

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES CRAIG IRVING,

APPELLANT

v.

CASE NO. 2010-M-00310-SCT
Consolidated with
CASE NO. 2010-TS-00355

JOHNNIE EVANS IRVING,

APPELLEE

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DECISION OF THE
CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI

John T. Lamar, Jr.

MSB [REDACTED]

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ARGUMENT

ISSUE 1: WHETHER THE CHANCELLOR WAS MANIFESTLY IN ERROR IN GRANTING THE APPELLEE'S MOTION TO DISMISS THE APPELLANT'S PETITION FOR MODIFICATION ON THE DOCTRINE OF RES JUDICATA.

In the appellee's brief the Appellee, Ms Irvin, argues the date for the decree of modification should be December 3, 2008, which is the date the Chancery Court signed the decree nunc pro tunc to November 5, 2008. "Nunc pro tunc means 'now for then' and when applied to the entry of a legal order or judgement, it normally does not refer to a new or fresh (de novo) decision, ... but relates to a ruling or action previously made or done." *White vs. White*, 645 So. 2d 875, 880 (Miss. 1994). See also Warner's Griffith, Mississippi Chancery Practice (Rev. Ed.), §623.

In the present case this means the modification of child support was heard, ruled upon and entered on November 5, 2008. It was only entered "now for then" on December 3, 2008.

Mr. Irvin lost his job, through no fault of his own, after the hearing and ruling on November 5, 2008. He was served with a Petition for contempt on January 14, 2009, and filed a Counter-Petition to Modify in his answer. A person must be in compliance with a previous order or show that it is impossible to perform that order to be able to bring a Petition for modification. *Kincaid v. Kincaid* 578 So. 2d 263 (Miss. 1992). The Counter-Petition to Modify was subsequently voluntarily dismissed without prejudice to allow him to come into compliance with the November 5th, 2008 ruling of the court. In dismissing without prejudice he reserved his

rights to bring forth all factors contributing to the change in circumstances after the November 5th ruling.



A petition for modification can only be modified when there is a substantial and material change in the circumstances of the child or parents since the decree awarding the support. *McEwen vs. McEwen*, 631 So. 2d 821 (Miss. 1994). Mr. Irving's circumstances have changed, due to the loss of his job and having to take a reduction in income. Further, the court would not allow him to present proof at a modification hearing that he has lost his job and, the reasons therefore, are inequitable. Mr. Irving has not had the opportunity to place into evidence his loss of employment, or the reasons therefore. In order for res judicata to apply all four identities of res judicata must be present. See *Dunaway v. W. H. Hopper and Associates, Inc.*, 427 So.2d 749 (Miss. 1982). Mr. Irving's job loss took place after the Court ruled on November 5, 2008 and therefore, the fourth identity of res judicata, which is the quality or character of a person is not the same as the court previously heard, and thus defeats res judicata. The fact of his job loss was not present when the court heard the matter previously. This could not have been raised during the prior litigation.

CONCLUSION

It is the position of Mr. Irvin that the honorable and learned Chancellor, as a matter of law, committed reversible error when he ruled that Mr. Irvin could not put into evidence his termination of employment from his previous employer. The four elements of the doctrine of res judicata were not met. Therefore, Mr. Irving respectfully requests this Court to reverse the

Chancellor's decision and allow him to introduce this evidence at the modification proceeding currently pending before the Chancery Court of DeSoto County, Mississippi.

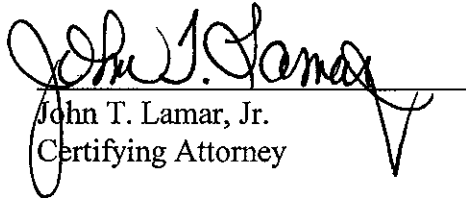
Respectfully submitted,
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CERTIFICATE OF SERVICE

I, John T. Lamar, Jr., attorney for Appellant, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief to the Honorable Malenda H. Meacham at her address of P. O. Box 566, Hernando, Mississippi 38632, to the Honorable Joy Wolfe Graves, P.O. Box 80281, Starkville, MS 39759, and the Honorable Percy L. Lynchard, Jr., Chancellor, at his address of P.O. Box 340, Hernando, Mississippi 38632.

This the 4th day of March, 2011.



John T. Lamar, Jr.
Certifying Attorney