2010-CA-00582-T

BRIEF OF APPELLANT

CERTIFICATE OF INTERESTED PARTIES

The undersigned Counsel of Record 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 this Court may evaluate possible disqualification or refusal:

1. Percy D. Hester, Sr., Defendant-Appellant;
2. Sundra Samples; Plaintiff-Appellee;
3. E. Michael Marks and Julie Ann Epps, counsel for Appellant on appeal;
4. E. Michael Marks, counsel for Appellant at trial;
5. Donald W. Boykin, counsel for Appellee at trial and on appeal;
6. H. David Clark, II, Chancellor

This, the 18th day of October, 2010.

Julie Ann Epps

COUNSEL FOR APPELLANT

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BRIEF OF APPELLANT

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2. THIS COURT SHOULD REFORM THE JUDGMENT BECAUSE THE CHANCELLOR ERRED IN THE ORIGINAL FINAL JUDGMENT WHEN HE FAILED TO AWARD PERCY CREDIT FOR THE $897.00 HE PAID FOR RENT WHEN PRISCILLA WAS LIVING AT AN APARTMENT IN 2006.

3. THE CHANCELLOR ALSO ERRED AS A MATTER OF LAW IN FAILING TO GIVE PERCY CREDIT FOR THE MONEY HE PAID DIRECTLY TO PRISCILLA FOR HER RENT AND EXPENSES AFTER SHE WAS KICKED OUT OF SUNDRA'S HOME IN NOVEMBER OF 2004 UNTIL SHE WENT TO LIVE WITH PERCY IN JUNE OF 2005. ALTERNATIVELY, PERCY SHOULD HAVE BEEN GIVEN CREDIT OF $200.00 A MONTH FOR THOSE MONTHS WHEN PRISCILLA WAS EFFECTIVELY IN HIS CUSTODY.

4. THE CHANCELLOR FURTHER ERRED IN NOT GIVING PERCY CREDIT ON ANY ARREARAGE FOR THE MONEY HE PAID TOWARD PRISCILLA'S COLLEGE TUITION.

5. THIS COURT SHOULD AWARD PERCY ATTORNEY'S FEES AND COSTS FOR THIS APPEAL AND SHOULD REMAND FOR A HEARING ON APPROPRIATE SANCTIONS TO BE IMPOSED ON SUNDRA AND/OR HER COUNSEL FOR ATTORNEY'S FEES AND OTHER COSTS INCURRED BY PERCY AS A RESULT OF SUNDRA'S PERJURY AND THE MISCONDUCT OF HER ATTORNEY.

STATEMENT OF THE CASE

(i) Course of the Proceedings and Dispositions in the Court Below:

Percy D. Hester, Sr. and Sundra Samples[1] were married on February 28, 1992 in Hinds County and were divorced in Newton County in November of 1992. R.I/8. They had one child, Priscilla Hester, who was born on August 4, 1988. R.I/8. The final judgment of divorce gave primary legal and physical custody of Priscilla to Sundra and required Percy to pay $200.00 a month beginning in May of 1992 as support for Priscilla. R.I/8-9.

Around September of 2007, Sundra went to the Texas Attorney General's office to seek assistance in obtaining past due child support payments she claimed she had not received from Percy. Exhibit 13id, RE 35. That case was subsequently referred to the Mississippi Department of Human Services (DHS) for action. DHS filed a notice of redirection of child support payments on June 4, 2008. R.I/22.

Thereafter, on September 9, 2009, DHS filed a contempt petition on behalf of DHS claiming that Samples had received services under Title IV-D of the Social Security Act and Department of Human Services. DHS alleged Percy owed past child support. R.I/25-28. The case was set before Special Master Norman Brown and continued several times for DHS to produce an affidavit from Sundra from Texas. R.I/44-45.

Subsequently on July 22, 2009, the Chancellor allowed DHS to withdraw their suit and allowed Sundra to refile a contempt petition in her own name. R.I/37, 39-40.

Sundra hired her former divorce attorney, Donald W. Boykin, to represent her, and on August 14th of 2009, she filed a new petition for contempt in her name asking for child support payments and other payments she claimed she had not received from Percy. R.I/74-78.

The case went to trial on the merits on November 3, 2009. Sundra was represented by Donald Boykin. Percy was represented by E. Michael Marks. Tr. 49. The final judgment was entered on November 20, 2009. RE 9, R.I/95.

In that judgment, the Chancellor awarded Sundra $23,761.00 for unpaid child support for the portions of the time period from May 1, 1992 through December 31, 2006, the date the Chancellor found that the child had become emancipated. RE 15, R.I/92-95. In addition, he awarded Sundra attorney's fees of $2500.00. R.I/95, RE 9.

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[1] Before the divorce, Sundra moved to Texas where she still lives. She then married Dwayne Samples in 1992 after the divorce. Tr. 54.

Immediately thereafter, Nicole Bryan, the attorney for DHS who had filed the initial contempt petition, faxed E. Michael Marks a copy of an affidavit signed by Sundra in Texas on September 11, 2007. RE 34, Exhibit 13id. The affidavit contradicted Sundra's trial testimony that she had not received *any* child support payments from Percy from May of 1992 until 2004. Consequently, on November 25, 2009, Percy filed a Motion for Reconsideration of Final Judgment. R.I/98-99.

Sundra filed a response to that motion on March 11, 2010, the date of the hearing on the motion to reconsider. R.I/116. At the March 11th hearing, the Chancellor ruled that the Texas affidavit was inadmissible because it did not qualify as "newly discovered evidence." RE 29. Consequently, on March 19, 2010, the Chancellor entered an order denying the motion to reconsider. R.I/137, RE 10.

Percy timely filed a Notice of Appeal from the Final Judgment and Order denying reconsideration on April 7, 2010. R.II/146-47.

(ii) Statement of the Facts:

On September 9, 2008, DHS filed a contempt petition alleging that Percy was in arrears in child support in the sum of $18,850.00 as of June 30, 2008, as evidenced by an "affidavit" attached as Exhibit B.[2] R.I/25. In the petition, DHS alleged that Sundra had received services under Title IV-D of the Social Security Act and that DHS, therefore, was entitled to a redirection of child support. Nicole, Bryan, an attorney with the Department of Human Services, represented DHS. R.I/25-28.

Subsequently, the case was set for hearing before a special master on numerous occasions and was continued at least twice because DHS in fact did not have an affidavit from Sundra

[2] The affidavit, signed by an Ellen Chapman, but not Sundra, did not contain an itemized list of payments made or not made by Percy, but merely summarized the claimed arrearage as of 7/10/208 as being $18,850.00, the amount claimed in the petition. R.I/37.

regarding past due support. R.I/44-45. Exhibit B to the petition, as it turned out, was a printout of an Affidavit signed by an Ellen Chapman in Texas. Chapman was apparently an employee of the Texas Attorney General's Office where Sundra had sought assistance to collect what she claimed was unpaid child support. R.I/37, 39-40. Not only was the affidavit not executed by Sundra, it did not contain an itemization of purported payments by Percy.

Evidence at the motion for reconsideration later demonstrated that the affidavit executed by Ms. Chapman was based on an affidavit signed by Sundra in Texas on September 11, 2007. RE 35. At some point when DHS and Percy appeared before the special master, the attorney for DHS, Nichole Bryan, represented to Marks that there was no Texas affidavit and that all she had was a letter from Texas. Tr. 302. In addition, Marks represented at the hearing on reconsideration that Tayna Carl, an employee of DHS, had also told the special master that they could not go forward because they could not obtain an affidavit. Tr. 307.

