2009-CP-00953T

CERTIFICATE OF INTERESTED PERSONS

The undersigned 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 Circuit Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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Hon. Billy Bridges
Special Chancellor Washington County
520 Chuck Wagon Drive
Brandon, MS 39042

This, the 13th day of January, 2010.

ROBERT D. EVANS, MSB [redacted]

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STATEMENT OF THE CASE

The parties were divorced in December 1998 (RE., p.13). At that time, there were two (2) minor children, Elizabeth Ann, born February 4, 1986 and that time the hearing was over twenty one (21). The remaining child, Robert Jr., born June 6, 1991 and was seventeen (17) at the time of the hearing and a junior in high school.

In the Marital Settlement Agreement (RE., p.15), the parties agreed to joint physical and legal custody and the Robert was to pay $2,000.00 per month plus a policy of life insurance with the children listed as the beneficiary. There were some other incidentals which are not relevant here. Robert was County Attorney for Washington County for the past twenty (20) years (T., p.148, l.2-4;

31.11-12). Mr. Evans lost that election in 2007 (T., p.147, l.10). This was a total net loss of $3,500.00 per month (T., p.147, l.13-14). Subsequent to that election loss, on November 14, 2007, he filed his Motion for Modification of Child Support (Re., p.20). At the time of the hearing May, 2008, Robert had only grossed $6, 440.00 (Plaintiff's Exh.#3, May 28, 2008 hearing). In 2007 his income from the partnership grossed $34,332.00 (Plaintiff's Exh.#4, May 28, 2008 hearing). With the loss of $3,500.00 per month net, in addition to the decrease in the firm's income and comparing the aforesaid exhibits, Robert's income had decreased more than fifty percent (50%) and the court also found that his income had decreased "At least" fifty percent (50%) (T., p.297, l.16). As a result of Beverly's request to reopen this matter (RE., p.75) this matter was called for a hearing again October 7, 2008 (T., p.63, l.12) Beverly failed to show for this hearing (T., p.63, l.16). That although Beverly was responsible to pay for the remaining minor child's tuition, she terminated those payments and Robert began paying same since January 2008 (T., p.65, l.3); (Plaintiff's Exh.#3, October 7, 2008 hearing). At the time of this October hearing, Robert had made a gross amount of $10,780.00 coming to an adjusted gross income or net income of $848.00 per month (T., p.65, l.25-26); (Plaintiff's Exh.#2, October 7, 2008 hearing). Out of that sum, Robert paid for the private tuition for the minor son in the amount of $375.00 per month, the son's car insurance at $125.00 per month, the life insurance at $161.00 per month, this amounts to over $600.00 per month that he was paying out of his adjusted gross income (T., p.65, l.25-29).

This case was further reopened, at the request of Beverly in which Robert supplemented his evidence on gross income for the year 2008 in the amount of $14,840.00 (Plaintiff's Exh.#1, January 28, 2009 hearing).

The Court, although finding a loss of income of at least fifty percent (50%), simply reduced the child support by $1,000.00 and Robert was to continue to pay the minor's child's car insurance,

and the premiums for the life insurance policy (RE., p.205).

STATEMENT OF THE FACTS

The parties were divorced in December 1998 (RE., p.13). At the time of the divorce there were two (2) minor children. At the time of the hearing and the filing of the Motion to Modify, the oldest child, Elizabeth Ann Evans, had reached majority. Only Robert Evans, Jr. was still a minor. That in the Marital Settlement Agreement (RE., p.15) parties agreed to joint physical and legal custody and Robert was to pay $2,000.00 per month plus retain a policy of life insurance with the children listed as beneficiary.

Robert was the County Attorney for Washington County for the last twenty (20) years (T., p.148, l.2-4). He lost his bid for re-election in November 2007 (T., p.147, l.10). In that same month, he filed his Motion for Modification of Child Support (RE., p.19).

The Appellant's Motion for Modification was filed on November 14, 2007 (RE., p.19). A hearing was set for January 16, 2008 (RE., p.22). On December 18, 2007, an Order was entered allowing Beverly's counsel to withdraw (RE., p.24). No hearing was held in January 2008. On February 11, 2008, an Entry of Appearance was filed by one Susan Smith representing Beverly (RE., p.26). In an effort to get the matter moving, Robert filed his Motion to Temporary Abate Child Support (RE., p.27).

