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CERTIFICATE OF INTERESTED PERSONS AND SERVICE OF APPEAL

I, ELLIOT G. MESTAYER, as counsel for the Appellant, do certify that the only known interested persons to this action are the parties and Appellant also certifies that he has mailed a true and correct copy of the foregoing Reply Brief and Record Excerpts to: Mark Knighten at his usual mailing address of P.O. Box 10, Pascagoula, MS 39568 and Chancellor Jaye Bradley P.O. Box 998, Pascagoula, Ms 39568-0998.

Elliot Mestayer

MAILING CERTIFICATE

I, ELLIOT G. MESTAYER, do certify that I have mailed and deposited on this day by U.S. mail, first class, postage prepaid Reply Brief for the Appellant (4) and Appellant's Record Excerpts (4) this the 3 day of December, 2010 unto the Mississippi Supreme Court at P.O. Box 117, Jackson, MS 39205.

Elliot G. Mestayer

APPELLANT'S REPLY TO APPELLEE'S ARGUMENT

The Appellee's meandering arguments in Paragraphs II and III of the Appellee's Brief are repetitive so we will address them together. The Reply Brief can be encapsulated as follows:

(1) Legal Authority for how to interpret Property Settlement Agreements is essentially the same as cited by the Appellant in the Appellants Brief;

(2) That there allegedly exists an ambiguity in the Property Settlement Agreement;

(3) The Appellant allegedly provided no evidence on how to interpret the provision contained in the PSA concerning educational expenses;

(4) Private School Tuition as an extraordinary expense;

(5) The Appellee makes numerous incorrect factual allegations to obscure and harass the Appellant and the Appellant's counsel;

(6) The medical expenses of the minor child;

(7) The wrong authority was applied to the case at hand;

(8) Veterans Benefits and Child Support

I. AUTHORITY FOR INTERPRETATION

The legal principals involved in reviewing Property Settlement Agreements are well known and were previously discussed in the Appellant's Brief. "To the extent that the Appellant believes that the intent of the parties has no place in the contract construction laws of this state, she is simply misguided and has no understanding of the law" (Appellee's Brief Page 11). Contrary to the Appellee's mischaracterization of the

argument, the Appellant asserts that the true intent of the Parties can be determined from the language of the Property Settlement Agreement.

> "Husband and Wife shall each be responsible for one-half (1/2) of all school and extracurricular expenses incurred by the minor child *including but not limited to* the cost of books, activity fees, lab fees, school uniforms, tuition, and sports equipment." (Page 7 of the Judgment of Divorce) (emphasis added)

The Chancellor and the Appellee fail to address the fact that tuition is not the only point of contention in this matter. The issue raised is that the Parties agreed in the Child Custody, Child Support and Property Settlement Agreement to equally be responsible for the **"all school expenses of the minor child including, but not limited to, cost of books, activity fees, lab fees, school uniforms, tuition, and sports equipment..."**. Tuition was just one example set forth in the document both Parties willfully executed. All school expenses cannot be interpreted any other way than written. The language is exact and precise – all school expenses of the minor child including, but not limited to, cost of books, activity fees, lab fees, school uniforms, **tuition**, and sports equipment..."

The Appellee's reference to *Harris vs. Harris*, 988 So.2d 376, 378 (Miss. 2008) presupposes that there is an ambiguity in the contract. There is no ambiguity. All school expenses is encompassing of all school expenses. There is no other way to interpret the word all, the word school or the word expenses.

The intent of the Parties is determined by the language of the document, not by what the Appellee testifies to some five (5) years after executing a document. This Court has repeatedly stated that when a contract is in fact determined to be ambiguous, the Court looks to the language of the contract for meaning, not the "intent" of the parties. (*Ivision v. Ivison* 762 So.2d 329 (Miss. 2000) and *Landry v Moody Grisham Agency* 181 So.2d 134, 139 (1965)).

The Four Corners doctrine should be applied to gleen intent, not the testimony of an individual who has already committed fraud and perjury on the Court to which he is currently testifying before.

II. THAT THERE ALLEGEDLY EXISTS AN AMBIGUITY IN THE PROPERTY SETTLEMENT AGREEMENT

By allowing testimony to explain a clause in the Child Support, Child Custody and Property Settlement Agreement, the Chancellor presupposes an ambiguity even exists. Secondly, if in fact an interpretation was being sought, albeit after the statue of limitations for interpreting contracts had expired, the Appellant is required to be given advanced notice that the language of the Agreement is being questioned. Pursuant to the comments to Rule 81(d)(4) of the Mississippi Rules of Civil Procedure, "the Rule does recognized that on occasion an answer may be necessary to present issues or narrow them." Further, this opens a Pandora's Box of scrutinizing every general term used in a Property Settlement Agreement to declare ambiguity when clearly none exists.