Marks first learned that in fact there was an affidavit signed by Sundra when shortly after the trial on the merits he received an unsolicited fax from Nicole Bryan containing the affidavit which had been signed in Texas by Sundra. Tr. 307.

In that affidavit, Sundra listed a total of $19,550.00 worth of payments which she said she had been received from Percy from May of 1992 until July of 2007. RE 35. The affidavit, which was not available to counsel at trial, assumed great significance at the hearing on the motion for reconsideration because, among other things, Sundra's affidavit showed that Percy paid a total of $11,200 from May of 1992 through December of 1996. RE 35.

In sharp contrast to the affidavit and her sworn contempt petition, Sundra testified at trial that Percy had not paid her anything at all during that time.[3] Tr. 56. Percy, on the other hand, testified that he made the $200 monthly payments from May of 1992 through June of 1998 when

he fell out with Sundra's husband, and the family moved and did not tell him where. Tr. 188, 225-26.

At the trial on the merits, the Chancellor credited Sundra's testimony that Percy had made no payments for either the money he said he paid or the $11,200 which Sundra in her Texas affidavit admitted he had paid. Percy will discuss the court's findings at trial and the motion to reconsider along with the implications of Sundra's Texas affidavit further in his argument that the Chancellor erred in overruling his motion to reconsider.

To return to the events leading up to the trial and the trial itself, at some point while the DHS petition was still pending and before the trial on the merits, Sundra retained Donald W. Boykin to represent her. Boykin had been her attorney in the original divorce proceeding. DHS withdrew from the case, and on July 22, 2009, the Chancellor granted Sundra's motion to substitute her as the plaintiff rather than DHS. R.I/48, 56.

In August of 2009, Sundra filed a sworn "Petition for Contempt and Other Relief." R.I/74-78. In that Petition, she swore that Percy had failed to pay **any** child support since it had become due starting in May of 1992.[4] Her total claim in this Petition was for $29,061.00 in past due child support from May of 1992 through August of 2008, the date she claimed Priscilla was emancipated. Sundra also asked for other costs, such as medical insurance and expenses and prekindergarten and kindergarten costs and attorney's fees. *Id.* Because the Chancellor ultimately denied Sundra's claims for these additional costs, other than the attorney's fees, and she has not appealed that denial, Percy will not further discuss those claims.

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[3] Sundra likewise swore in her August of 2008 petition for contempt that Percy paid no money at all ever. Tr. 78.

[4] By contrast, in the Texas affidavit, she had stated that Percy had paid a total of $19,550.00, which included the $11,200.00 she said he paid from May of 1992 through December of 1996, and additional amount of $1000.00 she said he paid in 2004, $2400.00 in 2005 and $2500.00 in 2006 and $2450.00 she said he paid in 2007. RE 35.

At the hearing on the trial on the merits, the evidence showed that after her separation from Percy, Sundra and Priscilla moved to Texas in 1992. Shortly after the divorce, Sundra married Dwayne Samples, and they lived thereafter at several different residences in Texas. Thereafter, Percy continued to visit with Priscilla until June of 1998 when Percy and Dwayne had a falling out when Percy went to pick up Priscilla for the summer. Tr. 141-44, RE 11. According to Percy, Dwayne accused Percy of still wanting Sundra and trying to control his family by paying child support. Tr. 144. Shortly thereafter, Dwayne, Sundra and Priscilla moved to an undisclosed address. Tr. 145.

According to Percy, he timely paid all of his child support to Sundra until they moved in June of 1998. Tr. 188, 225-26. Any money he "sent" to Sundra in Texas, he paid by Western Union MoneyGram. Tr. 141-42. He testified, however, that he also gave her cash when he would go to Texas to see Priscilla. Tr. 225-26. However, he was not able to produce Western Union receipts for the payments because Western Union only maintained records going back five years. Tr. 213. He did produce MoneyGram receipts for payments made both to Priscilla and to Sundra in the latter part of 2004 through April of 2008. *See,* Exhibit 12, RE 36-42. The Chancellor gave him credit for $10,439.00 the payments made to Sundra during that time, but not for any payments made directly to Priscilla because he found that legally Sundra still had custody of Priscilla even though Priscilla, for the most part did not live with Sundra after November of 2004. Tr. 247, 253, RE 16.

Percy testified that even after the move, he sent at least three more child support payments via Western Union MoneyGram, but they were not picked up by Sundra. Western Union called and let him know that nobody had picked them up. Tr. 226-27.

Percy testified that he had searched and searched for Sundra and Priscilla, even going to Texas on several occasions, and consulting several attorneys, but he had been unable to find them. Tr. 145, 188, 190.

Finally, in the latter part of October of 2004 or the first part of November of 2004, Sundra contacted Percy to let him know that she and Dwayne had been having problems with Priscilla and had kicked her out of the home. She screamed at him to come get Priscilla and take her back to Mississippi. Percy went to Texas and arranged for Priscilla to stay with Sundra. A week later he got a all from Sundra that things had fallen apart and they had put Priscilla out again. Tr. 145-47.

Percy then arranged for Priscilla to stay with a friend, Maria, and Maria's mother so that Priscilla could complete the school year in Texas. He sent money directly to Priscilla to pay her rent and other expenses while she was living with Maria and Maria's mother. Tr. 145-47. The Chancellor found that Priscilla had indeed lived there from November of 2005 through May of 2005, when she went to live with Percy in Mississippi, but he did not give Percy any credit for the money he paid to Priscilla for her support during that time. RE 12.

The MoneyGram history confirmed that on December 2, 2004, Percy indeed sent $200.00 directly to Priscilla. On December 10, 2004, he sent her an additional $50.00, on December 12, 2004, an additional 180.00 and on December 30, 2004 an additional 200.00. In January of 2005, he sent $450.00 directly to Priscilla, in February $250.00, in March $470.00, in April $265.00, in May $295.00. These amounts were in addition to the money he paid directly to Sundra. RE 36-42.

The reasonable inference to be drawn from these payments made directly to Priscilla is that Percy was making them so that she could indeed pay rent to Maria's mother and pay for other expenses while she was living with Maria's mother. An additional inference that can be

drawn is that Percy was more than willing to support his daughter providing money to her which was far in excess of what he was obligated to pay under the child support agreement. The large sums of money that Percy sent to both Priscilla and Sundra from December of 2004 further supports the notion that Sundra indeed hid Priscilla from him after June of 1998 until November of 2004 as he testified.

In January of 2005, Sundra and Percy signed a document provided by Longview Independent School District in Texas stating that both Percy and Sundra acknowledged that Priscilla had established a residence separate and apart from her. RE 12. Percy testified that he believed that in acknowledging that Sundra was no longer living with her, Sundra was in effect agreeing that he could pay support directly to Priscilla. Tr. 167-69.

Notwithstanding, the agreement, Percy made substantial payments by MoneyGram directly to Sundra in 2005 and 2006 for what he described as paying back the money he owed for the time he did not know where they were. Tr. 160. These payments were the $10, 439.00, Sundra ultimately at trial admitted she had been paid and the Chancellor gave Percy credit for paying.

The Chancellor, however, did not give Percy any credit for the payments he made directly to Priscilla for expenses from December of 2004 through May of 2005 even though he found that Priscilla lived with Maria and Maria's mother from November of 2004 through May of 2005 and not with Sundra. RE 12.