March 19, 2008, an Order was entered setting the matter to be heard on April 2, 2008 (RE., p.35). Beverly then filed for a Motion for Continuance on March 28, 2008 (RE., p.38) which was granted by the Court in it's Order filed April 3, 2008 (RE., p.43) and a hearing set for May 28, 2008. Discovery was conducted (RE., p.46-72). The initial hearing was held (T., p.2-63). At conclusion of this hearing, the Judge wanted, from each party, a "Short Summary of the Facts and Conclusions of Law for the Modification" (T., p.69, l. 16-17). Subsequent thereto, on June 3, 2008, Beverly fired

her attorney and said attorney filed her Motion to Withdraw (RE., p.73). On November 8, 2008, an Order was entered wherein Beverly was requesting to produce further testimony and the Court allowing same, set a hearing for October 1 or October 8, 2008 for additional testimony (RE., p.75) which was then rescheduled for October 7, 2008 (p.76). On the date of said hearing Beverly failed to show. On October 6, 2008, she simply emailed a message to Robert that she would not be able to attend and had informed Judge Bridges of same (October Hearing Exh. #1) (T., p.63, l. 25-27). The Judge announced he received no such message (T., p.64, l. 4-7). Robert then supplemented his evidence (T., p.64, l. 19-26; p.65-68) (October Hearing Exh. #2-3). Robert was then instructed by the Court to submit the Order granting the Motion to Modify which was to relate back to the May 2008 hearing (T., p.68, l. 11-17).

On October 17, 2008, present counsel filed her Entry of Appearance (RE., p.77) along with her Motion to Reconsideration/Motion for New Hearing or to Set Aside (RE., p.79). Although the Motion is styled as Plaintiff's Motion, it is clear from the body of the Motion that it is Beverly's Motion. Subsequent thereto, a Notice of Hearing by Telephone Conference was set to heard on November 13, 2008, one year from the date of Robert's filing his Motion to Modify (RE., p.91). Again, although the Notice states "Plaintiff by and through his attorney", it was Defendant who filed the Motion that was to be heard. The record is absent as to what occurred during this telephone conference.

On November 18, 2008, Notice of Hearing on Defendant's Motion was set to be heard on December 10, 2008 (RE., p.107). This date was rescheduled for January 28, 2009 (RE., p.108). A hearing was held and the Judge granted the Defendant's Motion (T., p.76, l. 17), and the Court announced, "I am ready today to hear testimony", along with Robert, for further testimony to begin (T., p.76, l. 21-23). On the morning of the hearing, Beverly filed a Motion for Contempt (T., p. 119,

l. 28-29). The Court then decided to reset this matter for a later time (T., p. 120, l. 12-13) with the matter to be heard on March 4, 2008 (T., p.123). The March hearing was held and subsequent thereto the Judge entered his Order modifying Robert's Motion to Modify by decreasing the child support by $1,000.00.

The Court further found Robert in Contempt of Court (RE., p.213) and further ordered him to pay Beverly's attorney's fee of $1,300.00.

SUMMARY OF THE ARGUMENT

Due to the fact that the lower Court requested, in an ex-parte conversation, with Beverly's attorney to prepare a Finding of Facts, Conclusions of Law and Order and no requests was made for Robert to submit same, and the Court adopting, verbatim, Beverly's attorney's Findings of Facts, Conclusions of Law and Order, the Court must review this case "de novo". That the Court erred in it's misunderstanding that he could totally disregard the child support guidelines set forth in §43-19-101 et seq (Miss. Code Annot.).

That this matter began by Robert's filing a Motion for Modification in November 2007. That due to delays caused by Beverly, the Court matter was finally heard in May, 2008. That due to further delays and requests to re-open the matter, the Court finally ruled, in an incorrectly Nunc Pro Tunc Order, in May relating back to the March 2009 hearing. This was a continuation of the May 2008 hearing and the Order should relate back to May of 2008.

Due to the lower Court's failure to conduct a McKee predicate the Court erred in awarding Beverly's attorney's fees on the modification matter.

As stated previously, upon Robert realizing a substantial reduction in income, he immediately filed a Motion for Modification in Child Support. This is the proper procedure and Robert cannot be held in contempt. In addition, the Court, on the record, stated Robert was not in contempt of court

due to inability to pay. However, in the Judge's Final Order, he did find Robert in contempt and this was error. That due tc the contempt, the Court also ordered Robert to pay Beverly's attorney of $1,300.00 and this was also error.

