IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-CA-02087-COA

ANGELA WILBANKS COSSITT **APPELLANT**

v.

JOHNNY KEVIN COSSITT **APPELLEE**

DATE OF JUDGMENT:	9/11/2006
TRIAL JUDGE:	HON. STUART ROBINSON
COURT FROM WHICH APPEALED:	HINDS COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	CHARLES R. WILBANKS
ATTORNEYS FOR APPELLEE:	JOHN ROBERT WHITE PAMELA GUREN BACH
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	PETITION TO CITE FORMER HUSBAND FOR CONTEMPT DENIED.
DISPOSITION:	AFFIRMED: 02/19/2008
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE KING, C.J., ROBERTS AND CARLTON, JJ.

KING, C.J., FOR THE COURT:

¶1. Angela Wilbanks Cossitt (Angela) filed a petition for contempt in the Hinds County Chancery Court that alleged Johnny Kevin Cossitt (Kevin) had failed to abide by the court's previous orders in a number of ways. After a hearing, the chancellor denied the petition for contempt. Aggrieved, Angela appeals. We find no error and affirm.

FACTS

¶2. On July 3, 2003, Angela and Kevin were granted a divorce by the Hinds County Chancery Court. The final judgment of divorce (divorce judgment) provided for property division, child support, and custody for Molly and Ashley, the parties' two minor children.

¶3. Almost two years later, Angela filed a petition for contempt and modification of child support. She also filed a motion for attorney's fees. In the petition, she claimed that Kevin had failed to abide by the divorce judgment. Kevin filed an answer to the petition and a counterclaim. He sought reimbursement for the children's medical treatment and relief from the final order requiring payment for college expenses.

¶4. On September 12, 2006, the chancellor denied Angela's petition for contempt and modification of child support. The chancellor granted Kevin relief under the provision in the divorce judgment that required the parties to pay the college expenses of the minor children. Further, the chancellor denied each party's motion for attorney's fees.

¶5. Aggrieved, Angela instituted this appeal.

STANDARD OF REVIEW

¶6. Whether a party is in contempt is a question left to the substantial discretion of the trial court. *Shelton v. Shelton*, 653 So. 2d 283, 286 (Miss. 1995). However, contempt must be proven by clear and convincing evidence. *Id*. Further, we will not reverse the findings of the chancellor unless the chancellor was manifestly wrong or an erroneous legal standard was applied. *Smith v. Smith*, 607 So. 2d 122, 126 (Miss. 1992).

ANALYSIS

¶7. Angela presents a total of five allegations of error committed by the trial court. Specifically, Angela alleges that: (1) Kevin should have been found in contempt for his failure to abide by the court's previous orders; (2) the court erred by relieving Kevin of the daughters' college expenses; (3) the court erred by failing to restrict Kevin's e-mail communication with his daughters; (4) the court erred by refusing to allow attorney's fees against Kevin; and (5) the court erred when it did not grant a judgment against Kevin for damages to their daughter's car.

I. Whether Kevin should have been found in contempt.

¶8. Angela alleges that the chancellor should have found Kevin in contempt for several different reasons. She alleges that: (1) Kevin failed to report his correct income to the court as required by the temporary order; (2) Kevin altered his paycheck stubs that he was required to provide Angela; (3) Kevin failed to obtain health insurance for his children; and (4) Kevin interfered with and violated Angela's privacy.

¶9. A finding of contempt is a very serious matter and must be proven by clear and convincing evidence. A citation for contempt is proper when "the contemner has willfully and deliberately ignored the order of the court." *Bredemeier v. Jackson*, 689 So. 2d 770, 777 (Miss. 1997).

A. Kevin failed to report an increase in income to the court.

¶10. The order awarding temporary support to Angela provided that since Kevin's gross income was $759 a month, the child support guidelines were inappropriate. It then set child support at $400 per month or 22% of Kevin's adjusted gross income, whichever might be greater. It further provided that "if Kevin's income increases to a point where he shall increase his monthly child support pursuant to this temporary order, he shall be required to immediately report that increase to the court and to Angela."

¶11. The chancellor's opinion stated that "[a]lthough Kevin failed to inform the [c]ourt of his income increase at this time, he properly informed Angela and increased the child support payment amount."