In May of 2005 after school was out, Percy went back to Texas and picked up Priscilla who stayed with him through the summer. In September of 2005, he took her back to Texas because she wanted to finish high school there. Her mother took her back at that time. However, in October, Dwayne and Sundra put Priscilla out again. Percy paid for her to stay at a motel for about a week and a half until he could get her and sort out the situation. Priscilla moved back in

with her mother but things fell apart again, and Sundra put Priscilla out again. Priscilla then moved to an apartment in March of 2006 which Percy paid for through the end of July of 2006. Tr. 149-50, 152, RE 242.

In August of 2006, Priscilla moved to Newton County to stay with him and go to college. She lived with him for a short time, but had difficulty obeying his rules. RE 242. Because the tuition Percy had paid for also covered room and board, she moved to a dorm at the college.[5] Tr. 158. Percy never received any money from Sundra to pay for Priscilla's college fees. He paid all her expenses during that time. She stayed with him until the summer of 2007 when she went to Texas for the summer. She came back that fall go back to school and lived with him until October or November when he learned that she had flunked out of school in December of 2006. At that time, she moved back into Percy's house, but when he returned from a revival in St. Kitts, he discovered she had brought drugs and liquor into the house and had slept with a young man in his bed. At that point, he told her she could not stay there any longer, and she moved across town. After she got into an altercation, she moved back to Texas. Tr. 160-62, 223, 232.

At the trial on the merits, Sundra testified that Percy sent her **no** child support money from May of 1992 through January of 2005. Tr. 56. Although she had claimed in her complaint that he had paid no child support whatsoever, she finally had to admit at trial that Percy was entitled to credit for the $10,439.00 the MoneyGram receipts show she had received as direct payments in 2005 and 2006. Tr. 61.

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[5] Exhibit 8 is a document showing Priscilla's tuition for each semester was $1900.00. Percy testified that he did not have receipts from the college for the payments because he gave the money directly to Priscilla to pay. Apparently, Priscilla did not use the money to pay for tuition after she flunked out in December of 2006 although she continued to maintain the fiction that she was going to school in the spring semester of 2007 and the fall semester as well. She was apparently using the money Percy gave her for tuition and expenses to otherwise support herself. Percy did not actually learn that she had flunked out until the latter part of 2007. Tr. 225.

Sundra conceded that she moved a lot during the years in question and never notified the Court of those moves. She claimed she did not know she had to notify the Court of those moves. She also admitted that she never wrote Percy and told him where she was although she claimed he "knew" where she was. Tr. 94. Her excuse for not filing for child support for 17 years was that she was waiting for Percy to do the right thing. Tr. 96. She denied receiving a $4000.00 tax refund that the IRS had seized from Percy on behalf of the Texas Attorney General for back child support and likewise denied receiving a $600.00 payment from the government which had also been seized by the Texas Attorney General for back child support. Tr. 126. Exhibit 5 for id- purporting to be a letter from the IRS showing the seizure of the $600.00.

Sundra and Percy were the only two witnesses who testified at the trial.

At the hearing on the merits, the Chancellor found that Sundra had failed to prove her claims for other costs and expenses. RE 20. He found that Priscilla had become emancipated as of December of 2006, the date she flunked out of college. He, therefore, found that Percy was liable for child support payments dating from May of 1992 through December of 2006. He further found that Percy had failed to pay any child support from May of 1992 through December of 2004. R.I/75, 92.

He found that Percy had paid the amounts shown on the MoneyGrams of $5,945.00 in 2005 and $4,494.00 in 2006 and credited Percy accordingly for a total of $10,439.00. He, however, denied credit to Percy for all payments he had made directly to Priscilla. He also found that Percy should be given credit for rent that he had paid on behalf of Priscilla from May of 2006 until August of 2006, but erroneously found that he had credited that sum was included in the $10,439.00 sum. RE 19.

He also found that Percy should be given credit of $1000.00 for the time Priscilla lived with Percy from August through December of 2006. For the 176 months between May of 1992

and December of 2006, he found that Percy owed 176 x $200 for a total of $35,200. After deducting the $10,439.00 and the $1000.00, he found that this left Percy owing Sundra $23,761.00 in past due child support. R.I/92. RE 15-16. The Chancellor also awarded Sundra $2500.00 for her attorney's fees. RE 20, R.I/95.

MOTION TO RECONSIDER

Immediately after the trial, Nicole Bryan faxed Percy's attorney an affidavit that Sundra had signed in 2007 when she sought assistance from the Texas Attorney General in obtaining her child support. *See,* Exhibit 13 id. The affidavit showed that from May of 1992 through December of 1996, Percy had in fact paid all the child support he owed for that time period. *Id.* This total would have been $1,600.00 in 1992, and $2,400.00 in each of the years of 1993, 1994, 1995 and 1996. In short, Sundra's Texas affidavit showed Percy had paid $11,200.00 more in child support than she claimed he had paid at trial where she testified that he had paid nothing at all during those years. Tr. 56. In addition, Sundra's affidavit showed that in 2007, he had paid her an additional $2,450.00. *See,* Exhibit 13. id. Again, at trial, Sundra testified that he had paid her nothing in 2007. Tr. 56.

Percy filed a Motion asking the Chancellor to consider the affidavit and modify the amount of the child support award. At the hearing, Sundra's attorney, Donald Boykin, admitted that he had received a copy of the affidavit from counsel for DHS or from Sundra but did not disclose it to Marks in discovery because he did not ask for it in discovery. Tr. 282-83. He stated that he said to Sundra, "we have documents from Texas that suggest **significantly different** payments than what is shown on the MoneyGram. And at that time she—I don't know how detailed of an explanation she gave me but she did say that Texas had tried –I think her words were, forced her to tell them what payments she had made [emphasis added]." Tr. 283.

The Court found that the affidavit did not qualify as "newly discovered evidence" because it had been in the possession of Texas and Mississippi at the time of the trial. Tr. 291. According to the Court, "[t]hat document is not an admissible document. It is not newly discovered evidence. It could have been introduced at trial. It existed at the time of the trial." Tr. 294. The Court also opined that in any event, the affidavit did not help Percy because the Court had already given him more credit than the affidavit did. Tr. 317.

SUMMARY OF THE ARGUMENT

The Chancellor erred in finding that the affidavit was inadmissible and did not qualify as "newly discovered evidence" which would allow him to revisit the final judgment. Consequently, he erred in denying Percy relief from the final judgment.

Moreover, the original judgment is deficient for a number of reasons. First of all, although the Chancellor inadvertently failed to credit Percy with the $897.00 which Percy had paid directly to Raymond Prince for rent for Priscilla's apartment from March through July of 2006 although he found that Percy was entitled to this credit. The Chancellor mistakenly believed that this sum had been included in the $10,439.00 MoneyGram payments which he gave Percy credit for.

Moreover, despite the fact that in November of 2004, Sundra had kicked out Priscilla and told Percy to come get her, the Chancellor erred in not giving Percy credit for the money he paid directly to Priscilla for rent to Maria's mother and for Priscilla's other living expenses during that time. It is clear that Percy paid substantial sums directly to Priscilla because of the friction between her and her mother and that these sums were used to pay for rent and other expenses for Priscilla to live. Had Percy taken Priscilla to Mississippi as Sundra demanded, there can be little doubt that he would be entitled to credit. Instead, he tried to keep her in the school she had been attending, and it is clear that he spent substantial amounts of time and money in doing so.

The Chancellor also erred in not giving Percy credit for all of the months when Priscilla lived with him after being kicked out by Sundra in the summer of 2005. Again, Percy expended time and money in supporting Priscilla directly because Sundra had kicked Priscilla out of her home.