ARGUMENT

THE COURT MUST REVIEW THE RECORD IN THIS MATTER, "DE NOVO".

This should have been a relatively simple matter of a Motion to Modify Child Support. However, through no fault of Robert, with the continuing putting off the matter to a later date, allowing re-openings; this case, as the lower court put it, "Is such a mess" (T., p.297, l.24).

The lower court accepted and adopted, verbatim, the Appellee's findings of facts, conclusions of law and order. This was to such an extent that statutes were cited that do not exist down to an improperly worded nunc pro tunc order (RE., p.185, ¶19; p.198, ¶19) (RE., p.191 & 205).

> **When a chancellor does adopt, verbatim, the proposed findings of fact and conclusions of law prepared by a party, this court "analyzes such findings with greater care and the evidence is subjected to heightened scrutiny".** ***Gutierrez v. Bucci, 827 So. 2d 27, 31 (¶ 13) (Miss. Ct. App. 2002) (quoting Brooks, 652 So. 2d at 1118).*** **The findings will be reviewed with a more critical eye than if the chancellor had made independent judicial findings of facts and conclusions of law.** ***Rice Researchers, 512 So. 2d at 1265.*** **"Where the chancellor has failed to make his own findings of fact and conclusions of law, this Court will 'review the record de novo.'"** ***Holden, 680 So. 2d at 798 (citing Brooks, 652 So. 2d at 1118.)*** **This will ensure that the chancellor has adequately performed his judicial function and made decisions regarding the facts of the case because he is the one who can most fairly make decisions based upon the credibility of the evidence as a whole.** ***Rice Researchers, 512 So. 2d at 1265. Rodriguez v Rodriguez, 2 So. 3d 720, 725 (¶ 10) (Miss. App. 2009).***

Further, "When the trial Judge is sitting as the finder of fact, and chooses to adopt in toto a party's proposed findings of facts and conclusions of law, we will conduct a de novo review of the record." *Puckett v Puckett, 16 So. 2d 764, 768 (¶ 14) (Miss. App. 2009); Miss. Dept. Of Transportation v Johnson, 873 So. 2d 108, 111 (¶ 8) (Miss. 2004); Holden v Frasher-Holden, 680 So. 2d 795, 798*

(Miss. 1996).

The Appellee prepared and submitted her findings of fact and conclusions of law and order (RE., p.178, Exh. A & B). This was the result of a ex-parte discussion between counsel opposite and the chancellor. The chancellor never contacted this attorney. Counsel opposite submitted her findings of fact to the chancellor, a copy of same being sent to the Appellant with no request from the chancellor for Appellant to submit his own findings of fact. Subsequent thereto, the chancellor signed his order, (RE. p.194) which is a verbatim replica of the Appellee. As a result, this court must conduct a de novo review of the record and analyze the court's findings with greater care and the evidence is subjected to a heightened scrutiny.

In paragraph one (1) of the Appellee's proposed findings of facts (RE., p.183) along with the Court's (RE., p.194), both state that Robert Evans has sought motions to modify on:

April 28, 2008,

December 6, 2005

May 1, 2007,

May 14, 2007.

A quick review of the docket sheet in this case (RE., p.5) will show that this is completely false and will not be found on said docket sheet nor in the record. It is incomprehensible how someone came up with these dates.

In paragraph two (2) of said findings of fact, in the Appellee's proposal and the lower court's order, both state that Robert's motion for modification was denied. This could not be further from the truth when in fact the motion to modify was eventually granted which is set forth further in this brief (RE., p.204). This is further supported by those statements on January 28, 2009.

The Court: Well, has he filed a modification?

Mrs. Portie: That's what we're here on today. (T., p.115, l.7-8).

In paragraph three (3) of the proposal and the Judge's findings of fact, state, subsequent to the May 28, 2008, hearing, both claim Robert filed a motion requesting that he be allowed to produce further testimony on his prior motion for modification. This was simply a misleading statement to the chancellor to which he accepted. The only order/request where a party wanted to re-open was filed by the Appellee on September 8, 2008 for a hearing set for October 17, 2008 (RE., p.75), and on November 3, 2008 (RE., p.98). This record is completely void of any motion by Robert requesting that he be allowed to re-open and produce further testimony.