¶12. Angela alleges that since Kevin failed to inform the court of his increase in income, he should have been held in contempt for violating the temporary order. While the chancellor stated that Kevin failed to inform the court of a change in the amount of child support, it still declined to find Kevin in contempt. In doing so, the chancellor specifically stated that Kevin had kept Angela

informed as to the amount he was making prior to divorce. Further, testimony at trial from both parties was that Kevin's income was highly variable during that time period. Neither party was sure what amount Kevin's next paycheck would contain. Kevin testified that his base income remained the same, and he would not have been able to attest to anything differently than that base. Further, it is undisputed that, after the temporary order until the final judgment of divorce, Kevin did not miss a child support payment.

¶13. While we may have found Kevin in contempt for failure to report his increase in income to the court, we cannot say that the chancellor committed manifest error when he failed to find Kevin in contempt.

B. Kevin altered his pay stubs that he was required to send to Angela.

¶14. Angela alleges that the chancellor erred in failing to find Kevin in contempt for altering his pay stubs. Kevin was required by the divorce judgment to send copies of his pay stubs to Angela after every pay period. Presumably, this was added in an effort to ensure that Kevin paid the proper percentage of his income in child support.

¶15. Kevin admitted that he began putting liquid paper over the deposit date of the pay stub. However, the remainder of the pay stub, including the pay period and amount earned, remained visible. Angela argues that Kevin's only purpose for obscuring the deposit dates was to "willfully defeat the purpose of the final judgment." However, Kevin stated during the hearing that he provided consecutive pay period documentation. He merely covered the deposit dates on the pay stubs to prevent them from confusing Angela.

¶16. Kevin did comply with the divorce judgment and provided copies of his consecutive pay stubs to Angela. Therefore, we hold that the chancellor did not abuse his discretion when he failed to find Kevin in contempt for placing liquid paper over the deposit dates on his pay stubs.

C. Kevin failed to obtain health insurance coverage for his minor daughters.

¶17. Angela argues that Kevin should have been held in contempt for failure to provide health insurance for his two minor daughters. The divorce judgment provides that:

> As of August 1, 2003, Husband shall maintain full medical coverage for the minor children. Husband and Wife shall each pay and be responsible for one-half (½) of the minor children's necessary medical, doctor, hospital, dental, orthodontic, optical, psychological, and/or prescription drug expenses of the children which are not covered and/or reimbursed by Husband's insurance. If Husband is unable to maintain full medical coverage for the minor children for whatever reason, Husband shall pay and be responsible for 75% of the minor children's necessary medical, doctor, hospital, dental, orthodontic, optical, psychological and/or prescription drug expenses of the children, and the Wife shall be responsible for 25% of same expenses.

¶18. This was obviously an important topic for the chancellor as he spent over two and a half pages solely on the issue of medical insurance. The chancellor found that while Kevin failed to obtain medical insurance on August 1, 2003, he was not convinced that Kevin willfully disobeyed the orders of the court. In his findings, the chancellor stated that as of August 1, 2003, Kevin did not have any employment-related group insurance available. However, Kevin did procure such coverage when it became available through his current wife's employment. He secured coverage in June 2005, and it came into effect on July 1, 2005. The chancellor found that Kevin had provided health insurance for the children after that period of time through the date of the hearing.

¶19. Kevin testified that any insurance coverage other than through employment-related group insurance was prohibitively expensive. Therefore, he interpreted the provision in the divorce judgment to allow him to pay for 75% of the daughters' medical expenses if he found medical insurance to be too expensive. It was undisputed that Kevin did pay 75% of the daughters' medical costs prior to obtaining medical insurance in July 2005. In addition, he obtained employment-related group insurance as soon as it became available.

¶20. Since Kevin did not have insurance for the children, Angela obtained medical insurance through her employment on March 1, 2004. Further, Kevin reimbursed Angela a total of $1,126 of the $3,276.48 she paid in insurance premiums from March 2004 until June 2005, when he procured medical insurance.

¶21. The chancellor found that Kevin "could have and should have provided full medical coverage for the minor children." Further, the chancellor stated that the provision did not allow Kevin to provide his own method of providing health care to his daughters. It required him to be "unable" to provide insurance. However, the chancellor stated that he was not convinced by clear evidence that Kevin had *willfully* disobeyed the orders of the court.

¶22. As previously stated, a finding of contempt requires the contemnor to have willfully and deliberately disobeyed an order of the court. *Bredemeier*, 689 So. 2d at 777. It appears that the chancellor found that Kevin was sincere when he stated that he had interpreted the order incorrectly. In support of this conclusion, Kevin upheld the remainder of the provision by paying 75% of the girls' incurred medical costs and procuring coverage as soon as employment-related group insurance was available. Since findings of fact by a chancellor, such as whether Kevin willfully violated the order, are awarded great discretion, we cannot say the chancellor abused his discretion in failing to hold Kevin in contempt.