Finally, the Chancellor erred in not granting Percy credit for payments which he made to Priscilla after she was emancipated.

ARGUMENT

I. THE CHANCELLOR ERRED IN NOT ADMITTING SUNDRA'S TEXAS AFFIDAVIT INTO EVIDENCE AT THE HEARING ON THE MOTION TO RECONSIDER. BECAUSE THE CHANCELLOR FAILED TO DO SO, HE ERRED IN OVERRULING PERCY'S MOTION FOR RECONSIDERATION.

A. Standard of Review:

On appeal, the Supreme Court must consider the entire record before it and accept all those facts and reasonable inferences which support the Chancellor's ruling. *Madden v. Rhodes,* 626 So.2d 608, 616 (Miss. 1993). The Chancellor's findings will not be disturbed, be they on evidentiary facts or ultimate facts, unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous, or unless he applied the wrong legal standard. *Id.* A finding of fact is "clearly erroneous" when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made. *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.,* 525 So.2d 746, 754 (Miss.1987)).

In summary, findings of fact are entitled to deference when reviewed on appeal but will be reversed where they are not supported by substantial evidence. Rulings of law, however, are subject to *de novo* review. *Dorr v. Dorr,* 797 So.2d 1008 (Miss. App. 2001).

B. The Merits:

The Chancellor erred as a matter of law in finding that the newly discovered affidavit was not admissible. Specifically, the Chancellor, found "[t]hat document is not an admissible document. It is not newly discovered evidence. It could have been introduced at trial. It existed at the time of the trial." RE 31,Tr. 294.

A. *Admission of party opponent:*

In finding that the document was not admissible, the Chancellor said the exhibit appears to be "somebody's estimate" and that it just does not have the accuracy of documents he usually got. Tr. 294. Neither of these two factors justifies exclusion of the document.

Even if the document was an estimate, it was clearly Sundra's estimate. As such, it is not hearsay but is rather admissible as an admission by a party-opponent. *See,* 801(d)(2), Miss.R.Evid. Rule 801 does not require that the statement be "accurate" before it is admissible. All that is required is that it be an admission by a party-opponent. While its accuracy might go to the weight to be given to the evidence, it does not have any effect on its admissibility under Rule 801(d)(2). *E.g., Conley v. State,* 790 So.2d 773, 787 (Miss. 2001) [admission of party opponent made to insurance company as part of an attempt to collect insurance was admissible against him even though he did no intend for the statement to be a statement against interest].

Percy does not deny that the document may reflect an attempt by Sundra to estimate the amount and dates of his payments. Of that, there can be no doubt. Clearly, Sundra "underestimated" the 2005 and 2006 payments in her affidavit. In her affidavit, she stated she had received only $4,900.00; whereas, at trial the evidence of the MoneyGrams showed she had received a total of $10,439.00. There can be no doubt that the MoneyGram history more accurately reflects Percy's payments than does the affidavit.

That Sundra may have been estimating the payments and may have been inaccurate in some respects in doing so, however, misses the point. The point is not whether Sundra's affidavit

is true in all respects. The point is that it directly contradicts her testimony about what Percy had paid to her and confirms Percy's testimony about his payments from May of 1992 through December of 1996. The affidavit, being an admission by a party opponent, was highly probative and admissible evidence. *Id.*

B. *Authenticity:*

Furthermore, if the trial court's statements that the document was an estimate and appeared to be inaccurate are intended to impugn the authenticity of the document, then the Chancellor again erred as a matter of law. There can be no question of the document's authenticity that would preclude its admissibility. In Sundra's pleading entitled, "Petitioner's Response to Respondent's Motion for Reconsideration" filed on March 11, 2010, she admits that "[t]he Affidavit was signed by the Petitioner on September 11, 2007." R.I/116.

Moreover, at the hearing on the motion to reconsider, counsel for Sundra stated to the Court that Sundra had signed the affidavit.[6] He argued that the Court should not consider it because Texas had insisted that she fill out an affidavit even though she had no records and that it was "wrongfully" filled out by her. Tr. 264. Later he stated that Texas had "forced her to tell them what payments she had made." Tr. 283. At no time, did counsel for Sundra deny that she had executed the affidavit under oath. Thus, the document was not inadmissible because of any problems in authentication because Sundra admitted its authenticity.

Rule 901(a), Miss.R.Evid., requires that authentication is a condition precedent to its admissibility. The rule goes on to say that the requirement of authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

[6] Sundra herself did not appear at the hearing on the motion to reconsider. Her attorney represented to the Court that she was at M.D. Anderson being treated for cancer and therefore not available for cross-examination. Tr. 264.

Clearly, Sundra's admission through her attorney was sufficient to show that the document was indeed an affidavit signed by Sundra.

The Court, therefore, erred in not admitting the document because of any questions about its authenticity.

C. *Newly Discovered Evidence:*

Finally, the Chancellor erred in not admitting and considering the affidavit on the ground that the evidence was not "newly discovered evidence." This finding was based in part on the fact that the document was in existence at the time of the trial. Again, this ruling is legally erroneous and based on a misinterpretation of the evidence.

First of all, that the evidence existed at the time of the trial does not mean that it cannot qualify as "newly discovered evidence." Newly discovered evidence is evidence which "was **discovered** following the trial [emphasis added]." *Goode v. Synergy, Corp.*, 852 So.2d 661, 664 (Miss. App. 2003), *cert. denied* 849 So.2d 899 (Miss. 2003).

In order to be entitled to a new trial on the ground of newly discovered evidence pursuant, a movant must show that (1) the evidence was discovered following the trial; (2) evidence from which due diligence on the part of the movant to discover the new evidence may be inferred; (3) the evidence is material and not cumulative or impeaching; (4) the evidence is such that a new trial would probably produce a new result. *Id.* Sundra's affidavit satisfied all four requirements for admission and reconsideration.

As for the first and second requirements, discovery of the document after trial and diligence, the existence of Sundra's Texas affidavit was only confirmed to Marks and Percy following the trial. Although an affidavit had been alluded to during the initial settings before the Special Master, DHS consistently failed to obtain any affidavit, so the document itself was not discovered in any real sense until after the trial. *See, Hunt v. State,* 877 So.2d 503 (Miss. 2004)

[although defendant had been given name of witness prior to the trial, defendant was not lacking in diligence in failing to discover that the witness was a former friend of the victim who would have corroborated defendant's testimony that victim consented to sexual intercourse where victim and husband were dismissive of the witness].

For example, at least twice the special master continued the case filed by DHS because DHS failed to produce the affidavit. R.I/45, 48. Tr. 302. At one point, Nicole Bryan was asked by the special master about the affidavit and told her that he could not proceed without it. Bryan told the special master that there was no affidavit; that all she had at that time was a letter. Tr. 302. Subsequently, Tayna Carl from DHS came before the special master and announced they could not go forward with the case because they did not have an affidavit. Tr. 306.

Ultimately DHS withdrew, and Donald Boykin was substituted for Bryan as Sundra's attorney on July 22, 2009. R.I/48, 56. Apparently, at some point thereafter, DHS did manage to obtain the affidavit from Texas and either DHS gave a copy to Boykin along with the rest of their file or Sundra did. Tr. 282-83. Neither DHS nor Boykin a copy to Marks or let him know that they now had the affidavit.[7] Tr. 283.

At the hearing, Marks claimed that he had relied on Bryan's representations that there was no affidavit. For this reason, he did not issue a subpoena or engage in formal discovery to Bryan or DHS because Bryan was a member of the bar. Tr. 304.