In paragraph seven (7), of the proposal and the court's order, state that Robert promised on prior occasions to seek more profitable employment. Again, in trying to prove a negative, this statement will not be found in the record. What Robert did, was inform the court of his efforts to find alternate employment. (T., p.65, l.6-24; T., p.156, l.12-24).

Paragraph eight (8) states that Robert took a trip to Cancun Mexico in January 19, 2008 and that while most of the expenses of said trip were paid by his current wife, he did not work during said trip and made expenditures during same while paying no child support.

The record will reflect that, yes, he did take a trip to Cancun with his wife. However, the record tells us more. That this trip was made totally on the current wife's travel points. Robert bought a t-shirt for his son and himself. (T., p.214, l.12-29); (T., p.215, l.1-25); (T., p.229, l.20-27). The issue that Robert was paying no child support during this period is not supported by the record. (T., p.65, l.25-29).

Paragraph nine (9) provides that he failed to attempt different employment. Again, this is not what the record reflects. As previously stated, Robert set out many matters in which he was attempting to find different employment. (T., p.65, l.6-24); (T., p.156, l.12-24). There is nothing

further in the record to show otherwise.

In paragraph ten (10), with regard to the daughter, Elizabeth Ann Evans, who is over twenty one (21) years of age at the time of the hearing, this writer cannot comprehend the purpose of this finding of fact which was adopted by the court.

In paragraph eleven (11), both the proposal and the court's order state that Robert has virtually no living expenses. Child support is based on income not expenses. Otherwise, the current wife's income would come into play, which is not the law in the state of Mississippi. The current wife is simply not responsible for this child support. *Kilgore v. Fuller 741 So. 2d 351, 355 (¶14)(Miss. App. 1999).*

In paragraph twelve (12) of the proposal and court's order state that Robert is entitled to state retirement at *some point*. Appellant fails to see what income is at *some point* in the future has anything to do with present situation.

In paragraph thirteen (13) through seventeen (17), this is nothing more than repetition of the above paragraph seven (7) in the proposal and order.

It is necessary that the court refer to paragraphs nineteen (19) through twenty two (22) in comparison to paragraph twenty six (26) of the proposed findings of fact along with the court's findings of fact, which, of course are identical. Both findings speak of the application of the guidelines and that an award should be moved upward due to the circumstances. However, paragraph twenty six (26) states the application of the statutory guidelines would be unjust. Quite a contradiction. Regardless, the court gave no written finding or specific finding on the record that the application of the guidelines would be unjust as determined under the criteria specified in §43-19-103 Miss. Code Annot. This was also error. *Dufour v. Dufour, 631 So. 2d 192, 194 (Miss. 1994).*

One last point, it is interesting to point out that in paragraph twenty five (25) of the proposed

findings of fact and the court's order, they make a comment that Robert spends an excessive and unnecessary amount for photographs. As the record reflects, these were a few photographs of his son in a sporting event over a period of a year and a half which did not amount to $100.00 (T., p.260, l.7). Regarding the liquor, the record reflects the more exact testimony (T., p.237, l.15-22).

As shown from the above, when you compare the proposed findings of facts of Appellee with the, "In toto", findings of facts in the court's, and compare it to the actual record, there is no comparison.

The above are examples of the lower Court blindly accepting Appellee's misrepresentation of the record.

THE COURT ERRED AS A MATTER OF LAW AND/OR ABUSED IT'S DISCRETION IN IT'S TOTAL DISREGARD TO THE CHILD SUPPORT GUIDELINES SET FORTH IN §43-19-101 et seq (Miss Code Annot.).

The Lower Court's position on the Child Support Guidelines set forth in §43-19-101 et seq (Miss Code Annot.) [Guidelines] was this:

The Court: "I don't think the Court has to follow the guidelines". (T., p.297, l.22)

The Court: "I don't care whether he pays the government a dime". (T., p.86, l.25-26)

The above stated guidelines sets out a percentage of a provider's adjusted gross income (AGI) to be paid for child support. In the case of *sub judice*, there was only one child left under 21 years of age. To arrive at the adjusted gross income, the statute provides that you determine gross income from all potential sources and subtract from that legally mandated deductions which includes Federal, State and local taxes (Sub ¶ 3 (b) (I)). It is clear the lower court was mistaken in it's view of the guidelines and how to arrive at the AGI.

