IN THE SUPREME COURT OF MISSISSIPPI

WILLIAM T. WHITE **APPELLANT**

VS. **CAUSE NO. 2009-CA-00537** E

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES **APPELLEE**
STATE OF MISSISSIPPI

CERTIFICATE OF INTERESTED PERSONS

I certify that the following persons are interested in the above styled cause:

1. Hon. Debbra K. Halford, Chancellor
2. Hon. Lem Mitchell, Family Master
3. Timothy T. White
4. Tracey Farrell
5. Blaine White
6. Hayden White
7. The Mississippi Department of Human Services
8. Russell W. Holmes

Respectfully submitted, this the 9th day of October, 2009.

Russell W. Holmes

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Procedural History and Facts of the Case

On July 10, 2008, Tracey Farrell (hereafter "Farrell") opened a child support case with the Mississippi Department of Human Services, Division of Child Support Enforcement (hereafter "DHS"). Farrell came to DHS for assistance in enforcing a child support order for her two children, Blaine White and Hayden White, aged four and two, respectively. Timothy White (hereafter "White") had fathered both children out of wedlock. When Farrell came to DHS, she brought a recent Custody Order which also required White to pay $670.00 per month as child support. This Custody Order was entered by the Pike County Chancery Court on April 14, 2008, but also reflected findings by the Chancellor in a bench opinion from February 19, 2008.

Prior to the Custody Order, the Court had entered an Agreed Temporary Order, in which White was required to pay $500.00 per month as child support for the two children, beginning December 15, 2006. But initially, child support was set at $400.00 per month by the Court in an Agreed Judgment, from April 5, 2005. Further, in DHS's interview with Farrell, Farrell signed an affidavit in the form of a Computation of Arrearage, which stated White owed her $1,105.28 as of August 31, 2008, for delinquent child support.

In pursuit of the child support arrears, DHS filed a Petition for Contempt and Other Relief against White on October 8, 2008. In its petition, DHS asked the Court to adjudicate the arrears at $1,105.28 and to incarcerate White until he purged himself of contempt. In addition, DHS requested the Court to issue an Order for Withholding and to order White to provide medical insurance for the children, along with payment of court costs and attorney fees.

DHS initially set the Petition for Contempt and Other Relief for hearing on December 11, 2008. However, White was not served with process, and therefore DHS needed to seek another date on which to present the case. DHS then reset the matter for hearing on January 8, 2009, but Farrell contacted DHS and stated she could not attend court due to medical reasons. Again, the case was rescheduled,

specifically to February 12, 2009, before the Honorable Lem Mitchell, Family Master.

After hearing testimony at trial from both White and Farrell, the Family Master requested that both sides submit authority on the issue of when the latest increase in child support should take effect, whether February 19, 2008, the date of the bench opinion by the Court, or April 18, 2008, the date when the Custody Order was filed with the Chancery Clerk.

Once the Family Master had received legal authority on the issue of the effective date of the increase in child support, the Family Master rendered its opinion on February 26, 2009. The Family Master concluded that the effective date for the increase in child support to $670.00 should be March 1, 2008. The Family Master reasoned that since the Chancellor, in her bench opinion, had ordered the increase to take place on the first, but not specific as to which first, then the next first of the month should apply. The next first of the month after February 19, 2008, would be March 1, 2008.

As for the other issues raised in the trial, the Family Master concluded that White owed $785.00 in delinquent child support, as of August 31, 2008. As a result, the Family Master ordered White to purge himself of contempt by paying the amount of $785.00 by March 31, 2009. The Family Master did not allow White to receive credit against child support arrears for his contribution to school and recreational expenses. Furthermore, the Family Master neither allowed White credit for payment of medical bills nor allowed him credit for the children as dependents on his 2007 tax return, as these issues had been previously adjudicated by the Court. Lastly, the Family Master did not require White to obtain separate medical insurance for the children, as the Court had previously found the children to be enrolled in the Mississippi CHIPS program. The recommendation of the Family Master was approved by the Chancellor and became the final Judgment on March 8, 2009.

Subsequently, White filed a Motion for Reconsideration with the Court on March 4, 2009, which the Court denied on March 23, 2009. From the denial of his Motion for Reconsideration, White filed a Notice of Appeal on March 30, 2009, and thus this case comes before this Court.

Appellee's Response to Appellant's Summary of the Argument, and Appellee's Argument

The first point of White's argument is the following:

Whether the effective date of the increase in payments was considered to be March 1, or May 1, 2008?

White is specifically referring to the effective date for the increase in child support from $500.00 per month to $670.00 per month. The bench opinion of the Chancellor, from February 19, 2008, stated that child support would increase to $670.00. However, this bench opinion was later memorialized in the Custody Order, which the Court signed on April 14, 2008. White contends that the effective date of the increase to $670.00 per month should be May 1, 2008.