¶23. It is important to note that while the chancellor did not hold Kevin in contempt, he did require Kevin to fully reimburse the remaining $2,150.48 Angela paid in premiums for health insurance coverage from March 2004 until June 2005. In addition, the chancellor noted the fact that Kevin was not very prompt in providing health insurance information to Angela. Therefore, he required notice of coverage to be provided to Angela within thirty days of the court's order and notice of any changes in coverage or renewals within thirty days as well. If Kevin should fail to

provide proper documentation, the chancellor ordered that Angela had the right to procure health insurance through her employment with Kevin being responsible for the full amount of the premiums.

D. Whether Kevin interfered with and violated Angela's privacy.

¶24. Angela alleges that the trial court erred when it failed to find Kevin in contempt for sending her various harassing e-mails. The divorce judgment provided that neither party would "molest or interfere with each other . . . and each party shall respect the privacy of the other." The excerpts from the e-mails included phrases such as "you are desperate and need help," "BS about car tags, your legal team screwed up, I caught it," and "whining and complaining." However, Kevin introduced an e-mail from Angela where she called him an "a– hole."

¶25. The chancellor found that "both parties had used questionable language in their email communications to one another." Therefore, the chancellor found that neither party was innocent regarding their communications. Since neither party had clean hands when it came to the communications, the trial court was correct in not finding Kevin in contempt. *See Brennan v. Brennan*, 605 So. 2d 749, 752 (Miss. 1992).

¶26. Since the trial court did not err in failing to find Kevin in contempt, we now turn to Angela's remaining allegations.

II. Whether the chancellor erred by relieving Kevin of his daughters' college expenses.

¶27. Angela alleges that the trial court erred in relieving Kevin of any further college expenses for the parties' minor children. In addition, she challenges the chancellor's finding that season football tickets, parking tickets, lockout charges, clothing, personal expenses, hair expenses, and sorority dues are not reasonable and necessary costs of a college education. The divorce judgment provided that each party was to be responsible for "one-half (½) of all reasonable and necessary

costs of a college education for each child, provided . . . that each child maintains full-time college status and maintains a 2.0 grade point average."

¶28. Each child attended Mississippi State University after completing high school. However, each daughter received less than a 2.0 grade point average at the end of their first semesters. Therefore, the chancellor held Kevin responsible for one-half of each daughter's college expenses for the first semester, but he relieved Kevin of any legal duty to pay any college expenses for the following semesters. While the chancellor found that it was a harsh result, he stated that "to do otherwise would completely strip the requirement of maintaining a 2.0 grade point average of all meaning." Further, the chancellor, citing *Barnett v. Barnett*, 908 So. 2d 833, 846-47 (¶34) (Miss. Ct. App. 2005), correctly stated that while courts generally favor a parental obligation to pay for a child's college expenses, it must be balanced with the "child's responsibility and aptitude to exceed at college."

¶29. Angela argues that for a child to be required to *maintain* a 2.0 grade point average, the child must first *attain* a 2.0 grade point average. However, the chancellor found that the children had a semester to attain and maintain a 2.0 grade point average. He stated that colleges have decided that a semester is an adequate period of time within which to determine how successfully a student is comprehending information. Therefore, he found that a reasonable method of measuring the daughters' success at college was likewise by semester grades.

¶30. After reviewing the divorce judgment we must agree with the chancellor. While the divorce judgment did not explicitly set a specific time period in which the girls could maintain a 2.0 grade point average, it is a reasonable interpretation to use the semester grades as the appropriate time period. As pointed out by the chancellor, this State favors parental support through college if the

children show the aptitude to succeed. However, the divorce judgment set a 2.0 grade point average as the benchmark for the girls, which they failed to meet.

¶31. Since the girls failed to show the responsibility and aptitude to succeed at college, the chancellor did not abuse his discretion when he relieved Kevin of the girls' college expenses *after* the first semester. *See id.*

¶32. Angela's second allegation of error, which pertains to college expenses, is that the chancellor erred when he found that certain items should not be included in the computation of college expenses. The chancellor specifically excluded football tickets, parking tickets, lock-out charges, clothing, personal expenses, hair care, and sorority dues from the college expenses. He found that these items were generally covered in child support, which he noted was not reduced when the girls began attending college. While these expenses maybe considered a part of the "college experience," they are by no means *necessary* to a college education. Therefore, the chancellor did not abuse his discretion in excluding these specific items from the amount Kevin owed Angela.