The uncontradicted testimony is that Robert lost his re-election bid in November 2007. This

was a loss of income of $3,500.00 net per month. The Court also found that Robert's income had been decreased "at least 50%" (T., p.297, l.22-25), but did not make a determination of his income as required under *Gray v. Gray, 745 So. 2d 234, 237 (¶ 14) (Miss. 1999).* Having found this loss of income by at least 50%, the Court arbitrarily pulled a figure out of the sky. The following transpired.

The Court: I don't think the Court has to follow the guidelines.

Mr. Evans: They have to look at them. The *McGowan* case said–

The Court: Yes sir, they have to, but this case is such a mess at this time, as I say, your income has probably been reduced at least that much.

Mr. Evans: Well, Judge, you ordering me to pay more than I am making as far as the record show.

The Court: Yes sir.

(T., p.297, l.22-28).

The Court went further in ordering Robert to continue to pay the son's car insurance and his own life insurance with the children as beneficiaries. (T., p.298, l.8-17) The Court continued.

Mr. Evans: Well, Judge, your ordering me to pay more than–uncontradicted proof shows–you're ordering me to pay almost 150% of my income.

The Court: Yes sir. I'm going to see what you can do. (T., p.298, l.18-20)

In the case of *sub judice,* the Court never attempted to ascertain Robert's specific salary, even though that evidence was presented in Robert's case in chief. (May 28, 2008 hearing, Plaintiff's Exh.#1; October 7, 2008 hearing, Plaintiff's Exb.#2; January 28, 2009 hearing, Plaintiff's Exh.#1). It would be impossible for the Judge to apply the guidelines without the Judge making this determination and why he deviated from the guidelines. Assuming he did deviate, such is only permitted by a written finding or specific finding on the record detailing the reasons for said

deviation. This was error *Gray @ p.237 (¶ 14).* As set out previously, one must also keep in mind, in reviewing the finding of fact, this Court must review the record de novo as a result of the Chancellor's verbatim acceptance of the Appellee's counsel's proposed findings of facts.

Going further on the Court's failure to follow the guidelines. The guidelines give Chancellors the proper amount of child support. Although this is rebuttable. §43-19-103 MS Code Annot. sets forth the criteria for overcoming these guidelines. Not only does the lower court fail to point out the allowable criteria set forth therein, it fails to point to any reason why he does not have to follow the guidelines.

There are a litany of lower courts that have been reversed by their disregard or deviation without reason, of the guidelines.[1]

In *Kilgore v. Fuller, 741 So. 2d 351 (Miss. Ct. App. 1999)*, as in the case of *sub judice*, Mr. Kilgore claimed that other amounts he paid should also be considered as child support when making a calculation under the guidelines. The court stated "There is substantial authority for including all child related expenses in the determination of whether the guidelines have been properly applied Id @ p. 355 (¶ 17). In this case, in addition to the child support, the court ordered Robert to pay the premium on his life insurance with the children as beneficiaries ($161.80) and automobile insurance on his son's automobile ($104.00). That these amounts should also be included when the court calculates child support under the guidelines.

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Gray v. Gray, 745 So. 2d 234,227 (¶14) (Miss. 1999) (where the order exceeded the guidelines with no finding specifically detailing the reasons.); *Lowery v. Lowery, 2009 WL 3645684 (Miss. 2009)* (no reason given for the deviation downward from the statutory guidelines); Dufour v. Dufour, 631 So. 2d 192, 194 (where the chancellor did not make any specific finding as to the obligor's income and failed to make any reference to the child support guidelines); *McEwen v. McEwen, 631 So. 2d 821,823 (Miss. 1994)* (where the lower court had the obligor paying over one-half of his income in child support); *Grove v. Agnew, 14 So. 2d 790, 792 (¶10) (Miss. Ct. App. 2009).*

Further, with regard to the guidelines and there being a total disregard, *Kilgore* said it best. "If a chancellor varies from the guidelines, it must still be a reasonable variation". We have found no authority for permitting the support award to be *totally unanchored from the guidelines. There can be deviation, but not a total disregarding of them".* Id @ 354 (¶ 12) (emphasis added). This was, in fact, the case when the obligor failed to truthfully report his expenses.

Based on the above precedent it would be totally incomprehensible for the lower court's ruling on the child support to stand. The lower court's arbitrary award totally disregards the guidelines and the many precedents of this court.