DHS agrees with the finding of the Family Master, that the effective date of the increase in child support to $670.00 per month, should be March 1, 2008. Although White may have not received a copy of the Court's Order until later, he was in fact present at the hearing on February 19, 2008. He was personally before the Court then and heard the Chancellor announce there would be an increase to $670.00 per month, and that it would begin on the first of the month. As the Family Master reasoned, since the first day of February had already passed, one would naturally infer that the next first of a month would be March 1, 2008. Since White did not receive a prompt copy of the order, he has attempted to take advantage of the delay and forgo the child support increase until May 1, 2008. DHS believes it would be grossly unfair to steal two months of the children's support, due to a mere delay in preparing the Court Order, when White personally heard the Court announce its opinion.

In its earlier argument before the Family Master, DHS argued that the verbal ruling of the Chancellor on February 19, 2008, constituted a bench opinion of the Court, which became legally effective on the time and date rendered by the Court. Although the Family Master shared a difference of opinion on the exact date that the support should increase, the Family Master did not cast any doubt

upon upon the legal effectiveness of the Chancellor's verbal ruling.

In furtherance of his position here, it appears that White still contends that a ruling by the Court is not legally effective until a written order has been entered by the Clerk. DHS takes the position that this is a misreading of the rules, and DHS states that the filing of a written order is merely a ministerial act required by Rule 58 of the Rules of Civil Procedure. The official comments to Rule 54 state that "filing" simply refers to the delivery of the judgment to the Clerk for entry and preservation. Therefore, the time of the filing of a judgment of the Court in no way affects the legal validity or force of that judgment. Furthermore, the legal effective date of a judgment would not be the date stamped-filed by the Clerk, as White contends, but rather the date upon which the Chancellor announced her ruling. By this reasoning, the legal effective date for the increase in child support would be at a minimum February 19, 2008, and certainly no later than March 1, 2008.

DHS recognizes that Rule 5.04 of the Uniform Chancery Court Rules indeed requires that a court order be submitted within 10 days of the Court's direction. However, it would be a misapplication of Rule 5.04 to allow it to be used as a technicality to negate an otherwise valid verbal ruling, when the delay was due to a procrastinating attorney.

It is unclear in this case what the exact reason is for the delay in entering the Court Order from the February 19, 2008, hearing, but no one is prejudiced in this situation more than the children, who stand to lose two month's of the increased support. The children, at ages 4 and 2 when the hearing occurred, should not be allowed to lose their vital child support, due to an incorrect and harsh application of Rule 5.04. Nothing in Rule 5.04 requires the Court to rescind its prior ruling, merely because an attorney did not strictly comply with the rule. Again, White was present when the Court announced its decision, and he should not be allowed to claim the advantage and prejudice his children, simply due to the mistake of someone else. White's obligation to his children is independent of any attorney's obligation to strictly comply with Rule 5.04.

The second point of White's argument is the following:

Whether the Custody Order filed on April 18, 2008, clearly instructed White of when the increase in child support was to begin?

White is relying on the language of the April 14, 2008 Order, which was later filed with the Clerk on April 18, 2008. This Court should bear in mind that the April 14, 2008 Order reflects the verbal opinion of the Chancellor from the hearing on February 19, 2008. In the argument above, DHS contends that White was personally present during the Court's announcement of an increase in child support to $670.00 per month. His personal appearance and receipt of this information directly from the Chancellor on February 19, 2008, makes it irrelevant how clear the April 14, 2008 Order is. In fact, White should have notified his own attorney promptly that the April 14, 2008 Order perhaps did not perfectly recite the opinion of the February 19, 2008 hearing. Instead, White has used a possible ambiguity to elude his obligation to timely increase the support, although he personally heard the Court's instructions in the courtroom. It is DHS's position that White should not be allowed to seize upon a possible ambiguity, when this ambiguity did not exist earlier, and also when such an ambiguity would defeat the best interests of his children.

The third point of White's argument is the following:

Whether White should be found in contempt and due $785.00 for failing to comply with an ambiguous order in which the Court found the effective date for support increase to be on March 1, instead of May 1, 2008?

The Family Master came to the conclusion, after resolving the effective date for the increase in support to be March 1, 2008, that White was in arrears $785.00, for child support due until August 31, 2008. The Family Master calculated that the child support obligation due from December 15, 2006, until August 31, 2008, was $11,270.00. He then subtracted the total payments made by White up until August 31, 2008, to be $10,485.00. As a result, White retained a child support arrearage of $785.00 as of August 31, 2008. The arrearage calculated by the Family Master was at variance with that of DHS.

In its Computation of Arrearage affidavit signed by Farrell, DHS had alleged the arrears was $1,105.28 as of August 31, 2008. While the Family Master found an arrears to exist, he determined White to be in contempt of court.

