113, 1122 (Miss. 1995); *Massey v. Massey*, 475 So. 2d 802, 803 (Miss. 1985).

The chancellor abused his discretion by requiring Jay to pay a harsh and excessive award that did not consider Jay’s reasonable living expenses. The chancellor required Jay to pay One Thousand Six Hundred Ninety and No/100 Dollars (\$1,690.00) per month, out of Jay’s adjusted gross income (total income less mandatory taxes) of Three Thousand Four Hundred Fifty and No/100 Dollars (\$3,450.00) per month. This monthly payment represents forty-nine percent (49%) of Jay’s income, which is unreasonable. This leaves Jay with an income on which to live of One Thousand Seven Hundred Sixty and No/100 Dollars (\$1,760.00) per month, when Jay has documented his living expenses, which are

uncontested, at over Five Thousand Dollars (\$5,000.00) per month. In line with the *Yelverton* case, Jay's available monthly income is below what is necessary for Jay to meet his basic obligations and to live a normal life.

According to Mississippi law, Jay must be afforded the opportunity to live a life of "reasonably financially-secure circumstance." *Duncan v. Duncan*, 815 So. 2d 480, 485 (Miss. Ct. App. 2002) (reversing the chancellor's award of Six Thousand Seven Hundred Dollars (\$6,700.00) per month to the wife from an income of Eleven Thousand Dollars (\$11,000.00) per month from the husband as excessive). Jay is currently in a negative income bracket, made worse by the chancellor's abuse of discretion and excessive award. Jay has been forced to raid his retirement accounts in order to pay his child support; and now, with the chancellor's excessive and erroneous award, Jay's retirement accounts and savings will be depleted in short order. While Jay is an ambitious, gainfully employed man, he has suffered an economic setback with the loss of a high-paying job, and in order to secure employment was forced, at the age of 50, to accept a lower-paying position.

If the current payment schedule continues, Jay will not only deplete his entire retirement fund and savings, but he will be unable to contribute to any future retirement, which will obviously not afford him a "reasonably financially-secure circumstance" that Mississippi law has long recognized as an important public policy. *Id.* See also, *Hopton v. Hopton*, 342 So. 2d 1298, 1301 (Miss. 1977). Jay will be fifty-five (55) years old when Bailey becomes emancipated, at which time, under the current and severely harsh award, Jay may have as few as ten years to even begin to replenish his retirement account. Jay is unable to meet his financial obligations due to the financial constraints the chancery court has placed upon him in order to avoid being incarcerated for contempt of court. Much like the case in

*Duncan*, Jay has been saddled with an excessive proportion of income being awarded to Lisa, leaving him without the means to live in reasonable financial security.

The judgment of One Thousand Dollars (\$1,000.00) per month is unreasonable *per se*, and when coupled with his newly-calculated child support payments of Six Hundred Ninety Dollars (\$690.00) per month make it impossible for Jay to support himself. Said Judgment is inequitable, against precedent, and the Judgment levying payments of One Thousand Dollars (\$1,000.00) per month should be reversed. The chancellor found that Jay had suffered financial setbacks through no fault of his own, after paying child support for thirteen years, and that a material change in circumstance warranted the reduction in child support. Therefore, to enter judgment that results in Jay's paying more than the original child support payments is absurd and defies the chancellor's own logic and reason. The payment schedule, in addition to being based on amounts Jay strongly contends he does not owe, is unreasonable and should be reversed.

**6. The chancellor committed manifest error by miscalculating the interest owed to Lisa under the chancellor's interpretation of the escalation clause.**

Although this seems to be an issue of first impression for the Court, as there is no case this writer has found directly on point, it is well established that manifest error is a basis for reversing a chancellor's ruling. *Sandlin v. Sandlin*, 699 So. 2d 1198, 1203 (Miss. 1997). It is reasonable to infer that a clear mathematical miscalculation would be manifest error. Assuming *arguendo* that Jay owes Lisa the monies calculated by invoking the escalation clause in the Divorce Judgment, which Jay strongly contends he does not, the chancellor committed manifest error when he miscalculated the amounts due by adding interest on the total amount computed from the escalation clause, yet failed to remove the interest when crediting Jay for surplus amounts overpaid directly to Lisa. This miscalculation leaves Lisa

with a windfall and penalizes Jay for making additional payments, contrary to logic and public policy. Although Jay reiterates his position that he does not owe any monies to Lisa under the unenforceable escalation clause, Jay certainly does not owe interest on money that has been paid to Lisa, money that the chancellor himself credited to Jay and is in no way under contention, and yet whose interest is still charged against Jay.