THE COURT ERRED, AS A MATTER OF LAW, AND/OR ABUSED IT'S DISCRETION WHEN HE FAILED TO HAVE HIS ORDER RELATE BACK TO MAY 28, 2008 WHICH IS THE DATE THE HEARING ACTUALLY BEGAN.

The Appellant's Motion for Modification was filed on November 14, 2007 (RE., p.19). A hearing was set for January 16, 2008 (RE., p.22). On December 18, 2007, an Order was entered allowing Beverly's counsel to withdraw (RE., p.24). No hearing was held in January 2008. On February 11, 2008, an Entry of Appearance was filed by one Susan Smith representing Beverly (RE., p.26). In an effort to get the matter moving, Robert filed his Motion to Temporary Abate Child Support (RE., p.27). This was due to the fact that this matter seemed like it was going to carry on for an extended period of time.

March 19, 2008, an Order was entered setting the matter to be heard on April 2, 2008 (RE., p.35). Beverly then filed for a Motion for Continuance on March 28, 2008 (RE., p.38) which was granted by the Court in it's Order filed April 3, 2008 (RE., p.43) and a hearing set for May 28, 2008. Discovery was conducted (RE., p.46-72). The initial hearing was held (T., p.2-63). At conclusion of this hearing, the Judge wanted, from each party, a "Short Summary of the Facts and Conclusions

of Law for the Modification" (T., p.69, l. 16-17). Subsequent thereto, on June 3, 2008, Beverly fired her attorney and said attorney filed her Motion to Withdraw (RE., p.73). On November 8, 2008, an Order was entered wherein Beverly was requesting to produce further testimony and the Court allowing same, set a hearing for October 1 or October 8, 2008 for additional testimony (RE., p.75) which was then rescheduled for October 7, 2008 (p.76). On the date of said hearing Beverly failed to show. On October 6, 2008, she simply emailed a message to Robert that she would not be able to attend and had informed Judge Bridges of same (October Hearing Exh. #1) (T., p.63, l. 25-27). The Judge announced he received no such message (T., p.64, l. 4-7). Robert then supplemented his evidence (T., p.64, l. 19-26; p.65-68) (October Hearing Exh. #2-3). Robert was then instructed by the Court to submit the Order granting the Motion to Modify which was to relate back to the May 2008 hearing (T., p.68, l. 11-17).

On October 17, 2008, present counsel filed her Entry of Appearance (RE., p.77) along with her Motion to Reconsideration/Motion for New Hearing or to Set Aside (RE., p.79). Although the Motion is styled as Plaintiff's Motion, it is clear from the body of the Motion that it is Beverly's Motion. Subsequent thereto, a Notice of Hearing by Telephone Conference was set to heard on November 13, 2008, one year from the date of Robert's filing his Motion to Modify (RE., p.91). Again, although the Notice states "Plaintiff by and through his attorney", it was Defendant who filed the Motion that was to be heard. The record is absent as to what occurred during this telephone conference.

On November 18, 2008, Notice of Hearing on Defendant's Motion was set to be heard on December 10, 2008 (RE., p.107). This date was rescheduled for January 28, 2009 (RE., p.108). A hearing was held and the Judge granted the Defendant's Motion (T., p.76, l. 17), and the Court announced, "I am ready today to hear testimony", along with Robert, for further testimony to begin

(T., p.76, l. 21-23). On the morning of the hearing, Beverly filed a Motion for Contempt (T., p. 119, l. 28-29). The Court then decided to reset this matter for a later time (T., p. 120, l. 12-13) with the matter to be heard on March 4, 2008 (T., p.123). The March hearing was held and subsequent thereto the Judge entered his Order modifying Robert's Motion to Modify.

It should be apparent that Robert was making every effort to get this matter resolved and heard by the Court as quickly as possible. This matter carried on for another year through no fault of Robert but due to continuances made by the Court and Beverly; all to the prejudice of Robert.