DHS contends that the Family Master exercised sound discretion in concluding that White owed a child support arrearage of $785.00. It was only after hearing testimony of both White and Farrell, and examining the exhibits offered by DHS and White, that the Family Master came to this conclusion. The Family Master was the trier of fact in this trial, and acted within his discretion to arrive at his conclusion that an arrears existed, placing White in contempt of court. In Barnett v. Lauderdale County Board of Supervisors, this Court reiterated its standard of review in an appeal of the trial court's findings of fact to say: "[i]n a bench trial the trial judge sits as the trier of fact and is accorded the same deference in regard to his findings as that of a chancellor, and the reviewing court must consider the entire record and is obligated to affirm where there is substantial evidence in the record to support the trial court's findings." Barnett v. Lauderdale Cty. Bd of Supervisors, 880 So.2d 1085, 1088 (Miss.Ct.App. 2004). In City of Jackson v. Lipsey, this Court went on to say: "[t]his Court recognizes that the trial judge, sitting in a bench trial as the trier of fact, has the sole authority for determining the credibility of witnesses." City of Jackson v. Lipsey, 834 So.2d 687, 691 (Miss. 2003). "Where there is conflicting evidence, this Court must give great deference to the trial judge's findings." Id. Further, this Court has stated that it will not disturb the findings of the chancellor unless those findings were clearly erroneous or the chancellor applied an erroneous legal standard. Peagler v.Measells, 743 So.2d 389, 390 (Miss.Ct.App. 1999). All of the above articulations of this Court emphasize a limited standard of review in examining and considering the findings of a trial judge. Ellison v. Meek, 820 So.2d 730, 734 (Miss.Ct.App. 2002). In applying the standard of review this Court has previously set out, this Court should find that the Family Master did not err in reaching the decision of the effective date for the increase in child support, the decision that White owed $785.00 in child support arrears,

and the decision that White is in contempt of court.

The fourth point of White's argument is the following:

Did the court err in including a $250.00 payment for August 2007 in calculating the amount in arrearage, when White was previously found not in contempt on a Motion for Contempt filed by Farrell, on February 15, 2008, which included the payment in question?

The Family Master did not err in including a $250.00 payment for August 2007 in calculating the amount in arrearage against White. In fact, both the Family Master and DHS (applying Farrell's Computation of Arrears from September 10, 2008) gave White credit for a payment of $250.00 toward his child support. However, White met his obligation by only half for August 2007 since the full obligation amount due at that time was $500.00 per month. There is no evidence in the record that White satisfied his obligation for August 2007 by paying an additional $250.00. Therefore, it was proper for the Family Master to find a deficiency of $250.00 still existed for the month of August 2007. Furthermore, the subsequent Custody Order from April 14, 2008, does not make any specific reference to the August 2007 payment, nor does it adjudicate any arrearage. The subject of the April 14, 2008, order is visitation, income tax application to child support, insurance and the child support increase. The Court then neither held the defendant in contempt nor acknowledged his compliance with previous orders of the Court.

The fifth point in White's argument is the following:

Whether the mere fact, that Farrell claims to have filed her 2007 IRS returns prior to the ruling by the Chancery Court on February 19, 2008, constitute reason enough for the court to not revisit the previous order of which was ambiguous as to whether White could begin to exercise his rights in 2007 or 2008?

DHS contends that it was within the discretion of Family Master to believe the testimony of Farrell, when she testified that she had already filed her 2007 tax return prior to the entry of the April 14, 2008 Custody Order. Again, the Family Master is the fact finder and has the burden of weighing the credibility of witnesses. This Court in Trittle v. Trittle stated that, "[a]s the finder of fact, the

chancellor is vested with the responsibility to hear the evidence, assess the credibility of witnesses, and determine ultimately what weight and worth to afford any particular aspect of the proof." Trittle v. Trittle, 956 So.2d 369, 373 (Miss.Ct.App. 2007), quoting Funderburk v. Funderburk, 909 So.2d 1241 (Miss.Ct.App. 2005). This Court went on to say that it will not substitute its judgment for that of the chancellor's when it comes to fact finding. Id. As the fact finder in this case, the Family Master heard the testimony of Farrell, found her credible and believed that she had in fact filed her 2007 tax return before the entry of the April 14, 2008 Custody Order. Meanwhile, White had the opportunity to cross-examine Farrell and to offer contradicting evidence. He offered nothing that contradicted the testimony of Farrell. As a result, White has failed to show that the Family Master abused his discretion or that the resulting decision was manifestly wrong or clearly erroneous. This Court has stated that the abuse of discretion standard means that a judge's discretion would have to be arbitrary and clearly erroneous. Poole v. Avara, 908 So.2d 716, 721 (Miss. 2005). Therefore, DHS requests that this Court apply its own deferential standard of review to the Family Master's decision to believe the testimony of Farrell, and to find that the Family Master did not err.

