2008-CA-01443

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

PARIS WOODFIN, APPELLANT

VS.

MARY WOODFIN, APPELLEE

ON APPEAL FROM
THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT
OF HARRISON COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

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V. The amount of child support awarded is unsupported by the record and the chancellor abused his discretion by setting the award without reference to the child support guidelines.

VI. The combined awards of spousal support and child support are *per se* unreasonable because they do not allow Paris to maintain a decent standard of living.

SUMMARY OF THE ARGUMENT

To the extent that Mary Woodfin has responded to the issues raised in this appeal, the assertions made are unsupported by any meaningful argument or citation of authority beyond that referenced in the Appellant's Brief. By so doing, she has placed this Court in the position of having "to act first as attorneys for appellee, and, when the function has been performed, then as judges to decide the case." *May v. May,* 297 So. 2d 912, 912-13 (Miss. 1974). To the extent this Court can consider the errors raised by Paris as confessed because of Mary's failure to cite authority or respond to the issues on appeal, it should do so as set out herein.

ARGUMENTS AND DISCUSSION OF THE LAW

I. THE CHANCELLOR ABUSED HIS DISCRETION IN FINDING PARIS IN CONTEMPT OF THE AGREED TEMPORARY ORDER

In his first assignment of error, Paris addressed *both* facets of the chancellor's finding that he was in contempt of the Agreed Temporary Order: the admitted arrearage in support pursuant to that order *and* his alleged non-payment of certain medical bills introduced at trial. Mary cites no authority to support her argument as to the arrearage except to quote *verbatim* a paragraph from page 16 of the Appellant's Brief, including the case law quoted therein, as follows:

> The Mississippi Supreme Court has held that "contempt can only be willful." *Mizell v. Mizell,* 708 So. 2d 55, 64 (¶ 52) (Miss. 1998). "A contempt citation is proper only when the contemnor has willfully and deliberately ignored the order of the court." *Riddick v. Riddick,* 906 So. 2d 813, 826 (¶ 42) (Miss. Ct. App. 2004); *Cooper v. Keyes,* 510 So. 2d 518, 519 (Miss. 1987). "A chancellor has substantial discretion in deciding whether a party is in contempt." *R.K. v. J.K.,* 946 So. 2d 764, 777 (¶ 39) (Miss. 2007). Although Paris acknowledged that he had fallen behind in his monthly support payments, there is nothing in the record to indicate that he willfully and deliberately ignored his obligation to pay support or one-half of the minor children's medical expenses as required of him by the Agreed Temporary Order.

(See Appellee's Brief at 10). In addition, she neither addresses nor even mentions the chancellor's finding of contempt for Paris's alleged failure to pay certain medical bills as set out on pages 18-21 of the Appellant's Brief. Her failure to cite authority and to address the issue of contempt with regard to the children's medical bills should be found by this Court as conceding Paris's claims and warranting reversal of the chancellor's findings of contempt.

Where the appellee fails to support an assignment of error with relevant authorities, the Mississippi Supreme Court has found that the appellate court "can consider such failure as conceding the claims of the appellant." *Yatham v. Young*, 912 So. 2d 467, 470 (¶ 9) (Miss. 2005). Given the powers of this Court where no authority is cited to support the appellee's position, Mary's complete failure to even address the second prong of the contempt issue further should be considered tantamount to not filing a brief at all. When the appellee does not file a brief, the appellate court has several options to approaching the task created for it by that party. As the Mississippi Supreme Court found in *May v. May*, 297 So. 2d 912 (Miss. 1974),

> There seems to be no uniform rule of procedure in the various appellate courts of the several states as to what shall be done when the appellee makes no oral argument and files no brief. Some of them hold that such default on appellee's part will be taken as a confession of the errors assigned and of the statement of facts, and citations of law, in appellant's brief and argument, and the judgment will thereupon be reversed as a matter of course. Other courts have said that they will to an extent disregard the default of the appellee and will determine the case on the merits; but even those courts have generally said that they will not devote any extended or laborious efforts to search out from the record the facts or the theories upon which an affirmance may be based, and have called attention to the liability to error, and to the danger of bringing forward and in acting upon points or theories that were not presented or passed upon in the trial court. **And sometimes the obvious point has been made that an appellee has no right to call upon the court to brief his case for him, for this would be to call upon the court to act first as attorneys for appellee, and, when the function has been performed, then as judges to decide the case.**

May, 297 So. 2d at 912-13 (quoting *W.T. Raleigh & Co. v. Armstrong*, 165 Miss. 380, 381, 140 So. 527, 528 (1932)) (emphasis added). In this case, where the appellee has failed to brief issues and parts of issues raised by the appellant, the Court similarly is put in the untenable position of having to act both as attorney for the appellee and as the

deciding judge. In *May*, the Court followed the procedure adopted in *Raleigh,* treating the appellees' failure to file a brief as a confession of error:

> We shall, in this court, at our discretion, on default of appellee, take one or the other of the following two courses: (1) When the record is complicated or of large volume, and the case has been thoroughly briefed by appellant with a clear statement of the facts, and with apt and applicable citation of authorities, so that the brief makes out an apparent case of error, we will not regard ourselves as obliged to look to the record or to search through it to find something by which to avoid the force of appellant's presentation, but will accept appellant's brief as confessed and will reverse. Or (2) when the record is in such condition that we can conveniently examine it, and when upon such an examination we can readily perceive a sound and unmistakable basis or ground upon which the judgment may be safely affirmed, we will take that course and affirm, thereby to that extent disregarding the default of appellee. But when, taking into view the argument presented by appellant, the basis or grounds of the judgment, and the facts in support of it are not apparent, or are not such that the court could with entire confidence and safety proceed to affirmance, the judgment will be reversed without prejudice.

Id. Given these authorities, this Court should consider Mary to have conceded to Paris's assertions that the chancellor erred in finding him in contempt of court on the issues of both child support and payment of the children's medical bills presented at trial.

> II. THE CHANCELLOR IMPROPERLY PLACED AN UNDUE BURDEN OF MARITAL DEBT ON PARIS AND REDISTRIBUTED THE AGREED DIVISION OF PARIS' RETIREMENT ASSETS BETWEEN THE PARTIES.

Mary's response completely misses the issue raised in Paris' second assignment of error. (See Appellee's Brief at 12). The concern on appeal was the chancellor's disregard for the agreements made by the parties, not the fact that Paris' 401K was marital property subject to distribution. Paris disputes the chancellor's final order which addressed matters not put to the chancellor for his review and which was inconsistent with the agreements made by the parties prior to trial.

Paris does not dispute that his 401K plan is marital property and subject to equitable distribution. *Goodson v. Goodson,* 816 So. 2d 420, 424-25 (¶ 13) (Miss. Ct. App. 2002). To the extent the court considered division of Paris' pension assets upon which the parties had agreed, the chancellor went beyond the parties' stipulations and agreements. As set out in the Appellant's Brief, however, the court cannot change the agreements made by the parties absent fraud, duress or unconscionability. *Barton v. Barton,* 790 So. 2d 169, 172 (Miss. 2001). No allegations of fraud, duress or unconscionability were raised by either party. Therefore, there was no reason for the chancellor to go beyond parties' agreements. See *Riley v. Riley,* 846 So. 2d 282, 287 (¶ 21) (Miss. Ct. App. 2003) (where parties had consented and agreed to division of pension assets, such division was not an issue to be decided by the chancellor).

Mary's extensive citation of the chancellor's application of the factors set out in *Ferguson v. Ferguson,* 639 So. 2d 921 (Miss. 1994), her only authority, is largely irrelevant to the issue at bar. (See Appellee's Brief at 12-17). It does, however, clearly show that the chancellor failed to make proper findings regarding the valuation of the parties' marital assets and debts. *Johnson v. Johnson,* 650 So. 2d 1281, 1287 (Miss. 1994). Even assuming *arguendo* the chancellor did not exceed his authority in re-distributing the parties' assets and liabilities, the findings made are inadequate for this Court to determine whether there was an abuse of discretion in the apportionment of the pension plan, as well as the parties' debts, set out in the final judgment. *Goodson,* 816 So. 2d at 425 (¶ 14). It is imperative that this issue be remanded so that clarification of the pension documents on which the parties based their agreement is made so that a QDRO

which is both acceptable to the plan administrator and consistent with the court's orders can be entered for Mary's benefit.

III. THE CHANCELLOR ABUSED HIS DISCRETION IN NOT AWARDING REHABILITATIVE ALIMONY.

As set out in Issue IV of the Appellant's Brief, Paris asserted that based on the facts of the case, the chancellor abused his discretion in not making an award of rehabilitative alimony to Mary, as he had requested at trial, and instead, in awarding permanent periodic alimony. Mary's response provides no meaningful discussion of the law or facts. Without acknowledging any distinction between the two types of alimony, she simply references her argument in support of the chancellor's findings regarding periodic alimony to respond to Paris's assignment of error regarding rehabilitative alimony. (See Appellee's Brief at 19). Again, Mary's failure to cite any relevant authority or address the issue should be considered a confession of error. *Yatham*, 912 So. 2d at 470 (¶ 9); *May*, 297 So. 2d at 912-13.

IV. THE CHANCELLOR ABUSED HIS DISCRETION IN REQUIRING PARIS TO PROVIDE COBRA INSURANCE FOR MARY WITHOUT REFERENCE TO THE COST OR SPECIFIC DURATION OF SUCH COVERAGE.