It is clear that this Court, on the issue of child support modification, modification will not relate back to the time of filing the Motion. *Thurman v. Thurman, 559 So. 2d 1014, 1016-1018 (Miss. 1990). Cumberland vs. Cumberland, 564 So. 2d 839, 847 (Miss. 1990).*

Cumberland goes further and gives the rational behind this rule; in that it provides sharp incentives for one who would have his support obligation reduced to bring it to trial as expeditiously as possible. Id at 847. This is exactly what Robert was trying to do only to be met with multiple continuances and re-openings requested by Beverly. In *Cumberland,* there were many delays. This Court further rational turned to the father who was seeking a reduction of child support, stating:

> **Here it is quite possible that, had Michael [father seeking modification] known he could obtain no forgiveness of any part of his child support obligation short of a hearing, he may have pre-terminated some of his tactical maneuvers which only served to fuel the fires and delay the final decree. Id at 847.**
> . . . . . .
> **[emphasis added].**

The same rational should be applied to the case of *sub judice.* A tactical move by anyone facing a motion for modification of child support would have a strong incentive to delay, delay, and delay a finality of the matter knowing that all prior child support payments are becoming vested. This is exactly what Beverly was doing in making a relatively simply matter run on for a year and

a half.

Applying the same rational as *Cumberland*, Robert who was attempting to bring this matter before the Court is not asking this Court that the matter be related back to the filing but to the time of the first hearing which began in May 2008 and continued on and on throughout the next year.

Even counsel opposite, at the hearing in March 2009, stated "This is a continuation of the May hearing" (T., p.99, l. 3-6).

THE COURT ERRED AS A MATTER OF LAW AND/OR ABUSED IT'S DISCRETION WHEN HE, ON ROBERT'S MODIFICATION MATTER, AWARDED BEVERLY'S ATTORNEY AN ATTORNEY'S FEE.

The Court, without a request by Beverly nor a showing of inability or McKee Predicate[2], ordered Robert to pay an attorney's fee of $1,000.00 as to the modification issue (T., p.298, l.25-27).

The record on the modification is void of any request by Beverly for an attorney's fee. As to inability to pay attorney's fees, the record is also void. By contrast, in October 2008 Beverly took out and had liquid cash from the bank in the total sum of $15,500.00 (T., p.139, l.7-15). The record is also void of any admissible evidence as to what she did with these sums. In fact, Beverly never testified on this particular matter.

The standard of review for overturning an award of or denial of attorney's fees is an abuse of discretion. *Rodriguez v. Rodriguez, 2 So. 3d 720, 732 (¶ 42) (Miss. Ct. App. 2009).* In order for this Court to say that the Chancellor has abused his discretion, there must be insufficient evidence to support his conclusions. *Maybus v. Maybus, 910 So. 2d. 486, 488-89 (¶ 7) (Miss. 2005).* The party requesting attorney's fees must prove an inability to pay. *Rodriguez @ 732 (¶ 43) citing Dunn v.*

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2 *McKee v. McKee, 418 So. 2d 764, 767 (Miss. 1982).*

Dunn, 609 So. 2d 1277, 1278 (Miss. 1992). The record is void of any evidence to support the Chancellor's conclusions or of Beverly's inability to pay.

Again, there was no evidence in the record to support the Chancellor's conclusion of an award of attorney's fees. More specifically Beverly had a money sum in excess of $15,000.00 which she gave no accounting.

THE COURT ERRED, AS A MATTER OF LAW, AND/OR ABUSED IT'S DISCRETION WHEN HE FOUND ROBERT IN CONTEMPT AND FURTHER AWARDING ATTORNEY'S FEES AS A RESULT THEREOF.

The Lower Court clearly abused his discretion both on the facts and the law of this State, when he found Robert in Contempt. This finding also contradicts what the Chancellor found from the bench. Robert had been the County Attorney for Washington County for twenty (20) years and lost that position in the November 2007 election (T., p.147, l.10-11; T., p.148, l.1-13). Due to the expected loss of income (net of $3,500.00) (T., p.147, l.9-13) at the end of his term, (2007) Robert filed his Motion for Modification on November 14, 2007 (RE., p.19). That matter was set on December 14, 2007 for a hearing to be held on January 16, 2008 (RE., p.22). Prior to that hearing, on December 13, 2007, Beverly's attorney was allowed to withdraw (RE., p.24). There is no need to again set for the time line as it is set out above. On February 11, 2008, Susan Smith entered her appearance.

In the Divorce Settlement Agreement (RE., p.15) Robert was obligated to pay child support of $2,000.00 per month. Out of that $2,000.00 he was to pay the house note on the parties residence in which Beverly had possession (RE., p.15). Subsequent to the filing his Motion to Modify and due to the loss of income, Robert, out of a tax account and savings account, continued to pay the house note through May, 2008.