The sixth point in White's argument is the following:

> **Whether money spent on behalf of the children by White, for school activities and recreational activities, with Farrell approving and having knowledge of these payments, can be considered as child support?**

DHS concurs with the Family Master, in not allowing White credit for the payment of certain school and recreational activities. This Court has previously visited the issue of whether a noncustodial parent may be allowed a setoff against his child support, where he has made voluntary payments for expenses outside of the court order. In Farrior v. Kittrell, this Court reversed a chancellor who had allowed credit for private school tuition, when the payment of tuition was not part of the child support order. Farrior v. Kittrell, 2009-MS-0408.150 (Miss.Ct.App. 2009). In upholding a chancellor's denial of credit for private school tuition paid outside a court order, this Court quoted the chancellor in saying,

"to permit a parent credit for voluntary payments would allow such parent to vary the terms of the judgment, and to usurp from the custodial parent the right to determine the manner in which support money should be spent." Cook v. Whiddon, 866 So.2d 494, 500-01 (Miss.Ct.App. 2004). Although this Court in the above cases considered whether the noncustodial parent could claim a setoff against child support arrears for private school tuition, it can be rationalized that this Court likewise would not approve White to be allowed credit for payments made outside of the court order for school and recreational activities. Such payments violate the specific terms of the order and do indeed usurp Farrell's right to determine how to spend the child support. Giving White credit for gifts, recreational expenses and various school expenses against his child support arrears would be condoning the unilateral modification of the court order and the interference of Farrell's right to determine how best to manage the child support. Further, the record does not contain proof that Farrell had knowledge of or approved these outside payments. Consistent with the above cases, it is clear that the Family Master in the instant case applied the applicable law in not allowing White a setoff against child support for certain school and recreational expenses made outside of the court order.

The seventh point in White's argument is the following:

Whether the court was in error when calculating support payments due by using time periods that were not within the April 14, 2008 through August 31, 2008 time frame as requested in the DHS petition?

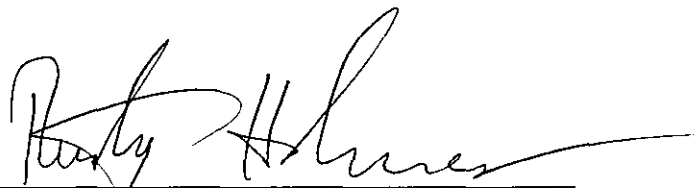
In its Petition for Contempt of Court and Other Relief, DHS brought into issue child support that was due until August 31, 2008. DHS attached a copy of the December 29, 2006 Agreed Temporary Order, which ordered White to pay $500.00 per month as child support. From this order, Farrell signed an affidavit, in the form of a Computation of Arrearage, which tracked the child support payments and arrears from December 29, 2006 until August 31, 2008. The affidavit alleged that White owed $1,105.28 as of August 31, 2008. At the hearing of this case, DHS introduced Farrell's affidavit into evidence. The Family Master admitted the affidavit into evidence, but after hearing testimony

from both Farrell and White regarding the arrears, the Family Master concluded that White owed only $785.00 in arrears up until August 31, 2008. Although the conclusion of the Family Master varies with the position of DHS in the amount of arrears, DHS contends that the Family Master did not err in considering child support owed prior to April 14, 2008. Since DHS brought into question the issue of arrears, by reference to the December 29, 2006 Agreed Order, and by reference to Farrell's affidavit which traced the arrears from December 15, 2006 until August 31, 2008, the Family Master exercised his sound discretion in admitting the affidavit and estimating the arrearage from December 15, 2006.

Conclusion

Based upon the sound reasoning and proper application of the law by the Family Master, this Court should find that the Family Master did not err on any of the issues raised in White's appeal. The Family Master acted well within his discretion to believe the testimony of Farrell, in that she had already filed her 2007 tax return before the Chancery Court ruled on this case on February 19, 2008. Further, the Family Master applied sound reasoning to conclude that the child support should increase to $670.00 per month on March 1, 2008. Finally, after considering all of the testimony and exhibits offered at trial, the Family Master could not reach any other conclusion than that White is in arrears $785.00 as of August 31, 2008, and that he is in contempt of court. Therefore, DHS respectfully requests this Court to affirm the recommendation of the Family Master, and the subsequent approval by the Chancellor in this case.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I certify that I have mailed by United States mail first class, the above Appellee's Brief to:

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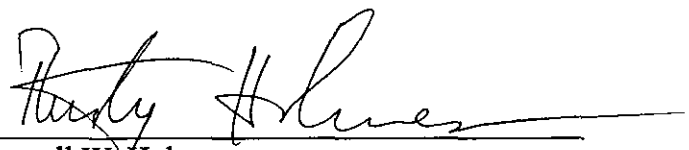
So certified, this the 9th day of October, 2009



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