III. THE APPELLANT ALLEGEDLY PROVIDED NO EVIDENCE ON HOW TO INTERPRET THE PROVISION CONCERNING EDUCATIONAL EXPENSES.

The Appellee stated that the Appellant did not contact him or consult him about moving the child to private school (Appellee Brief Pages 10 and 11). However, admitted into evidence is a letter written September 12, 2009 (Exhibit 7 of the original court Exhibits) wherein the Appellee acknowledges receipt of the letters the Appellee had sent him regarding the transfer to private school. The Appellant also testified how pointless and futile it was to try to contact the Appellee because never returned any of the messages left for him on the answering machine at the number he provided.

The Appellee executed the Child Custody, Child Support and Property Settlement Agreement of his own free will and after much discussion and negotiation with the Appellant. After the document was accepted by the Court and incorporated into the Divorce Decree the Appellee waited five (5) years before questioning the language. The very phrase in question was the subject of the prior contempt litigation wherein the school expenses were enforced in the Court's Order dated February 13, 2009. Even when the Appellant sent the invoice for the private school tuition to the Appellee, the Appellee never stated that he was only responsible for college tuition, only that he could not afford the tuition (Exhibit 7 of original trial Exhibits).

The Appellee incorrectly represents that he is the only person to offer evidence that private school tuition was never contemplated. Quite the contrary, the minor child was in a Magnet School in Mobile, Alabama during the 2006-2007 school year which by agreement of the Parties. This school is part of the Mobile Public School System but operates like a private school with selective entry and different grading scales and expectations than traditional public school. The Appellee and Appellant jointly made the decision to move the minor from a traditional public school and place the minor in a school that was to a private school environment.

The Appellee admitted on the stand that he knows of no college or university that requires students in matriculation to wear uniforms (Transcript page 179 lines 20-29). So if the Appellee really thought the phrase in question only referred to college tuition, school uniforms would never have been included. Therefore, by agreeing to and signing the Child Custody, Child Support and Property Settlement Agreement with the wording

the way it was, including the payment for school uniforms acknowledges the fact that the educational expenses were not limited specifically to college.

IV. PRIVATE SCHOOL TUITION AS EXTRAORDINARY EXPENSES

Independent of the Property Settlement Agreement, the Appellant provided overwhelming evidence that the minor was having difficulties in the public school system from February 2009 until September 2009.

The Appellee states "While the Appellant contends that she contacted numerous school officials and even the school board attorney, not one witness was ever called by the Appellant to support this contention" (Appellants Brief Page 14), the Appellee asks this Court to ignore not only the testimony of Ann Garrison, the Appellant, the Appellant's mother, and the Appellee's own witness, Principal Caterra Payton who verified the Appellant's concerns and contentions.

Ann Garrison testified that she has a child at the same school, the same age as the minor child herein that was experiencing the same problems. When she tried to resolve the problems, the antagonistic principal had her barred from the school property. (Transcript Page 21 Line 26 – Page 28 Line 4).

The Appellee is implying that only the Appellant and the Appellant's mother testified as to the reasons and justifications for moving the minor child out of the public school system and into private school (Appellee's Brief Page 14). The testimony of Ann Garrison (Transcript Page 16 line 20 – Page 27 line 14) and the Appellee's own witness, Principal Caterra Payton (Transcript pages 71 line 12 – page 73 line 3), verify that multiple occasions of bullying were reported.

The Appellee's own witness, Caterra Payton, cited at least four (4) separate occasions of bullying of the minor reported after initially testifying that she was never made aware of any bullying. Further, Caterra Payton acknowledges that she never directly saw the Appellant talking to her secretary which reported the reasons for withdrawing the minor child from public school. Mrs. Payton specifically says that she was in an inner office and was only going by what her secretary said transpired. The allegation that Appellant's counsel would pay the tuition is a blatant effort to attack counsel for the Appellant. The Appellant's father paid for the tuition with a credit card (Transcript Page 90 lines 8-22).

If a an eleven (11) year old child is tormented to such an extent that she cries before school and has to seek psychiatric help, is that not adequate reason to move the child to a private school? If not, the Appellant respectfully asks what is adequate reason? How much should a child have to endure? Please keep in mind that the Appellant also has to pay one-half (1/2) of the tuition which Appellant can ill-afford to pay. The move to private school was only made after all other avenues of relief were exhausted.

The Appellant did not create the minor's tears. The Appellant did not create the numerous bullying reports confirmed by Principal Caterra Payton. The child's well-being was just simply ignored.

