

2010-CA-00582-E

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that no additional persons have an interest in the outcome of this case.

  
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## **STATEMENT OF THE CASE**

### **Course of the Proceedings and Dispositions in the Court Below**

Many of the statements made by Hester were either disputed, or were not established as "fact." More importantly, numerous statements made by Hester as being facts, were nothing more than unsupported statements made by Hester's counsel during hearings.

Samples disputed that she had ever received services under Title IV-D of the Social Security Act. (T. 95). No documentary evidence supports Hester's contention that the hearing on the merits was continued "several times for DHS to produce an affidavit from Sundra from Texas." None of the orders for continuance verified that, but to the contrary, show that some of the continuances were sought by Hester. (C.P. 39, 42)

Hester says the attorney for DHS, Nicole Bryan, who filed the initial Petition, faxed an affidavit by Samples to Hester's counsel after the trial. That statement is based purely upon Hester's counsel's statement. The DHS attorney was not present at the hearing, nor had she been requested or subpoenaed to be there. Hester sought a motion for reconsideration, claiming that the affidavit was "newly discovered evidence," but the trial judge disagreed that it was.

### **Statement of the Facts**

Again, numerous purported facts were disputed or were based on hearsay or other inadmissible evidence. Hester's "Statement of the Facts" is more an argument of Hester's claims than it is "facts."

Again, Samples disputed that she had received any services under Title IV-D of the Social Security Act. It was not established as a fact that continuances were sought by DHS, because it did not have an affidavit from Samples.

Hester's counsel told the Court that Nicole Bryan, the DHS attorney, "represented" to Hester's counsel there was no affidavit. There was no documentary or any other evidence to support the claim of Hester's counsel. The statement by Hester's counsel that the first learned of an affidavit by Samples after the trial on the merits when he received a fax from Nichole Bryan is likewise unsupported by any documentary or other evidence. Hester testified that prior to trial he knew about the affidavit, though he did not have it. (T. 316). Hester did not subpoena any documents from DHS or from any State of Texas agency. He requested no documents from either DHS or Samples. (T. 282). It was only because of Hester's lack of diligence in obtaining the affidavit that he did not have it. In discovery, Hester was asked what payments he had made to Samples for child support and other payments that may have been required by the Final Judgment of Divorce. Hester's response was to refer Samples to a MoneyGram Report, and it clearly showed that no payments were sent to Samples prior to the year 2005. (Ex. 12). Hester claimed that MoneyGram could not produce any records beyond five years, and therefore, he was unable to provide documentary evidence of any payments he had made. Notably, the two Subpoenae Duces Tecum to MoneyGram asked for records only back to the year

2004. (C.P. 80, 89) There is not even a document in the record showing that the Subpoenae Duces Tecum were ever served on MoneyGram. He claims in his brief that Samples's Petition said Hester failed to pay any child support after May, 1992, when the parties divorced. That is an incorrect statement. Exhibit "A" to her Petition gives him credit for payments made during the years 2005 and 2006. (C.P. 77). Samples had no legal requirement to give him credit for those payments, because that information was based solely upon a MoneyGram report provided by Hester. Credit for those payments was not based on any cancelled checks or receipts.

Hester claims that subsequent to the divorce, Samples moved to "an undisclosed address." That was not established as fact. (T. 94). Further, it was disputed that Priscilla "for the most part, did not live with Samples after November of 2004."

While Hester repeatedly claimed he had sent payments directly to Priscilla using MoneyGram, there was no evidence to show that the MoneyGrams were received by Priscilla, nor if they were, evidence of how that money was used. Other than the MoneyGram report and a statement from East Central Community College (ECCC), Hester admitted no documents in evidence. Hester claimed he had paid Priscilla's tuition at East Central Community College. The ECCC Statement, was just that, not a receipt, and it showed there was a balance. It further showed that it was for a time period after the trial judge determined Priscilla was emancipated, that being December, 2006. (Ex. 8) Further, Hester stated he gave the money to Priscilla and not to ECCC.