Furthermore, the chancellor used the date of February 15 of each calendar year to calculate the accrual of interest. February 15 is a full two months prior to the date upon which federal income tax returns are due and payable. As such, it is quite likely that Jay will not even know what his adjusted gross income would be on February 15 of each calendar year. The date appears to be lifted from some extraneous language in the Divorce Judgment that relates to a collateral matter not at issue in the case at bar.

In the Divorce Judgment, there is conditional language that would be invoked upon Jay's remarriage in which Jay would be required to provide his W2 or 1099 forms (not his adjusted gross income) to Lisa by February 15 which would be entirely reasonable, as employers are required to provide these by the end of January for the previous year's income. However, to require Jay to provide his adjusted gross income by February 15 on what is likely no more than an educated guess is a violation of due process and clear error. In addition, this requirement was based on Jay's remarriage which is currently not a ripe issue, as Jay has remained single since his divorce in 1994. To begin to accrue interest on a date two months before the amount of Jay's adjusted gross income may even be known is also a violation of due process and is patently unfair. The calculation also increases Jay's arrearage for every year that the chancellor miscalculated it. The interest awarded is clear error and should be reversed.

7. **The chancellor abused his discretion by granting Lisa's request for attorney's fees and committed manifest error by awarding attorney's fees without there having been evidence presented under the *McKee* factors.**

When a father has suffered a financial setback, even if he is in arrears, it is proper for the court to refuse to hold him in contempt and to refuse to award attorney's fees. *Cumberland v. Cumberland*, 564 So. 2d 839, 841 (Miss. 1990) (affirming the trial court's holding that although the father unilaterally reduced his child support and was in arrears for Five Thousand Six Hundred Twenty Dollars (\$5,620.00), his financial difficulties precluded a finding of contempt and an award of attorney's fees). Jay's lack of willful contempt, consistent long-term payment record to Lisa, and current financial status make an award of attorney's fees an abuse of the chancellor's discretion.

Attorney's fees are awarded in order to reimburse the prevailing party for "losses sustained by reason of a defendant's noncompliance with a judicial order." *Jurney v. Jurney*, 921 So. 2d 372, 376 (Miss. Ct. App. 2005). Lisa's attorney's statement for attorney's fees includes legal work that Lisa's attorney undertook in defending Lisa's unsuccessful counterclaim to avoid modification of Jay's child support obligation due to a material change in circumstances and her unsuccessful attempt to have Jay incarcerated. There is no breakdown in the bill to differentiate between the costs of legal services for those issues on which Lisa prevailed in the trial court and those issues on which Jay prevailed. The award of attorney's fees based on issues in which Lisa did not prevail (the amount of which is unclear) was in error and should be reversed.

It has been long held that a number of factors must be considered when a chancellor awards attorney's fees; such factors, commonly referred to as the *McKee* factors, include the skill and competence of the attorney, the complexity of the issues involved, the novelty of the issues at bar, and the preclusion of employment on behalf of other clients. *McKee v. McKee*,

418 So. 2d 764, 767 (Miss. 1982). The *McKee* factors further require that there be sufficient evidence to assess the appropriateness of the fees, and there should be a clear explanation for the breakdown of the fees. *Id.* Lisa's counsel did not provide any such explanation of how his fees were severable among the different issues. There is no finding by the chancellor that he considered any of the *McKee* factors when making his award which is clear error.

In addition, for all of the aforementioned reasons contained within this Brief of Appellant, the finding of contempt is manifest error and cannot support an award of attorney's fees to Lisa. The chancellor erred, and the award of attorney's fees to Lisa should be reversed.

**8. The chancellor abused his discretion by failing to state with particularity the factual findings used to support an award outside the statutory guidelines.**

When a chancellor requires payment of child support that deviates from the statutory guidelines set forth in Miss. Code Ann. Secs. 43-19-101(1) and (3) (Rev. 2004), he must "make a specific, on-the-record finding which overcomes the rebuttable presumption [that the statutory guidelines are the appropriate amount] . . . ." *Yelverton*, 961 So. 2d at 28. The chancellor, in his findings of fact, did not set forth any reasons why Jay's children have any increased needs or other circumstance that would support an award of child support beyond the statutory guidelines. The award of Three Thousand Six Hundred Dollars (\$3,600.00) per year, applied retroactively, and incorporated in the Order for future payments, is manifest error. The chancellor made no specific findings that would overcome the presumption that the statutory guidelines are appropriate and just. The excess amounts awarded by the chancellor are in error, both past and future, and should be reversed.