V. APPELLEE MAKES NUMEROUS INCORRECT FACTUAL ALLEGATIONS TO OBSCURE AND HARRASS APPELLANT AND COUNSEL

The Appellee's allegation that the Appellant was employed "by her attorney" as a legal secretary at the time the documents were prepared is grossly incorrect (Appellee Brief Page 8). The Appellant did not begin working for Mestayer & Associates until April 2008, long after the divorce was granted. The Appellant's allegation that the minor

child of the Parties attended public school in Mobile, AL at that time is also false (Appellee Brief Pages 7 and 9). The minor child of the Parties did not begin school in Mobile, AL until the school year started in September 2005.

The Appellee further alleged that the Appellant did not contact him or consult him about moving the child to private school (Appellee's Brief Pages 9, 10, 11, 13, and 14). However, admitted into evidence is a letter written September 12, 2009 (Exhibit 7 of original Court exhibits) wherein the Appellee acknowledges receipt of the letters the Appellee had sent him regarding the transfer to private school. It should also be noted that even when the Appellant sent the invoice for the private school tuition, the Appellee never mentioned he was only responsible for college tuition, only that he could not afford the tuition.

The Appellee falsely claimed that the Court did not modify the PSA of the Parties. However, the Court did, in its Ruling, modify the original terms of the Agreement of the Parties. The Court modified the term tuition and how medical bills were to be exchanged and paid.

The Appellee also incorrectly stated that the child was removed from public school before the first progress report for the school year was even received (Appellee's Brief Page 14). Please refer to Exhibit "8" of the original trial Court exhibits, also included herewith. The progress report was received on September 3, 2009. The child was not withdrawn from public school until September 9, 2009.

VI. MEDICAL EXPENSES OF THE MINOR CHILD

The bill submitted to the Appellee from Singing River Hospital was not submitted on January 8, 2010. An EOB received from the Appellant's insurance company was submitted on that day. The bill was in fact submitted to the Appellee on September 30, 2009 within thirty days of receipt by the Appellant. The Appellee never questioned the bill to the Appellant, in fact, the Appellee never contacted the Appellant at all concerning the stay in Singing River Hospital, why the minor was there, what was wrong, and how she was. Therefore, the Appellee is in fact in contempt of Court for failure to pay the medical bill submitted directly to him on September 30, 2009, well within the thirty days required to submit in the Agreement.

VII. WRONG AUTHORITY

Both the Chancellor and the Appellee are citing *Moses v. Moses*, 879 So.2d 1043 (Miss. Ct. App 2004) and *Southerland v. Southerland*, 816 So.2d 1004 (Miss. 2005) without taking into consideration that both of these cases were contested divorces wherein there was no written agreement to pay for school expenses. In neither case was there any evidence presented showing extraordinary needs or circumstances of the child. We have an existing and enforceable Child Custody, Child Support and Property Settlement Agreement that uses plain language free of ambiguity. It is patently unfair to deprive the Appellant of the benefit of this bargain.

VIII. VETERANS BENEFITS AND CHILD SUPPORT

The Appellee contends that his Veterans Administration (VA) benefits are not necessarily used in the calculation of child support based on *Barnes v. Mississippi Department of Human Services*, 2009-CA-00438-SCT (MSSC). This case specifically mentions that this type of payment can be considered as income when calculating child support. "We hold that the Chancellor did not err in using Barnes SSI benefits to calculate child support." (Barnes Paragraph 28) However, this specific case is discussing SSI. This is a payment for low income completely disabled individuals. The Appellee likens SSI to the benefits received by the VA. The United States Supreme Court takes a different stance on using Veterans Administration Benefits for child support in *Rose v. Rose*, 481 U.S. 619 (1987). This case specifically says that while the benefits may be exempt from attachment while in the possession of the government, once the benefits are delivered to the veteran, they can be used to satisfy child support. The U.S. Supreme Court determined that Congress intended disability benefits to support the beneficiary *and his dependents (Rose).*

Even if we assume for the sake of argument that the Chancellor was right about private school tuition, the Appellant has provided overwhelming evidence of the minor's exceptional educational needs. The additional cost of the private school tuition should have been more than sufficient reason to include the VA benefits in the calculation of child support.

Including the VA Benefits in the income of the Appellee warrants the Appellant's increase in child support requested at both contempt trials in this matter. The guidelines

say 14% of the adjusted gross income shall be allocated for one child. The current child support and denial of an increase in child support on two separate occasions is not within the 14% guidelines set forth by this State.

CONCLUSION

Through incorrect factual allegations, misdirection, and incorrect legal arguments, the Appellee tries to cloud the issues in a very simple case. This case has always been about the enforcement of a simple PSA. There is no real question that the phrase "all school expenses including but not limited to..." is clear, enforceable and unambiguous.

The learned Chancellor disregarded the overwhelming evidence and the emotional state of the minor. *Southerland* and *Moses* simply have no application in this case. The special needs of the minor were ignored.