Marks' reliance on DHS's representations to both him and the special master that no affidavit existed was reasonable. There can be no doubt that as the attorney for DHS, Bryan was under an ethical duty not to deceive Marks about the affidavit. For example, in *Mississippi Bar v.*

[7] Probably Ms. Bryan, who was no longer in the case, relied on Boykin to provide Marks with a copy of the affidavit. Although we do not know for certain why Ms. Bryan faxed a copy of the affidavit to Marks after the trial, she likely did so in order to comply with the rules of ethics once she discovered that Sundra's testimony differed from her affidavit. *See,* discussion *infra* on the duty of an attorney to report a client's possible perjury.

Land, 653So.2d 889 (Miss. 1994), the Court suspended an attorney where the attorney failed to reveal in discovery an alternative theory of causation which he was aware of. Marks, therefore, was entitled to rely on Bryan's ethical duty not to lie about having the affidavit. Consequently, his failure to discover the affidavit until after trial was not due to any lack of diligence on his part but was rather based on a justifiable reliance on counsel opposite that there was no affidavit.

After the trial Percy was finally able to obtain an authenticated copy of the affidavit but only after he went to Texas, hired an attorney and threatened to sue the Texas Attorney General's Office. Tr. 281.

In the case of *Goode v. Synergy Corporation,* 852 So.2d 661 (Miss. App. 2003), *cert. denied* 849 So.2d 899 (2003), the Court addressed the question of diligence in a case similar to the one here. In that case, family members of a deceased child brought a wrongful death action claiming that an improperly installed propane gas heater exploded. Synergy claimed that the fire was the result of a homemade "ventura" plate attached to the heater. The jury returned a verdict in favor of Synergy. *Id.* at 663.

After the trial, the Goodes were approached by a former employee of Synergy who told the Goodes that he had manufactured and installed the plate in the course and scope of his employment with Synergy. Based on the employee's affidavit, the Goodes filed a motion for a new trial. The circuit court denied the motion. *Id.*

At issue on appeal was whether the Goodes had been duly diligent in discovering the identity of the person who had installed the ventura plate. Synergy claims that it provided the Goodes with information two years prior to trial that the homemade ventura plate had caused the fire and that the Goodes' own expert was aware of the plate. According to Synergy, the Goodes elected to proceed to trial on a different theory and failed to investigate and discover the identity of the plate's manufacturer. Synergy never provided any information to the Goodes because its

records did not indicate that any employee had installed the plate. The Court found that under these circumstances, the Goodes were excusably ignorant of the person who had modified the ventura plate even though they might have known that someone had. *Id.*[8]

In the instant case, as in *Goode,* there was originally some suggestion that other evidence might exist to dispute Sundra's claim that Percy had paid not child support. That suggestion, however, was dispelled by DHS, Sundra's predecessor in interest. Percy and his attorney, therefore, were excusably ignorant that an affidavit did in fact exist.

Furthermore, unlike Synergy who themselves were apparently ignorant that one of their employees had installed the plate, Sundra cannot claim ignorance of an affidavit which she herself admitted signing. Nor can her attorney claim ignorance. Donald Boykin admitted that he had received a copy of the affidavit in the file he had received from DHS or had received it from Sundra. He further admitted that he had in fact discussed the discrepancies in the affidavit and her petition with Sundra. According to him, he had said to her:

> We have documents from Texas that suggest **significantly different** payments than what is shown on the MoneyGram. And at that time she—I don't know how detailed of an explanation she gave me but she did say that Texas had tried—I think her words were, forced her to tell them what payments she had made [emphasis added].

Tr. 283.

Notwithstanding, at the time that Sundra testified to "significantly different" payments, Boykin informed neither the Chancellor nor Marks that Sundra's trial testimony was inconsistent

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[8] *See also, January v. Barnes,* 621 So2dx 915, 919-921 (Miss. 1992). In that case, Ms. January was relying on the testimony of her proposed expert to survive a motion for summary judgment. The expert had assured her that the defendant doctor had given her a drug contraindicated during pregnancy, but at the time of motion for summary judgment, the expert reversed his opinion. After summary judgment was granted, Ms. January obtained an affidavit from another doctor supporting her theory of the case. Within six months, she filed a motion for reconsideration based on the "newly discovered evidence." The appellate court rejected Barnes' claim that January was not diligent and ruled that the affidavit was "newly discovered evidence" which

with the affidavit. At the hearing on the motion to reconsider, he justified his failure to disclose the affidavit to Marks by claiming that he did not give Marks a copy of the affidavit because Marks had failed to request it in discovery and because he assumed DHS and Ms. Bryan would have given Marks a copy. Tr. 282.

Boykin's claim that he was not required to provide the affidavit to Marks in discovery m misses the point. The most important issue here is not whether Boykin should have provided the affidavit in discovery. *See, however, Mississippi Bar v. Land, supra* [where attorney knew causation was a material issue, attorney violated the canons of ethics in not revealing evidence which he had showing an alternative theory of causation]. The critical issue is whether his client's perjury warrants reconsideration of the initial judgment because his client committed a fraud on the court.

The Mississippi Rules of Professional Responsibility are clear about what an attorney's duties are when he knows his client is about to commit a fraud or commit perjury, or has done so. In an opinion by the Mississippi Bar (Opinion No. 205) rendered on October 30, 1992, the Bar Committee considered what an attorney's duties are when his client has committed perjury.[9]

In that case, the deponent/plaintiff admitted to committing perjury in another state. The deponent's attorney offered to counsel opposite to dismiss the lawsuit if the attorney and his client would agree not to report the admission of perjury to authorities. The Committee was asked to opine (1) on the duty of the deponent's attorney to report his client's perjury, and, if so, to whom; and (2) whether opposing counsel had any obligation to report the perjury, and, if so, to whom.

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warranted setting aside the summary judgment order even though she had known that her expert would contradict her theory prior to the hearing on the motion for summary judgment.

[9] The opinion can be found at http://www.msbar.org/ethic_opinions.php?id=468.

The Committee began the discussion by noting that although an attorney has a duty of loyalty and fidelity to his client, the duty is not absolute and is secondary to the attorney's duty to the tribunal and to the administration of justice. *Id.*

The Committee found that the attorney had become aware that his client had committed perjury, albeit in an out of state tribunal. The Committee cited M.R.P.C .3.3(a)(2) which states that

> A lawyer shall not knowingly: (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.

The Committee noted that the Comment to that rule is specific in its admonition of the attorney's responsibility when he learns of his client's perjury. Where perjured or false testimony has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, "the advocate should make disclosure to the court." Mississippi Bar Commission, Opinion No. 205.

The Committee noted that the failure of an attorney to address his client's perjury by convincing his client to take remedial steps or to disclose the perjury to the tribunal in fact assists the client in both committing perjury "and **perpetrating a fraud on the tribunal** and is in violation of the Mississippi Rules of Professional Conduct. M.R.P.C. 1.2(d), M.R.P.C. 1.6()(1); M.R.P.C. 1.16(b); M.R.P.C. 4.1(b); and M.R.P.C. 8.4(b), (c) and (d) [emphasis added]." *Id.* The Committee went on to say that the failure of the attorney to disclose his client's perjury to the tribunal would place the attorney "in the position of assisting in the commission of a crime in violation of M.R.P.C. 8.4(b) and (c)." *Id.*

Finally, the Committee found that the failure of opposing counsel to report perjury to the tribunal would be a violation of M.R.P.C. 8.4(d) which states that is improper to engage in "conduct that is prejudicial to the administration of justice . . . ." *Id.*

Accordingly, regardless of whether Sundra's affidavit was discoverable, Sundra owed a duty to the tribunal not to commit perjury, and her attorney had a duty not to allow it to go uncorrected. Of course, To argue that Marks failed to discover Sundra's perjury earlier and to fault him for lack of diligence is to allow Sundra to get away with a fraud on the court. Such an argument turns the canons of ethics on their head.