Hester claims "inferences" can be made about the purpose for which he sent Priscilla money. Again, there is no evidence that she received it, and no evidence that if she received it, for what purpose it was used. Hester suggests that the purported amount of money shown as being sent to Priscilla by MoneyGram is evidence that Samples hid Priscilla from him. That is mere supposition, not fact.

Hester's Brief acknowledges that the total payments made to Samples in 2005 and 2006 was \$10,439.00. He claims that Samples "ultimately at trial admitted she had been paid, and the Chancellor gave credit for paying." That is an incorrect statement, because Samples admitted she was giving Hester credit for those payments, and that is further established by Exhibit "A" to her Petition.

Hester says he never received money from Samples to pay for Priscilla's college education. That was not an issue before the Court. He claims he paid all of Priscilla's expenses during the time she was in college, but again, he had no documentary or other evidence of that. Again, the only semblance of evidence Hester offered for any purpose was the MoneyGram report.

Hester repeatedly claims in his Brief that Samples "finally had to admit at trial" that Hester should be credited with \$10,439.00 for child support payments in the form of MoneyGram receipts. Again, as shown by Exhibit "A" to her Petition, she never failed to give him that credit. Apparently, Hester wants to suggest that Samples at some point lied about receiving money from Hester. That simply is not true.

Hester claims that Samples was under court order to notify the court of her change of address. It was not established that there was any rule or court order requiring that of her, particularly considering nothing was stated to that effect in the Final Judgement which was entered in 1992. Hester claims that Samples denied receiving a \$4,000.00 tax refund that IRS had seized from Hester and a \$600.00 payment, which had been seized by the Texas Attorney General. Yes, she denied that, because she did not, in fact, receive those payments, and there was no evidence to show that she did. Further, there was testimony that Hester had other children he was supporting. (T. 133).

Hester claims that the trial judge erroneously failed to give him credit for some of Priscilla's rent for which he had made payment. That is incorrect as shown by the trial judge's statement concerning that. (T. 248).



## STATEMENT OF ISSUES

### ISSUE I

THE CHANCELLOR CORRECTLY DENIED HESTER'S MOTION FOR RE-CONSIDERATION

### ISSUE II

THE CHANCELLOR DID NOT ERR IN THE FINAL JUDGMENT WHEN HE FAILED TO AWARD HESTER CREDIT FOR THE \$897.00 HE PURPORTEDLY PAID FOR RENT WHEN PRISCILLA WAS LIVING AT AN APARTMENT IN 2006

### ISSUE III

HESTER SHOULD NOT RECEIVE CREDIT FOR THE MONEY HE PURPORTEDLY PAID DIRECTLY TO PRISCILLA FOR HER RENT AND EXPENSES IN NOVEMBER, 2004 UNTIL JUNE, 2005, NOR RECEIVE ANY OTHER CREDIT.

### ISSUE IV

HESTER SHOULD NOT RECEIVE CREDIT ON ANY ARREARAGE FOR ANY MONEY HE MAY HAVE PAID TOWARD PRISCILLA'S COLLEGE TUITION

### ISSUE V

HESTER SHOULD NOT BE AWARDED ATTORNEY'S FEES NOR COSTS OF THE APPEAL, NOR SHOULD THE CASE BE REMANDED. TO THE CONTRARY, SAMPLES SHOULD BE GRANTED ATTORNEY'S FEES FOR DEFENDING THE APPEAL, PLUS THIS COURT SHOULD IMPOSE SANCTIONS AND AWARD ATTORNEY'S FEES, BECAUSE THE APPEAL IS FRIVOLOUS PURSUANT TO M.R.A.P. 38

## SUMMARY OF ARGUMENTS

### ISSUE I

#### THE CHANCELLOR CORRECTLY DENIED HESTER'S MOTION FOR RE-CONSIDERATION

Hester's Motion for Reconsideration essentially claimed that he had newly discovered evidence which the Court should consider with respect to its decision. This purported evidence was an affidavit from the Texas Attorney General and an affidavit accompanying it signed by Samples. Attached to the affidavits were "spread sheets." The trial judge determined that they did not constitute newly discovered evidence previously, because Hester knew of the documents prior to the hearing on the merits.