**9. The chancellor abused his discretion by failing to address the issue of Jay's obligation for post-secondary education being predicated upon his children's maintaining a minimum 2.0 grade point average.**

Support to assist children with a college education is not an absolute right but must be earned by the children. *Hambrick v. Prestwood*, 382 So. 2d 474, 477 (Miss. 1980) (reversing the trial court award of college expenses for a nineteen-year-old daughter who refused to maintain a relationship with her father, and further lowering her overall child support award payments). While Jay has made efforts to talk with and maintain a relationship with his children, they have steadfastly refused to communicate with him since the onset of these proceedings by their mother, Lisa. (R. 160). Jesse has already reached the age of majority; however, Bailey will be embarking on the road to college. As such, Jay's request for a 2.0 GPA requirement that would reflect Bailey's interest and aptitude, as well as her respect for being afforded some of the expenses of a college education, should be granted and incorporated into the Divorce Judgment. The chancellor abused his discretion by ignoring Jay's request for this amendment to the Divorce Judgment.

## 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 not supported by clear and convincing evidence in the record, Mississippi case law, or public policy concerns upon which Mississippi precedent is based. Jay has paid child support consistently for fourteen years, has never defied a court order, has abided by his counsel's advice, and in no way has ever been contumaciously or willfully disobedient.

Jay has done what we all would hope divorced fathers would do, but often do not -- that is -- take responsibility and consistently provide for his children, even when facing difficult times. To allow the chancery court to punish Jay by holding him in contempt of court by imposing an extraneous reading of a fourteen-year-old court order for failure to pay an amount neither he, nor anyone else, ever suspected he owed, is unjust and unconscionable. The holding of contempt, the award of arrearages based on the erroneous escalation clause, and its attendant interest should be reversed. To burden Jay with payments above the statutory guidelines that leave him in hopeless financial straits is inequitable and is not supported by Jay's record of fourteen years of consistent payments for his children. Lisa's award of attorney's fees cannot be supported by the erroneous finding of contempt nor can they be supported by her unsuccessful claims against Jay, and the award of attorney's fees should be reversed. Jay should be awarded attorney's fees and costs based on his lack of contempt, as shown by his consistent and unwavering reflection of good faith reflected in his reliable and substantial child support payments for fourteen years, as well as his current financial situation. The chancellor erred in failing to address the 2.0 GPA requirement, and Jay respectfully asks this Court to incorporate such a requirement when it renders its Opinion.

WHEREFORE, PREMISES CONSIDERED, Jesse Qualls Stigler III respectfully prays to this Court to reverse the chancellor's finding of contempt as manifest error, reverse the award of arrearages, reverse all interest computed thereon, and reverse the attorney's fees granted to Lisa Elaine Stigler. Jesse Qualls Stigler III further respectfully prays to this Court for his attorney's fees and court costs and any and all other relief as this Court may deem just and proper.

This the 28<sup>th</sup> day of October, 2008.

Respectfully submitted,

JESSE QUALLS STIGLER III

By: John Robert White  
JOHN ROBERT WHITE

JOHN ROBERT WHITE, PA  
Attorneys at Law  
Post Office Box 824  
Ridgeland, Mississippi 39158  
Telephone: (601) 605-9811  
Facsimile: (601) 605-9836  
E-mail: jrw@jrwlaw.com  
John Robert White  
[REDACTED]  
Attorneys for Jesse Qualls Stigler III

**CERTIFICATE OF SERVICE**

I, John Robert White, 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:

Honorable Mitchell M. Lundy, Jr.  
Chancellor  
Desoto County Chancery Court  
2535 Highway 51 South  
Hernando, Mississippi 38632

J. Wesley Hisaw, Esq.  
3040 Goodman Road West, Suite A  
Post Office Box 256  
Horn Lake, Mississippi 38637-0256

So certified, this the 28<sup>th</sup> day of October, 2008.

  
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JOHN ROBERT WHITE