The testimony and exhibits are uncontradicted that in 2008, Robert's income had decrease

drastically to a gross amount of $14,040.00 (T. 154, p.9-10) (Plaintiff's Exh. #1, January 28, 2008 hearing) half of what it was in 2007 (Plaintiff's Exh. #4, May 28, 2008 hearing, K-1) plus the net of $3,500.00 per month loss from the County Attorney's position ($42,000.00 annually). Taking away for taxes, etc., this comes to $800.00 per month net or his adjusted gross income. That further, Beverly instructed Robert that she would no longer be paying the younger child's tuition at Washington School. (Plaintiff's Exh. #3, October 7, 2008 hearing). Although not required to do so by the Divorce Agreement, out of this adjusted gross income, Robert began paying the $375.00 per month for school tuition and as per the previous Order of the Court he continued to pay for Robert Jr.'s insurance of $109.00, life insurance for $161.00 per month along with a cell phone of $60.00 per month for an approximate amount of $700.00 (T., p.155, l.19-27).

Having heard the testimony the lower court stated from the bench:

The Court: "But the law is that he can't be held in contempt if he can't pay. I hope you know that law."

Mrs. Portie: I've studied up on it, your Honor.

The Court: And I was not going to hold him in contempt today.

Mrs. Portie: I am sorry to hear that.

The Court: Well I don't think I can based on the evidence (T., p.299, l.26-29; p.300, l.1-2)".

No further evidence was presented on the contempt. The only other matter entertained by the Court was Appellant's Petition to Reconsider and Appellant's Petition for the Judge's Recusal.

Regardless of the Judge's finding from the bench, his Order was entered on July 28, 2009 finding Robert in contempt (RE., p.213) and as result, ordering him to pay Beverly's attorney's fees of $1,300.00.

Robert, in reliance on this Court's precedent, and upon realizing a substantial loss of income,

filed his Motion to Modify in November 2007. During the time he was attempting to get a hearing and ruling, he paid virtually all of his income in his attempts to comply with his obligations. The Court found, from the evidence, his inability to comply with all previous Court Orders. As a result, he cannot be held in contempt. In addition, "When a party promptly files for a modification, i.e. reduction, of support based on his inability to pay, a finding of contempt is not proper". *Setser v. Piazza, 644 So. 2d 1211, 1216 (Miss. Ct. App. 1994) citing Cumberland v. Cumberland, 564 So. 2d 839 (Miss. 1990); Thurman v. Thurman, 559 So. 2d 1014 (Miss. 1990); Clower v. Clower 988 So. 2d 441, 445 (¶ 11) (Miss. App. 2008).* As Robert promptly filed for a reduction in child support when his financial circumstances changed, the Chancellor erred in finding him in contempt. Consequently, no attorney's fees should have been awarded to Beverly, Id @ 1216, *Grissom v. Grissom, 952 So. 2d 1023, 1030 (¶ 19) (Miss. App. 2007).*

In accordance with the above, Appellant knew of his upcoming reduction in income and promptly filed his Motion to Modify. In addition, in his effort to comply within his ability, paid virtually all his income for the benefit of the minor child. As a result, and based upon this Court's precedent, he could not be held in contempt and the attorney's fees which followed.

CONCLUSION

After this Court conducts it's "de novo" review of the actual facts of this case, the replica ruling of the lower Court cannot stand in addition to the lower Court's total disregard of the child support guidelines.

In addition, to the lower Court erred in awarding attorney fee to Appellee absent any evidence or precedent by this Court.

Upon remand, any Order to the matter of modification should date back to the beginning of the hearing to the Motion to Modify which was held in May 2008.

Robert, in following precedent set by this Court, knowing of the loss of income promptly filed his Motion for Modification in November, 2007 so that he would not be, in Contempt of Court.

Respectfully submitted, this the 15th day of January, 2010.

ROBERT D. EVANS, Appellant

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CERTIFICATE OF SERVICE

I, Robert D. Evans, Appellant, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing document to:

Evelyn Tatum Portie, Esquire
Attorney for Appellee
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Brandon, MS 39047

Hon. Billy Bridges
Special Chancellor Washington County
520 Chuck Wagon Drive
Brandon, MS 39042

This, the 15th day of January, 2010.

ROBERT D. EVANS, MSB [redacted]