### ISSUE II

#### THE CHANCELLOR DID NOT ERR IN THE FINAL JUDGMENT WHEN HE FAILED TO AWARD HESTER CREDIT FOR THE \$897.00 HE PURPORTEDLY PAID FOR RENT WHEN PRISCILLA WAS LIVING AT AN APARTMENT IN 2006

Hester claimed that while the trial judge said he was giving him credit for rent he had paid for Priscilla, that was not reflected in the Final Judgment. Samples testified during the hearing on the merits that she, in fact, gave Hester credit for money she had received from him for rent. That credit is reflected in her Petition and in the amount for which she agreed to give Hester credit.

### ISSUE III

HESTER SHOULD NOT RECEIVE CREDIT FOR THE MONEY HE PURPORTEDLY PAID DIRECTLY TO PRISCILLA FOR HER RENT AND EXPENSES IN NOVEMBER, 2004 UNTIL JUNE, 2005, NOR RECEIVE ANY OTHER CREDIT.

Hester cited no legal authority for this proposition, nor did he have any evidence that purported payments he had made directly to Priscilla were, if fact, received by her. Hester's testimony contradicts his response to an interrogatory stating that he made no payments for child support prior to the year 2005, as shown on a MoneyGram report. He also testified that the money for the MoneyGram payments was not his, but that of the church. He claimed that Samples committed perjury and a fraud on the Court, because she testified that Hester made no payments to her other than those shown on the MoneyGram report, but had signed an affidavit in 2007 indicating otherwise. During the hearing on Hester's Motion for Reconsideration, the error in the affidavit was explained to the trial judge.

### ISSUE IV

HESTER SHOULD NOT RECEIVE CREDIT ON ANY ARREARAGE FOR ANY MONEY HE MAY HAVE PAID TOWARD PRISCILLA'S COLLEGE TUITION

Hester claimed he paid money to East Central Community College for Priscilla's education. He presented to the Court a statement from the college, but the statement showed there was a balance owed, and it was not a receipt. Further, Hester testified that he gave the money to Priscilla, not the college. The statement also was for a period subsequent to Priscilla's Emancipation in December, 2006.

## ISSUE V

HESTER SHOULD NOT BE AWARDED ATTORNEY'S FEES NOR COSTS OF THE APPEAL, NOR SHOULD THE CASE BE REMANDED. TO THE CONTRARY, SAMPLES SHOULD BE GRANTED ATTORNEY'S FEES FOR DEFENDING THE APPEAL, PLUS THIS COURT SHOULD IMPOSE SANCTIONS AND AWARD ATTORNEY'S FEES, BECAUSE THE APPEAL IS FRIVOLOUS PURSUANT TO M.R.A.P. 38

Hester claims he should be awarded attorney's fees, because Samples committed perjury or a fraud on the Court. For a number of reasons, Hester failed to prove that. In fact, it appears that Hester was the one who committed perjury, because in a number of material respects, he contradicted himself during the hearing. Particularly, he wanted credit for child support payments he purportedly made outside the years 2005 and 2006; however, his response to an interrogatory said the only payments he made were during 2005 and 2006 in the form of a MoneyGram. He claimed he paid East Central Community College for Priscilla's education, but the document from East Central Community College was not a receipt, but a statement, and it showed there was a balance owed. The East Central Community College statement also showed that the costs were for a period of time subsequent to Priscilla's emancipation in December, 2006.

