SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-TS-01454

DORIS A. ANDRES — APPELLANT

VERSUS

PATRICK T. ANDRES — APPELLEE

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

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

SUBMITTED BY:

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Patrick asks this court to condone his self help and his "unclean hands." "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." *Evans v. Evans*, Lexis 582, NO. 2007-CP-00920-SCT, decided November 20, 2008, *citing Varner v. Varner*, 588 So.2d 428 (Miss. 1991). The Court has reiterated on several occasions that child-support obligations are for the benefit and protection of children, and that the children's interest weighs in the judicial mind far heavier than that of either parent. *Id. citing Varner*, 588 So.2d 428; *Lawrence v. Lawrence*, 574 So.2d 1376, 1381 (Miss. 1991); *Cumberland v. Cumberland*, 564 So.2d 839, 847 (Miss. 1990); *Nichols v. Tedder*, 547 So.2d 766, 781 (Miss. 1989); *Alexander v. Alexander*, 494 So.2d 365, 368 (Miss. 1986).

This case mirrors the facts in *Evans v. Evans*, Lexis 582, 2007-CP-00920-SCT where a father unilaterally modified the court's order. The Court addressed the issue of modification of child support without the consent and approval of the trial court as follows:

> . . . in addressing Evans's argument that Elizabeth's coming emancipation would result in an unfair windfall for Beverly, the chancellor expressly relied on *Varner*. Along with the Court's instructive reminder to be mindful of situations necessitating the need for equity, *Varner* reaffirmed another well settled principle: For global child-support payments providing for two or more children, the emancipation of one child does not automatically reduce the lump-sum payment. *Varner*, 588 So.2d at 433 (*citing Wilson v. Wilson*, 464 So.2d 496, 497-98 (Miss. 1985); *Schilling v. Schilling*, 452 So.2d 834, 836 (Miss. 1984); *Moore v. Moore*, 372 So.2d 270, 271 (Miss. 1979)). Citing *Moore*, the *Varner* opinion noted the following reasons for this view: First, global child-support orders may contemplate that a base amount would be required, regardless of the number of children, with an undetermined amount for each child included in the periodic payment. Second, a child-support payment is not based solely on the needs of the minor children, but takes into account the ability of a parent to pay child support; consequently, a child-support order may not accurately reflect the amount actually required for the support of children, but may reflect only the amount a parent can

> afford to pay. Third, considering an undivided child-support obligation as equally divisible among the children overlooks the possibility that the requirements of the individual children may vary widely, depending upon the circumstances of each child. *Varner*, 588 So.2d at 433 (*citing Moore*, 372 So.2d at 271).
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> P16. *Varner* added nothing new to the principles and policies undergirding our law on child support. The law governing this area was, and remains, well settled: "There can be no modification of a child support decree absent a substantial and material change in the circumstances of one of the interested parties arising subsequent to the entry of the decree sought to be modified." *Gillespie v. Gillespie*, 594 So.2d 620, 623 (Miss. 1992) (*citing Caldwell v. Caldwell*, 579 So.2d 543, 547 (Miss. 1991); *Clark v. Myrick*, 523 So.2d 79, 82 (Miss. 1988); *Adams v. Adams*, 467 So.2d 211, 214 (Miss. 1985)). The change must occur as a result of after-arising circumstances of the parties, not reasonably anticipated at the time of the agreement. *Tingle v. Tingle*, 573 So.2d 1389, 1391 (Miss. 1990); *Clark*, 523 So.2d at 82; *Shaeffer v. Shaeffer*, 370 So.2d 240, 242 (Miss. 1979). Some of the factors which may be considered in determining whether a material change has taken place include: (1) increased needs caused by advanced age and maturity of the children; (2) increase in expenses; (3) inflation; (4) the relative financial condition and earning capacity of the parties; (5) the health and special needs of the child, both physical and psychological; (6) the health and special medical needs of the parents, both physical and psychological; (7) the necessary living expenses of the non-custodial parent; (8) the estimated amount of income taxes the respective parties must pay on their incomes; (9) the free use of a residence, furnishings, and automobile; and (10) such other facts and circumstances that bear on the support subject shown by the evidence. *Adams*, 467 So.2d at 215 (*citing Brabham v. Brabham*, 226 Miss. 165, 84 So.2d 147 (1955)).

Patrick may have a valid argument if he were up to date on his child support payments or if he paid what he thought to be a fair amount. However, Patrick incurred most of his arrearage after Doris' complaint for contempt was filed on January 12, 2007. Patrick did not pay a dime from July 2006 through September 2007. During that time, his daughter's need for food, clothing and shelter continued.

Patrick claims that no child support was owed for A.J. after he was emancipated. However, Patrick was required to pay child support under a "global child-support order." That order required him to pay child support for both children without any regard to a per

child payment. There would be no automatic reduction in child support when A.J. was emancipated. See *Evans,* Lexis 582, 2007-CP-00920-SCT, citing *Varner*, 588 So.2d at 433.