Even Sundra's attorney conceded that her affidavit was "significantly different" from her petition and her trial testimony. There can be no other conclusion than that Sundra either perjured herself in her affidavit in Texas or she perjured herself when she testified.[10] Because she had no reason to overestimate the payments in the Texas affidavit, the conclusion is inescapable that she perjured herself at the trial of this cause. Either way, she committed perjury, and her attorney had an ethical obligation to inform the Court of the Texas affidavit. *See, Mississippi bar v. Mathis,* 620 s0.2d 1213 (Miss. 1993) [unethical to misrepresent evidence on a material issue]; *Mississippi Bar v. Land,* 653 So.2d 889 (Miss. 1994) [where attorney knew causation was a material issue, attorney violated the canons of ethics in not revealing evidence which he had showing an alternative theory of causation].[11]

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[10] To hold otherwise would be to accept evidence that "is so contrary to the probabilities when weighed in the light of common knowledge, common experience, and common sense that impartial, reasonable minds cannot accept it other than as clearly an improbability." *Teche Lines, Inc. v. Bounds*, 182 Miss. 638, 649, 179 So. 747, 749 (1938). That the Court will not do. *Id.*

[11] Rule 3.3(a)(1) of the Rules of Professional Conduct provides that an attorney may not make a false statement or material fact or law to a tribunal. Rule 3.3(a)(2) punishes failure to disclose a material fact to a tribunal when disclosure is necessary to avoid assistant a criminal or fraudulent act by a client. Rule 3.4(a) prevents unlawful obstruction of another party's access to evidence or unlawfully or unlawfully altering, destroying or concealing a document or other material having potential evidentiary value, or counseling or assisting another person to do such an act. Rule

In *Land,* the Court found that where an attorney knows that false statements are being submitted to the court or that material information is improperly being withheld and takes no action, thereby causing injury or potential injury to another party on the legal proceeding, sanctions are warranted. *Id.* at 910.

Under circumstances revealing that Sundra deliberately concealed the affidavit from Percy, Percy and her attorney cannot be faulted for not discovering it earlier. Thus, the Chancellor erred in concluding Percy was not diligent in finding the affidavit earlier. In effect, the Chancellor is saying that Marks should have assumed Bryan misrepresented the existence of the affidavit and that counsel opposite would fail to turn it over and would then allow his client to testify to facts which were directly contrary to the affidavit. Surely, that sort of diligence is not required of Marks. Rather, because Sundra is clearly the party at fault, she should bear the burden of her perjury.

As for the third requirement for admission of newly discovered evidence--that the evidence be material and not "merely impeaching"--, the Chancellor failed to appreciate the significance of the conflict between Sundra's testimony and the affidavit because Boykin erroneously represented to the Chancellor that Percy had admitted he did not pay any child support from May of 1992 through the end of 2004. Tr. 272, 293 and see Sundra's Response to the Motion to Reconsider (at R.I/117) stating "Petitioner's counsel recalls that during the hearing, Rev. Hester testified he made no payments prior to 2004, yet he now wants to be given credit for payments purportedly made by him to Mrs. Samples prior to 2004."

Boykin is much mistaken. Percy has demonstrated that he testified at trial that he made all payments for the amounts he owed from May of 1992 through June of 1998 when Sundra moved and did not tell him where she was. Tr. 188, 225-26. Sundra's affidavit supports Percy's

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8.4(c and d) preclude an attorney from engaging in conduct involving dishonesty, fraud, deceit,

claim which he was unable to prove at trial because the MoneyGram history could only go back for five years.

Even though the affidavit impeaches Sundra's trial testimony, it is not "merely impeaching" as that term is used in the context of newly discovered evidence. There is a distinction between evidence which is impeaching and that which, although impeaching, is "merely impeaching." In this case, the affidavit is substantive proof that is material and "not merely impeaching" because it reaches the essential issue of the case on the only testimony offered by Sundra to support the verdict. *See,* generally 66 C.J.S. New Trial, §180, Impeaching or contradictory evidence.

The case of *Jackson v. State,* 164 Md.App. 679, 98, 884 A.2d 694, 705 (Md.App. 2005), provides useful illustrations of when impeaching evidence will be considered "merely impeaching" and when it is considered material. The Court there uses the example of newly discovered evidence that a witness for the state has convictions for crimes involving truth and veracity and has lied about other matters having a bearing on his testimonial credibility but would not have a direct bearing on the merits of the trial under review. In that case, the evidence would constitute collateral impeachment and would, therefore, be merely impeaching. *Id.,* 884 A.2d at 705.

The Court contrasted this with a situation where, as in the instant case, the newly discovered evidence demonstrated that the State's witness had actually testified falsely at the trial. In that case, the evidence, although having a tendency to impeach the witness, could not be dismissed as "merely impeaching." *Id.* Because Sundra's affidavit showed she testified falsely, it cannot be dismissed as merely impeaching and should have been considered by the Chancellor. *Hunt v. State,* 877 So.2d 503 (Miss. 2004) [evidence from former friend of prosecuting witness

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or misrepresentation, and engaging in conduct prejudicial to the administration of justice.

that impeached testimony of rape victim witness was not "merely impeaching" because it supported the defendant's claim of consent].

Moreover, the Chancellor failed to appreciate the materiality of the affidavit in an additional respect because he erroneously believed that he had to credit all of the affidavit or none in order to grant Percy relief. As a result, he opined that Percy would receive less credit for the years of 2005 and 2006 if the affidavit were admitted than he had already been given based on the proof of the MoneyGram history. While it is true that the MoneyGram history provided a more accurate record of Percy's payments of a greater amount for those years, what the Chancellor overlooked was that the affidavit supported Percy's trial testimony of the amounts he had paid from 1992 through 1996. Therefore, that portion of the affidavit more accurately reflected what Percy had paid than did Sundra's testimony because there is no logical reason why Sundra would have overestimated what Percy had paid during that time. It was therefore material and should have been considered. *See, Trim v. Trim,* 33 So.2d 421 (Miss. 2010) [evidence showing that husband had intentionally filed a substantially false financial disclosure statement perpetrated a fraud on the court and was material].

As for the final requirement for newly discovered evidence, Percy was required to show that reconsideration of the affidavit would likely produce a different result. In that regard, the Chancellor, as does this Court, had a number of options.

1. DISMISSAL OF SUNDRA'S CASE.

First of all, because Sundra's perjury constitutes a "fraud on the court," the Chancellor should have dismissed her case. Mississippi Bar Opinion, No. 205; *Trim v. Trim,* 33 So.2d at 478 [filing false financial statement rises to the level of a fraud on the court]. This Court can now do so. This Court considers perjury by a party to be so egregious that it has sanctioned the extreme remedy of dismissal of the case. *See, Pierce v. Heritage Properties, Inc.,* 688 So.2d 1385 (Miss.

1997) [dismissal appropriate where plaintiff made willful misstatements in responses to discovery].