## ISSUE I

### THE CHANCELLOR CORRECTLY DENIED HESTER'S MOTION FOR RE-CONSIDERATION

Hester says his Motion for Reconsideration should have been granted, because the Texas affidavit was not admitted into evidence at the hearing on his motion. While the trial judge did deny its admission into evidence, it appears he denied that for purposes of the hearing on the merits, and not as evidence of whether the motion should have been granted. Throughout the hearing on the Motion, the trial judge read and discussed the Affidavit (Ex. 13 I.D.) (T. 256-329). In effect, it was marked only for identification, because it was not to be considered as evidence on the merits of Samples's contempt claim. However, it was considered by the trial judge in determining if it was "newly discovered evidence" and whether the Motion for Reconsideration should have been granted.

Hester claims the affidavit was "newly discovered evidence," and therefore, his Motion for Reconsideration should have been granted. For several reasons, the affidavit was not newly discovered evidence.

As stated in the Brief of Appellant, to be newly discovered evidence, it must be proven that the evidence was discovered only following the hearing on the merits. Most importantly, Hester testified on cross-examination at the hearing on his Motion for Reconsideration, that he knew before the trial that the affidavit existed. Specifically, Hester admitted that "Texas" told him

before the trial there was an affidavit; however, he said it was not provided to him at that time. (T. 316). During the hearing on the merits the trial judge reminded Hester's attorney that he had previously told him, "I should like to have had something from the State of Texas...." Hester's attorney did not respond (T.103). That was in reference to Hester attempting to have introduced in evidence a portion of the affidavit. (T. 103, Ex. 3 I.D.) The pages of Exhibit 3 I.D. are included with the affidavit Hester presented to the trial judge during the hearing on the Motion for Reconsideration. Thus, that is obviously further evidence the financial documents included with the affidavit were not newly discovered evidence.

Hester's attorney repeatedly argued before the trial judge that the Department of Human Services, and specifically its attorney, had either intentionally or negligently failed to provide him the affidavit. Once Samples was substituted for the Department of Human Services (DHS), DHS ceased to have any responsibility in the legal action.

Hester's attorney's argument concerning this issue consisted in large part about what DHS's attorney may have told him. Ms. Bryan, DHS's attorney, was not present, nor had she been subpoenaed or otherwise requested to attend the hearing on Hester's Motion for Reconsideration. Thus, whatever Ms. Bryan may have said, was inadmissible hearsay. Whatever Tanya Carl may have said was inadmissible as hearsay.

The trial court asked Hester's attorney if there had been any effort before the trial to obtain the affidavit. Hester's attorney said "representations" had been made by DHS's attorney that its file had been turned over to Sample's attorney. The trial court noted that if that were true, then DHS's attorney would have to testify to that. (T. 295, 296).

During the hearing on Hester's Motion for Reconsideration, Hester's attorney argued that when the trial was initially set, the trial judge's Family Master, who at that time was assigned to the case, told DHS the trial could not proceed without an affidavit from Texas. Hester's attorney argued that DHS's attorney said the affidavit did not exist. But again, there is nothing in the record to substantiate what Hester's attorney argued. Again, DHS's attorney was not present at the hearing on the Motion for Reconsideration, nor had she been subpoenaed or otherwise requested to be at the hearing.

Hester's attorney said DHS sought a continuance when the hearing was initially set. (T. 303). The record shows that it was Hester who sought the initial continuance. The Order for Continuance, dated September 17, 2008, said the hearing was continued so that Hester could have his attorney present. (C.P. 39). Subsequently, on December 16, 2008, Hester filed his Motion to Continue the Case, because his attorney had a conflict. (C.P. 42) However, the Order for Continuance, dated December 18, 2008, says for some reason not stated in the record, that the continuance

was granted on the motion of DHS. After that the hearing was twice continued upon the motion of DHS.

As Samples's attorney informed the trial judge, Hester never propounded a request for production of documents. (T. 282). That is verified by Hester's Notice of Service of Discovery, which shows that he only propounded interrogatories. (C.P. 61). No subpoena duces tecum was issued to the Department of Human Services or any Texas State Agency.