Patrick claims that the court's docket prevented him from appearing for relief from the court sooner. However, he offers no supporting evidence, and the docket entries does not support his claim. (R.E. 1) Patrick made no effort to set this before the court, nor did he file any motions for temporary relief. (R.E. 1) Patrick has consistently failed to take any steps to help himself. This court should note that Doris filed her complaint for contempt on January 12, 2007, and Patrick did not file his answer and counterclaim until October 25, 2007. (R.E. 5 & R.E. 6)

Patrick claims that Doris would not give him her physical address prior to her filing her motion for contempt. But, he offers no proof whatsoever of any attempt on his part to serve or find her. Doris, on the other hand, stated she told him where she lived, but did not know the address since it was a temporary FEMA trailer park. Doris also stated that if he had anything to give her she would meet the process server and accept it.

Patrick could have gone to the court and sought *ex parte* relief if, as he claims, Doris was hiding. But, he did nothing at all.

Doris agrees with Patrick's argument that a judgment for arrearage would cleanse his hands. However, Doris disputes the method for arriving at the arrearage. The judgment for arrearage must come prior to any modification. *Howard v. Howard*, 968 So.2d 961 (Miss. App. 2007). In *Howard*, the court entered a judgment for the arrearage, then modified the judgment. *Id.*

Patrick claims that the judgment of arrears cleanses one's hands. However, he misinterprets the courts ruling in *Howard*. Patrick wants the court to modify the judgment, then enter a judgment for arrearage based upon the modification. He puts the cart before the horse. The court should have entered a judgment for arrears, then modified the global child support order. *See Id.*

Patrick claims that he is entitled to credit for child support payments that were made subsequent to A.J.'s emancipation pursuant to *Caldwell v. Caldwell*, 823 So.2d 1216, 1221 (Miss. 2002). Patrick's case is distinguished from *Caldwell*. In *Caldwell*, the obligor parent was current in his child support payments and continued to make child support payments at the time of the hearing. *See Id.* The obligor then received credit for payments made for the emancipated child from the date of his filing for relief. *See Id.* Patrick was not current in his payments. He had stopped making payments prior to his claim for relief, and he cannot expect to receive help from the court.

In addition, the court can allow credit only for the payments made after the obligor filed his petition for relief. *See Id., citing Department of Human Servs., State of Mississippi v. Fillingane*, 761 So.2d at 872 (Miss. 2000); *Sumrall v. Munguia*, 757 So.2d 279, 284 (Miss. 2000); *Houck v. Houck*, 812 So.2d 1139, 1143 (Miss. Ct. App. 2002); *Ligon v. Ligon*, 743 So.2d 404, 408 (Miss. Ct. App. 1999). In Patrick's case, this date would be October 25, 2007. (R.E. 6) The chancellor erroneously allowed Patrick credit for payments made well prior to his counterclaim for relief.

Patrick entered the court with "unclean hands" and is by law prohibited from receiving a child support modification until his hands are cleansed. See *Bailey v. Bailey*,

724 So.2d 335 (Miss. 1998). Patrick should not be allowed to self help to terminate a global child support order without court approval.

CONCLUSION

Patrick modified the judgment of the Chancery Court of Harrison County, Mississippi unilaterally leaving his daughter to fend for herself for over a year. Patrick ran up an arrearage while his case was pending and when he was represented by counsel. Patrick unilaterally modified the judgment of the court and suffered no ill effects for doing so. This court must decide if, under the circumstances, if it is willing to set a precedent and allow a parent to modify the judgment of the court with impunity. Doris respectfully suggests that this would open a Pandora's Box of problems for the future.

At any rate, Patrick can be given credit only for payments made after he filed his counterclaim for relief. He cannot expect credit for payments made prior to his request for relief in October 2007. The prior Complaint for Determination of Emancipation and Modification filed in 2006 by Patrick is a moot issue since Patrick never served Doris nor did he do anything else to protect his rights.

Therefore, it is respectfully submitted that this case be remanded to the Chancery Court of Harrison County, Mississippi with instructions that Patrick T. Andres be denied his requested relief and be assessed an arrearage in the amount of $12,854.20 as of January 28, 2008.

RESPECTFULLY SUBMITTED this the 6th day of March, 2009.

DORIS A. ANDRES

BY: _____

WILLIAM W. DREHER, JR.
FOR APPELLANT

CERTIFICATE OF SERVICE

I, William W. Dreher, Jr., do hereby certify that I have this day mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing **REPLY BRIEF OF THE APPELLANT** to the following:

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P.O. Box 1692
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Honorable James B. Persons
Chancellor, Harrison County, Mississippi
P.O. Box 467
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SO CERTIFIED this the 6 day of March, 2009.

WILLIAM W. DREHER, JR.
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