This is so because when a party commits perjury, she has committed a fraud on the court. *Id.* The power to dismiss an action for such misconduct is "inherent in any court of law or equity, being a means necessary to orderly expedition of justice and the court's control of its own docket [citations omitted]." *Id.* at 1388. Moreover, the court can dismiss as part of "its inherent power to protect the integrity of the judicial process." *Id.* Here, the Court should exercise this sanction because not only did Sundra lie, but her delay in taking legal action for some 15-17 years also resulted in Percy being unable to defend because his MoneyGram receipts were no longer unavailable.

Moreover, Priscilla is now emancipated, and any child support now awarded to Sundra would only provide a windfall to Sundra rather than any real benefit to Priscilla. *See generally, Varner v. Varner,* 588 So. 428 (Miss. 1990) [equitable principles may prevent a mother from obtaining a windfall for past due support where the evidence shows direct payments made to a child for support and maintenance].

Moreover, Sundra behaved reprehensibly in secreting herself and Priscilla from June of 1998 until November of 2004. This Court, for example, has approved the denial of child support benefits to a mother who hid the children for a period of years, kept her address secret and therefore prevented the father from seeing the children and exercising visitation and also prevented him from sending monthly child support payments when due. *Cole v. Hood,* 371 So.2d 861 (Miss. 1979).

Under the unusual circumstances of this case, the Court should impose the extreme sanction of dismissal.

2. REDUCTION FOR PAYMENTS MADE FROM MAY OF 1992 THROUGH JUNE OF 1998 AND/OR FROM MAY OF 1992 THROUGH DECEMBER OF 1996:

Next, should the Court find that dismissal is unwarranted; it should give Percy credit for the payments the affidavit showed he made to Sundra from May of 1992 through December of 1996. As Percy has demonstrated, there is no logical reason for Sundra to say in the affidavit that she had received the money when she had not. The affidavit, therefore, supports Percy's testimony, and the Court should now credit it rather than Sundra and give Percy credit for the $11,200.00 the affidavit shows he paid during that time.[12] RE 34.

Moreover, that Sundra lied also casts doubt on her claim that Percy did not pay child support from January of 1997 through June of 1998, as he claimed. Because Sundra waited so long to make a claim for support, Percy was no longer able to obtain a history for those times periods. Other than his testimony, he had no way to refute Sundra's claim of non-payment. Ordinarily, the best evidence rule would require Percy to submit some sort of documentary proof of payment in order to satisfy his burden of refuting Sundra's testimony of non-payment, if indeed such evidence was available. Here, however, it was not available because of Sundra's delay. That Sundra lied about the other payments supports the notion that she may have been lying about the remaining payments as well. Equity requires that Percy also be given credit for the $3,400.00 in payments he testified he made from January of 1997 through June of 1998. Tr. 188, 226.

3. PAYMENTS MADE TO PRISCILLA AFTER EMANCIPATION:

The MoneyGram history shows that even after Priscilla was emancipated in December of 2006, Percy continued to send her money. It is unclear if the Chancellor either in at the original hearing or the motion for reconsideration recognized that he in fact had the discretion to grant an

[12] Moreover, Sundra should be equitably estopped from asserting one thing in Texas and another in Mississippi. *See, e.g., Pursue Energy Corp. v. Miss. State Tax Commission,* 968 So.2d 377 (Miss. 2007) [Principles of estoppel preclude a party from assuming one thing at one stage of a proceeding and asserting another in the same case].

obligor parent a credit for child support payments made on behalf of a child subsequent to the child's emancipation. *See, Department of Human Services, State of Mississippi v. Fillingane,* 761 So.2d 869, 872 (Miss. 2000). Although payments made directly to a child after emancipation ordinarily do not count toward an arrearage in child support, this Court has established that in the exercise of its equity jurisdiction may apply those payments to past due child support. For example, in *Fillingane,* the Chancellor reduced Fillingane's arrearage to reflect direct payments made to both his ex-wife and daughters after their emancipation. *Id.* at 870. This Court allowed the retroactive modification for those payments.

The same is true here. The Court should award a credit in the amount the MoneyGram history reflects that Percy paid directly to Priscilla since her emancipation.[13] That amount is $1130.00 in 2007 and $250.00 in 2008. RE 41-42. Support for Percy's claim that Sundra authorized Percy to make direct payments to Priscilla for support is shown by Sundra's affidavit which shows that Percy paid her $2450.00 in 2007. RE 34. Since he clearly did not make any MoneyGram payments to Sundra during that time, this Court is warranted in concluding that even Sundra considered the direct payments to Priscilla to be in lieu of child support.

4. ATTORNEY'S FEES:

It requires no extended discussion to demonstrate that the Chancellor erred in not revisiting the issue of the attorney's fees of $2,500.00 which he awarded to Sundra. A party requesting relief from a court of equity must come into court with "clean hands." In *Cole v. Hood,* 371 So.2d at 863, the Court described this principle as the "age-old maxim" which declares that "no person as a complaining party can have the aid of a court of equity when his conduct with respect to the transaction in question has been characterized by willful inequity or

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[13] The MoneyGram history fails to reflect cash payments which Percy made to Priscilla during the years of 2007 when she was living with him.

illegality." The Court noted that it is not necessary that the maxim be pleaded, "for it at any time during the progress of the case it becomes evidence that the facts exist which call the maxim into use it is the duty of the court to apply it, on the basis of sound public policy." *Id.* at 864.

The doctrine of "clean hands" precludes either Sundra or her attorney from benefiting in any way from her perjury and her attorney's failure to reveal that perjury to the Court and to counsel opposite. At trial, when confronted with Exhibit 3 for id, Sundra denied that she had seen the document. Tr. 97. That exhibit was the Texas Attorney general's spreadsheet which was obviously complied from Sundra's 2007 affidavit because it reflects the same payments Sundra had listed on her affidavit.[14]

While Sundra may have been telling the literal truth when she testified that she had not "seen" that document before, both she and her attorney knew that it tracked the payments she had listed on her affidavit. Her testimony then was seriously misleading. As a result of her failure to admit the truth of that document and to reveal the affidavit at that time, she seriously misled the Court and counsel opposite. To allow either her or her attorney to benefit from such conduct would be unconscionable. Had she admitted that Exhibit 3 for id was based on an affidavit she had executed in Texas, the document could have then been admitted. She would have saved the Chancellor and this Court, not to mention Percy and his attorney, considerable time and expense.

In addition to the expense of the trial, motion for reconsideration, and this appeal, Percy was forced to incur additional expenses in traveling to Texas and hiring an attorney in order to obtain an authenticated copy of the affidavit. Tr. 279-81.

This Court should conclude that Sundra is not entitled to attorney's fees and revise the judgment accordingly.

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[14] Marks had the spreadsheet which was in the DHS file he had been given. The Chancellor did not admit the document because Sundra denied having seen it. Tr. 102-03.

II. THIS COURT SHOULD REFORM THE JUDGMENT BECAUSE THE CHANCELLOR ERRED IN THE ORIGINAL FINAL JUDGMENT WHEN HE FAILED TO AWARD PERCY CREDIT FOR THE $897.00 HE PAID FOR RENT WHEN PRISCILLA WAS LIVING AT AN APARTMENT IN 2006.

As Percy previously argued, the Chancellor intended to give Percy credit for the amount of money he paid directly for Priscilla's apartment rent from March through July of 2006. The Chancellor, however, erroneously believed that that amount was accounted for in the $10,439.00 he had given credit for. RE 19. In fact, the MoneyGram history shows that Percy paid that $10,439.00 directly to Sundra in 2005 and 2006. RE 36-42.