Thus, Hester failed to prove that the affidavit was discovered following the trial. Another requirement for Hester to show the affidavit was newly discovered evidence is that he used due diligence to discover the evidence. Obviously, Hester failed to satisfy that requirement, particularly considering he stated he knew about the affidavit prior to trial and had Exhibit 3 I.D.

For a new hearing to have been granted, Hester also had to show that the purported newly discovered evidence would probably have produced a new result. Goode v. Synergy Corp., 852 So. 2d 661 (Miss. Ct. App. 2003), cert. denied, 848 So. 2d 899 (Miss. 2003). Hester suggests that Samples committed perjury, and therefore the trial judge had the option to dismiss Samples's case. In support of that proposition, Hester cites Trim v. Trim, 33 So. 3d 471 (Miss. 2010). In that case, this Court held that the intentional filing of a false Rule 8.05 Financial Statement constituted a fraud on the court. Other than her Petition, Samples filed no document



with the Court. Hester did not provide the Court with any documentary evidence to refute Samples's testimony, and that is because he had none.

Hester said that Samples's delay in taking action resulted in Hester's purported MoneyGram receipts being no longer available. Hester never provided any proof that any MoneyGram receipts or documents for the period 1992 through 1998 ever existed. Nothing in the record shows that any subpoena duces tecum was served on MoneyGram. The subpoena duces tecum to MoneyGram only asked for documents back to 2004. (C.P. 80-89). Exhibit 4, the MoneyGram International Transaction History Request, states that the report range dates are January, 2003 to May, 2008. Thus, MoneyGram apparently researched its records concerning payments made by Hester going back to at least January, 2003, but found his first MoneyGram payment was made December 2, 2004, and that was not to Samples.

Samples's interrogatories to Hester asked him to state what payments of child support he had made to Samples, including the date of payment, whether the payment was hand-delivered or mailed, to whom payment was made and whether Hester had a receipt for the payment. Hester's only response to that interrogatory was, "See documents attached." (T. 275). Hester's attorney responded that the only proof of payment and only document attached was the MoneyGram Report. Thus, Hester's responses to the interrogatory further verify that he made no payments to Samples prior to 2005.

Hester had testified that he did not know where Samples lived from May, 1998 through October, 2004. Thus, he would not have known where to send any child support payments during that time period. (T. 180). Hester further testified that money paid with MoneyGrams was not his money, but that of the church. When asked about the source of the MoneyGram payments, Hester said:

Q. All that money you paid out in MoneyGrams receipts, that was your money and nobody else's money?

A. No, Sir, that money was church money. (T. 192).

Thus, Hester cannot say that it was his money which was paid to Samples through MoneyGram. Samples did not have to give Hester credit for the MoneyGram payments shown as being sent to her, because the MoneyGram report was not sufficient legal evidence of her receipt of the money, and it was not sufficient legal evidence that Hester's money was used to make the payment. He wants credit for payments he purportedly made to Priscilla, but again, he testified that those payments were not even his money. Hester wanted to be given credit for a payment purportedly made to East Central Community College, but he admitted that he did not make any payment to East Central Community College, but gave the money to Priscilla. (T. 205). If anyone committed fraud on the Court, or perjury, it was Hester.

## ISSUE II

### THE CHANCELLOR DID NOT ERR IN THE FINAL JUDGMENT WHEN HE FAILED TO AWARD HESTER CREDIT FOR THE \$897.00 HE PURPORTEDLY PAID FOR RENT WHEN PRISCILLA WAS LIVING AT AN APARTMENT IN 2006

The trial court was referring to MoneyGrams sent directly to Samples, which were used to pay rent in March, April and May, 2006. Samples testified that she was giving Hester credit for those amounts for which he had paid directly to her by MoneyGram. (T.126). The Final Judgment listed the payments for which Hester was given credit by the trial court, and Hester's attorney signed the Final Judgment agreeing as to its form. Thus, Hester is procedurally barred from stating that the Judgment was in error in not including other payments which may have been made by Hester.