Responding to Paris' assertion that the chancellor abused his discretion in requiring him to "keep Mary on his employer's medical insurance plan through COBRA as long as permitted by applicable law and or regulation" without any evidence of the cost or duration of such coverage, Mary merely states that this issue "pivots off" the previous issues and provides neither authority nor meaningful argument. (See Appellee's Brief at 20). Her failure to cite any relevant authority or address the issue should be considered a confession of error. *Yatham*, 912 So. 2d at 470 (¶ 9); *May*, 297 So. 2d at

912-13. The argument set out in the Appellant's Brief on pages 33-34 clearly shows that the award, as set out by the chancellor, should be reversed because "any provision regarding any provision of health care extending beyond the creation of an obligation to provide health insurance under terms where the costs of coverage are known and can, therefore, be assessed as to reasonableness is an abuse of discretion." *Duncan v. Duncan,* 815 So. 2d 480, 484 (¶ 14) (Miss. Ct. App. 2002).

V. THE AMOUNT OF CHILD SUPPORT AWARDED IS UNSUPPORTED BY THE RECORD AND THE CHANCELLOR ABUSED HIS DISCRETION BY SETTING THE AWARD WITHOUT REFERENCE TO THE CHILD SUPPORT GUIDELINES.

In making his determination of child support, the chancellor failed to follow the dictates of the child support guidelines or even reference them as thoroughly discussed on pages 35-38 of the Appellant's Brief. In *Knudson v. Knudson,* 704 So. 2d 1331 (Miss. 1997), the chancellor made specific findings relative to the child support, but did not make any reference to the child support guidelines. The Mississippi Supreme Court found that "[s]ince he did not reference the guidelines, clearly he did not make specific findings on why the application of the guidelines would be unjust or inappropriate" and determined that the chancellor erred in not following the Court's precedents and the statutory requirements. *Knudson*, 704 So. 2d at 1335 (¶¶ 25-28).

Mary's only attempt to reference the applicable law, however, is taken verbatim from the standard of review set out on page 36 of the Appellant's Brief, which states as follows:

> The amount of child support awarded is controlled by the child support guidelines set forth in Miss. Code Ann. § 43-19-101 (Rev. 2004) et seq., with some discretion left to the chancellor. *McGehee v. Upchurch,* 733 So. 2d 364, 371 (¶ 37) (Miss. Ct. App. 1999).

(See Appellee's Brief at 20). Moreover, in response to the assignment of error, Mary simply states that the chancellor did not abuse his discretion. Once again, Mary's failure to actually address the issue raised on appeal is tantamount to not filing a brief. In matters of child support and custody, however, this Court has held that rather than considering error to be confessed when there is no reply, the practice is to make a "special effort" to review the record in order to decide the issue on appeal. *Edwards v. Edwards-Barker*, 875 So. 2d 1126, 1128 (¶ 5) (Miss. Ct. App. 2004). Especially because the chancellor fashioned a universal support order requiring a return to court as each child reaches the age of majority, this Court should make a special effort to review the record and the applicable law so that the proper foundation for future modification can be made.

VI. THE COMBINED AWARDS OF SPOUSAL SUPPORT AND CHILD SUPPORT ARE *PER SE* UNREASONABLE BECAUSE THEY DO NOT ALLOW PARIS TO MAINTAIN A DECENT STANDARD OF LIVING.

In response to Paris' final assignment of error, Mary again fails to cite any authority and asserts only that this issue is "simply pivoting off" the other issues raised on appeal. See *Yatham*, 912 So. 2d at 470 (¶ 9)(appellee's failure to cite any authority should be considered a confession of error). She suggests that because the difference between temporary support awarded and the final judgment is "minimal," the award must be reasonable. (See Appellee's Brief at 20). She cites no authority nor did a diligent search of Mississippi cases reveal any authority in support of her assertion. Indeed, in *Riley*, for example, the Court of Appeals affirmed an award of permanent alimony in the amount $1,000.00 despite the fact that the wife had been receiving $1,400.000 per month in temporary support. *Riley,* 846 So. 2d at 286 (¶ 15).

The chancellor's failure to follow the rule of *Ferguson* that "[a]ll property division, lump sum or periodic alimony payment, and mutual obligations of child support should be considered together," coupled with Mary's failure to address the issue or cite any authority, should warrant reversal on this issue. *Ferguson,* 639 So. 2d at 927.

CONCLUSION

Whether an appellee has failed to cite authority or completely failed to file a brief, this Court may consider the appellant's assignment of error as confessed and reverse the chancellor's findings. Mary's failure to cite authority and address the issues raised by Paris place the same burden on the Court as if no brief had filed at all.

WHEREFORE, Paris Woodfin prays that upon consideration of this appeal, the court will reverse and remand the chancellor's rulings in the July 21, 2008 Judgment for reconsideration of the issues raised in his appeal. Paris Woodfin also prays for an award of attorney's fees and any other relief to which he is entitled in the premises.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Pamela Guren Bach, Attorney for the Appellant, Paris Woodfin, hereby certify that I have this day caused to be served by first class mail, postage prepaid, a true and correct copy of the above Reply Brief of Appellant on the following persons:

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Trial Court Judge

Hon. Thomas Wright Teel
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SO CERTIFIED, this the 24th day of April, 2009.

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