The MoneyGram, however, also shows that in addition to that amount, he paid $299.00 to Raymond Prince, Priscilla's landlord, on March 9, 2006, $299.00 on June 10, 2006, $200.00 on July 8, 2006, and an additional $99.00 on July 17, 2006. RE 39-40. This Court, therefore, should give Percy credit for these amounts for a total of $897.00. *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc., supra* [Chancellor commits an error of fact warranting relief where the Court is left with a definite and firm conviction that a mistake was made].

III. THE CHANCELLOR ALSO ERRED AS A MATTER OF LAW IN FAILING TO GIVE PERCY CREDIT FOR THE MONEY HE PAID DIRECTLY TO PRISCILLA FOR HER RENT AND EXPENSES AFTER SHE WAS KICKED OUT OF SUNDRA'S HOME IN NOVEMBER OF 2004 UNTIL SHE WENT TO LIVE WITH PERCY IN JUNE OF 2005. ALTERNATIVELY, PERCY SHOULD HAVE BEEN GIVEN CREDIT OF $200.00 A MONTH FOR THOSE MONTHS WHEN PRISCILLA WAS EFFECTIVELY IN HIS CUSTODY.

The Chancellor found that Sundra had indeed kicked Priscilla out of the house in November of 2004. RE 12. Percy testified that Sundra told him to come and get Priscilla and take her back to Mississippi. Tr. 145-47. From that time until May or June of 2005 Priscilla lived with her friend Maria and Maria's mother. RE 12. The MoneyGram history shows numerous

direct payments to Priscilla during that time and supports Percy's testimony that he sent Priscilla money so that she could pay rent to Maria's mother and pay other living expenses. RE 12.

Thereafter, Priscilla went to live with her Percy in Mississippi from June through August of 2005 when Percy managed to talk Sundra into taking Priscilla back so that she could finish her senior year in Texas. Priscilla remained there until October of 2005 when she again fell out with Sundra and Dwayne. At that point, Percy paid for Priscilla to stay at a motel until he could arrange an apartment for her. This is the apartment of Raymond Prince that Priscilla lived in though the end of July of 2006 when she went to live with her father in Mississippi to go to college. Tr. 148-52.

The MoneyGram history corroborates that in addition to the money he paid directly to Sundra, Percy paid a total of $5446.00 directly to Priscilla from December of 2004 through December of 2006. The Chancellor should have credited this amount toward any arrearage. There can be no doubt that a Chancellor has the authority to give a father credit for payments for support and goods paid directly to or for the benefit of the child in order to avoid unjustly enriching the mother. *Varner v. Varner,* 588 So.2d 428 (Miss. 1991); *Johnston v. Parham,* 758 So.2d 443, 446 (Miss. App. 2000) [holding that non-custodial parent is entitled to receive credit for having paid child support where, in fact, he paid the support directly to or for the benefit of the child, where to hold otherwise would unjustly enrich the mother].

In *Varner,* for example, the Court held that even though the father had not petitioned the court for modification of child support payments, he was entitled to credit for having made child support where he took custody of one of the children and reduced his direct payments to his ex-wife proportionately. Under those circumstances, the Court held that the father had discharged his obligation to support the child. The Court held that where the child made the payments directly to or on behalf of the child rather than the ex-wife, and the ex-wife accepted this

arrangement and did not complain at the time, she was not entitled to be unjustly enriched by claiming past due child support after the fact because the father had ceased to use her as a conduit for financial support of the child. *Id.* at 434-35.

Here there can be little doubt that Sundra turned over actual, if not legal, custody to Percy in November of 2004 when she kicked Priscilla out of her home and called Percy to pick her up and take her to Mississippi. Priscilla was for all practical purposes in Percy's custody from November 2004 until her emancipation in December of 2006, with the exception of the brief time between September and October of 2005 when she lived with Sundra before Sundra again kicked her out. *Id.*

Therefore, he should be given credit toward the arrearage for the money which the MoneyGram history shows he paid directly to Priscilla from 2004 through 2006. In 2004, Percy paid $630.00 directly to Priscilla. In 2005, he paid $1980.00 directly to Priscilla. In 2006, he paid $2836.00 to her. In all, he made direct MoneyGram payments to her of $5,446.00 from December of 2004 through December of 2006 for which he should receive credit. RE 36-41.

Alternatively, at a minimum, he should receive credit of $200.00 a month for the time between December of 2004 and December of 2006 when Priscilla was in his *de facto* custody, with the exception of the month of September of 2005 when Priscilla lived with Sundra. Because the Chancellor did give Percy a $1,000.00 credit for the period between June of 2006 and December of 2006 when Priscilla actually resided in Mississippi, this would mean that Percy should receive credit for an additional $2,400.00.

IV. THE CHANCELLOR FURTHER ERRED IN NOT GIVING PERCY CREDIT ON ANY ARREARAGE FOR THE MONEY HE PAID TOWARD PRISCILLA'S COLLEGE TUITION.

In addition, Percy appears to have given Priscilla $3,800.00 to pay for two semesters of college tuition and board as well as an undetermined amount of cash for her support while she

was living with him from July of 2006 through December of 2006. The divorce decree provides that Sundra and Percy are to share equally in Priscilla's education costs. R.I/18. There is no evidence that Sundra made any contribution toward Priscilla's college costs. Therefore, Percy should have been given a credit of $1,900.00 toward any past due child support. *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc., supra* [Court should grant relief where the Court is left with a definite and firm conviction that the Chancellor made a mistake].

V. THIS COURT SHOULD AWARD PERCY ATTORNEY'S FEES AND COSTS FOR THIS APPEAL AND SHOULD REMAND FOR A HEARING ON APPROPRIATE SANCTIONS TO BE IMPOSED ON SUNDRA AND/OR HER COUNSEL FOR ATTORNEY'S FEES AND OTHER COSTS INCURRED BY PERCY AS A RESULT OF SUNDRA'S PERJURY AND THE MISCONDUCT OF HER ATTORNEY.

Rule 36, MRAP, provides that this Court shall tax costs against the Appellee in the event the case is reversed. This Court should do so.

Moreover, as Percy has previously shown, this Court has the inherent power to sanction a party of her attorney for a violation of the rules of the Court. *See also,* Rule 2(b), MRAP. This Court should remand this case to the lower court for the imposition of sanctions in the form of attorney's fees and costs against Sundra and her attorney.

CONCLUSION

This Court should find that Percy is entitled to have his case dismissed because of Sundra's perjury. Alternatively, he should be given proper credit for the payments he made to Priscilla and for her support as discussed herein. Finally, the Court should impose appropriate sanctions on Sundra and her attorney or remand this case to the lower Court with instructions to determine appropriate sanctions, including, but not limited to, Percy's costs and attorney's fees. Percy requests any other relief to which he might be legally entitled.

Respectfully submitted,
PERCY D HESTER, SR., APPELLANT

By: Julie Ann Epps
ATTORNEY FOR APPELLANT

CERTIFICATE

I, the undersigned attorney for Appellant, do hereby certify that I have this date mailed by United States mail, first class, postage prepaid, a true and correct copy of the above and foregoing to Donald W. Boykin, Attorney for Appellee, at 515 Court Street, Jackson, MS 39201 and one to Hon. H. David Clark II, Chancellor, PO Box 434, Forest, Mississippi 39074, and the original and three copies to Kathy Gillis, Clerk, PO Box 249, Jackson, Mississippi 39205-0249.

This the 18th day of October, 2010.

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