Hester failed to acknowledge that the trial judge gave him credit for the money he paid for rent. In its opinion, the trial judge referred to Priscilla living in an apartment from March, 2006 to August, 2006, and that Hester paid for the rent. The trial court stated:

He testified he sent money to do that, and that money is credited in this 10,439 that we referenced. We have already given him credit for that. (T.248).

The Final Judgment of Divorce-Irreconcilable Differences awarded Hester visitation with Priscilla during the months of June, July and August when school was not in session. (C.P. 17). The trial judge noted that Hester was not entitled to credit against his child support for his visitation periods. (T. 247).

### ISSUE III

HESTER SHOULD NOT RECEIVE CREDIT FOR THE MONEY HE PURPORTEDLY PAID DIRECTLY TO PRISCILLA FOR HER RENT AND EXPENSES IN NOVEMBER, 2004 UNTIL JUNE, 2005, NOR RECEIVE ANY OTHER CREDIT.

Hester wants credit he purportedly made to Priscilla. All of those payments were purportedly made by MoneyGram. Hester offered no evidence that Priscilla received any of the purported payments. Priscilla was not called to testify as to whether she received any of the purported payments, nor to testify as to the purpose of the payments. Hester has cited no legal authority stating that a mere list of purported payments is sufficient proof of those payments. The MoneyGram list was not even verified. (Exhibit 12). Notably, Hester suggested he made some form of child support payments prior to December 2, 2004, the first entry on Exhibit 12; however, Exhibit 12 states "Report Range Dates: January, 2003 - May, 2008. Thus, Exhibit 12 shows that even if it is accurate and authentic, Hester made no MoneyGram payments prior to December 2, 2004. Not even an original of the MoneyGram report was introduced into evidence. In addressing the issue of proof of payment, the Court in Dorr v. Dorr, 797 So. 2d 1008 (Miss. Ct. App. 2001) said:

The Rules of Evidence of this State declare that in order "[t]o prove the content of a writing..., the original writing... is required, except as otherwise provided by law." M.R.E. 1002. Rule 1003 permits the use of a duplicate in certain circumstances. Rule 1004 permits other evidence of the contents of a writing only if all originals have been lost or destroyed, or no original can be obtained by any available judicial process or procedure.

Dorr held that a chancellor erred in accepting a check register as proof of payment of child support payment.

Hester claims Samples's Petition should have been dismissed, because of her allegedly committing perjury, or Hester should be given credit for whatever payments he claims he made from May, 1992 through June, 1998 or from May, 1992 through December, 1996. In essence, Hester wants the best of both worlds. Particularly, he wants the Court to use Exhibit 3 I.D. or the Texas affidavit in giving him credit for that period of time, but wants the Court to use the MoneyGram report for all other times. The MoneyGram report shows that his first MoneyGram payment to Samples was sent February 13, 2005, and the last on June 5, 2006. Hester's Brief says, "There can be no doubt that the MoneyGram history more accurately reflects Percy's payments than does the Affidavit." (Brief of Appellant, p. 14). Thus, by Hester's own admission, the affidavit he wanted the trial judge to consider was inaccurate. The trial judge highlighted numerous discrepancies in the affidavit. (T. 215-217). Again, based on Hester's responses to Samples's interrogatories and requests for documents, the only payments he made were as reflected on the MoneyGram statements. The affidavit shows that of December 5, 2006, the month in which the trial judge said Priscilla was emancipated, the balance owed in child support was \$18,100.00. Thus, it is obvious that Hester wants the Court to use the portions of multiple documents which benefit him. As the trial court noted, the amount for 2005 and 2006 for which Samples was willing to give Hester credit exceeded

the amount shown on the affidavit, Exhibit 3 I.D. Clearly, the only document the Court could have considered as being accurate was the MoneyGram statement. As stated previously, Hester could not even testify that the MoneyGram payments sent to Samples was his money. He said it was the church's money. Even if the affidavit, of Exhibit 3 I.D., was relevant, by Hester's own admission, it was confusing and misleading, and therefore, could be excluded as evidence. M.R.E. 403.

Hester argues that the inaccuracy of the affidavit, and that the trial judge believed it was "somebody's estimate," is not sufficient justification to not allow the affidavit to be considered as evidence. Obviously, Hester first has to show that the affidavit was "newly discovered evidence," which by Hester's own admission, was not. However, the fact that the trial judge believed the documents contained "inaccurate information, and was otherwise somebody's estimate" falls within the realm of "confusion" and "misleading" under M.R.E. 403.

Hester says the affidavit "confirms Percy's testimony about his payments from May of 1992 through December of 1996." (Brief of Appellant, p. 15). Again, Hester's responses to Samples's interrogatories say the only payments he made were according to the MoneyGram statement, and that statement does not include any payments between May, 1992 and December, 1996.

Hester further argues that if the trial judge questioned the authenticity of the affidavit, and if that was a reason for its not

being admitted, that was an error. The authenticity of the document was not an issue before the Court during the hearing on Hester's Motion for Reconsideration.

Hester argues that Samples's attorney knowingly allowed Samples to commit perjury and a fraud on the court. Samples did not commit perjury, but, as stated previously, it appears it was Hester who may have done that. If Samples had knowingly presented to the court a false document, and that was proven, then there would have been a fraud on the court. However, as Samples's counsel informed the trial judge during the hearing on the Motion for Consideration, the affidavit was erroneous, and he explained the reason for that. Had Samples's counsel known that the affidavit was correct, but allowed Samples to testify differently, that would have been unethical and a fraud on the court. However, that was not proven, nor was it true. Samples had no legal or ethical duty to volunteer to Hester anything Samples may have said or done which may have been contradictory to her testimony. Obviously, that is one of the reasons for the discovery process, which Hester's counsel did not diligently pursue, since he failed to request any documents and failed to subpoena any documents from DHS or the State of Texas.

Hester argues that Samples should not have been awarded attorney's fees, because she came into court without "clean hands." Specifically, Hester claims that her testimony was "seriously misleading," because she testified that she had not seen Exhibit 3

I.D., the Texas Attorney General's spreadsheet. Samples was asked on cross-examination if she had seen that document before, and her response was, "No, I've never seen this one." (T. 97). After the trial judge refused admission into evidence of that document, the only other question asked of Samples about that document was whether she had "received Title IV-D funds or any other funds whatsoever through the Attorney General's Office in the State of Texas?" To that question, Samples again replied that she had not. (T. 95). Hester's Brief says that Samples failed "to admit the truth of that document and to reveal the affidavit at that time...." Again, she was never asked anything about the information on the document nor anything about an affidavit. Notably, the affidavit is dated September 11, 2007; whereas, as shown in its upper right hand corner, the Texas Attorney General's spreadsheet, Exhibit 3 I.D., is dated February 15, 2008. Exhibit 13 I.D., which includes that spreadsheet and the affidavit, also includes the original documents labeled "Financial Activity Report as of 2/17/2010." Samples was never asked about "the truth of that document." Hester's Brief also says that had Samples admitted that Exhibit 3 I.D. was based on the affidavit, it could have been admitted. However, she was never asked to compare the spreadsheet with any affidavit. Thus, Hester's accusations about unclean hands, perjury, and misleading the court, are totally without foundation.



#### ISSUE IV

#### HESTER SHOULD NOT RECEIVE CREDIT ON ANY ARREARAGE FOR ANY MONEY HE MAY HAVE PAID TOWARD PRISCILLA'S COLLEGE TUITION

Hester cites no legal authority why he should be given credit on the arrearage for any money he allegedly paid for Priscilla's college tuition or for her support. Hester is procedurally barred from his argument being considered by this Court, because of his failure to cite authority. Wells v. Wells, 35 So. 3d 1250 (Miss. Ct. App. 2010).

Even if Hester's argument is not procedurally barred, except for Hester stating he paid her college tuition, there is no documentary evidence to support that. In fact, Exhibit 8 introduced as an exhibit by Hester, the East Central Community College (ECCC) Statement, is dated May 24, 2007 (T. 172). The trial judge determined that Priscilla was emancipated December, 2006, when she "flunked out of school" (T. 244). Exhibit 8 is not a receipt, but merely a statement, and it shows that as of the date of the statement, there was a balance of \$1,966.00. Hester said he gave the money to Priscilla, not to ECCC. (T. 205). The second page of Exhibit 8 shows that Priscilla dropped classes in February and March, and that it was for school year 2007. Thus, Hester's Exhibit does not evidence his payment of anything, and even if it did, it was for a period subsequent to her emancipation.

Hester argues that Samples presented no evidence that she made any contribution to Priscilla's college education, and that because Hester did, he should be given credit. Payment of Priscilla's

college education was not an issue before the Court, and thus, Samples did not need to present any evidence of contributions she may have made to Priscilla's education. Furthermore, even if Hester had successfully proven that he paid for Priscilla's college tuition prior to her emancipation, this Court has said "... payment such as college tuition will seldom [qualify as credit toward child support] as they do not diminish the child's need for food, clothing and shelter." Varner v. Varner, 588 So. 2d 428 (Miss. 1991), citing Lawrence v. Lawrence, 574 So. 2d 1376 (Miss. 1991) and Nichols v. Tedder, 547 So. 2d 766 (Miss. 1989).

#### ISSUE V

HESTER SHOULD NOT BE AWARDED ATTORNEY'S FEES NOR COSTS OF THE APPEAL, NOR SHOULD THE CASE BE REMANDED. TO THE CONTRARY, SAMPLES SHOULD BE GRANTED ATTORNEY'S FEES FOR DEFENDING THE APPEAL, PLUS THIS COURT SHOULD IMPOSE SANCTIONS AND AWARD ATTORNEY'S FEES, BECAUSE THE APPEAL IS FRIVOLOUS PURSUANT TO M.R.A.P. 38

As previously stated, Hester's appeal is totally without merit, and is, in fact frivolous pursuant to M.R.A.P. 38. Generally, for defending an appeal this Court awards attorney fees equal to one-half of the amount awarded by the trial court. Killen v. Killen, 2010 WL 3221862 (Miss. Ct. App.), citing Pool v. Pool, 989 So. 2d 920 (Miss. Ct. App. 2008) and Lauro v. Lauro, 929 So. 2d 585 (Miss. Ct. App. 2006). However, Hester's appeal is frivolous, and this Court should award the actual amount of attorney's fees incurred by Samples in defending this appeal. The Court should permit Samples to submit to this Court an affidavit stating the amount of her fees. McCoy v. City of Florence, 949 So. 2d 69 (Miss. Ct. App. 2006).

CONCLUSION

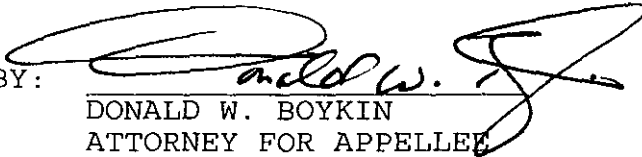
The ruling of the Chancery Court should be affirmed. Samples should be awarded attorney's fees not only for having to defend the appeal, but also because Hester's appeal is frivolous.

This the 11th day of January, 2011.

Respectfully submitted,

SUNDRA SAMPLES

BY:

  
DONALD W. BOYKIN  
ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

I, Donald W. Boykin, hereby certify that I have this day mailed, postage prepaid, or hand delivered a true and correct copy of the above and foregoing Brief for Appellee to:

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This the 11th day of January, 2011.

  
DONALD W. BOYKIN