III. Whether the chancellor erred by failing to restrict Kevin's e-mail communications to his daughters.

¶33. Angela alleges that the chancellor should have restricted Kevin's e-mails due to some questionable material he had forwarded to his daughters. She states that it was an abuse of discretion for the chancellor to not require Kevin to forward her all future e-mails that he might to send his daughters. The chancellor specifically addressed the issue of the e-mails and stated that while the daughters were older, the e-mails were "questionable in content and likely inappropriate communications from a father to his daughters." He then urged Kevin to be more mindful of his communications with his daughters.

¶34. In order to restrict visitation, and likewise communication, of the non-custodial parent, evidence must be presented that the restriction is necessary to avoid harm to the child. *H.L.S. v.*

R.S.R., 949 So. 2d 794, 800 (¶18) (Miss. Ct. App. 2006). During the hearing, Kevin admitted that at least one of the e-mails he sent to his daughters was sent by accident. The different e-mails included one of several topless women and one of a man in a swimsuit that left little to the imagination. After viewing the e-mails, we cannot say that any harm has befallen the daughters, and the chancellor took the proper action in urging Kevin to be more mindful of his communications with his daughters. Therefore, this allegation of error is without merit.

IV. Whether the chancellor erred by denying Angela's request for attorney's fees.

¶35. Angela alleges that the chancellor should have granted her request for attorney's fees. The chancellor properly stated that "without obvious findings of contempt, award of attorney's fees is not appropriate where a party has the means to pay his or her own attorney's fees." Further, the decision to award attorney's fees is left largely to the discretion of the chancellor. *Magee v. Magee*, 661 So. 2d 1117, 1127 (Miss. 1995).

¶36. The chancellor did not find Kevin in contempt, and as we have previously discussed, the chancellor did not abuse his discretion when he made that finding. Therefore, we are left with whether or not either party would be unable to pay his or her attorney's fees. The chancellor went on to state that both parties had not provided sufficient evidence to show that they were unable to pay their attorney's fees. Such a finding of fact is awarded a large amount of deference. *Smith*, 607 So. 2d at 126. While Angela had spent a great deal on her children, the court recognized that her attorney's fees were $5,830 and that she was represented by her father. We cannot say that the chancellor abused his discretion in denying Angela's request for attorney's fees.

V. Whether the chancellor erred when he did not grant a judgment against Kevin for damages to their daughter's car.

¶37. Angela's final allegation of error involves a car accident that occurred shortly before the contempt hearing. However, Angela acknowledges that this issue was not properly brought before the chancellor. Since the issue was never brought before the chancellor, it is not ripe for our review on appeal.

CONCLUSION

¶38. The chancellor gave an extremely thorough order which provided facts that supported his decisions in this matter. While Angela may have alleged conduct in her complaint that could amount to contempt, she had to prove such conduct by clear and convincing evidence. After a thorough review of the record, we find that the chancellor did not abuse his discretion when he failed to hold Kevin in contempt. Since the chancellor did not find Kevin in contempt it was within his discretion to deny Angela's request for attorney's fees. Further, the chancellor correctly applied the divorce judgment to end Kevin's obligation to pay for college expenses after the daughters' first semester. Therefore, we affirm the chancellor's judgment.

¶39. **THE JUDGMENT OF THE HINDS COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

MYERS, P.J., IRVING, CHANDLER, ROBERTS AND CARLTON, JJ., CONCUR. GRIFFIS, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY LEE, P.J.,BARNES AND ISHEE, JJ.

GRIFFIS, J., CONCURRING IN PART AND DISSENTING IN PART:

¶40. I concur with the majority on all issues except Issue II. As to Issue II, I am of the opinion that the chancellor abused his discretion, and therefore, I respectfully dissent.

¶41. The Mississippi Supreme Court often cites the rule that the "polestar consideration in child custody cases is the best interest and welfare of the child." *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). Indeed, recently, the court cited the rule that "chancellors are charged with

considering the 'totality of the circumstances.'" *Giannaris v. Giannaris*, 960 So. 2d 462, 467 (¶10) (Miss. 2007)(quoting *Kavanaugh v. Carraway*, 435 So. 2d 697, 700 (Miss. 1983)).

¶42. I am of the opinion that all child support agreements must be interpreted in light of both of these rules. In *McCord v. Healthcare Recoveries, Inc.*, 960 So. 2d 399, 405 (¶13) (Miss. 2007) (citation omitted), the supreme court held that abuse of discretion may be found where the appellate court has a "'definite and firm conviction' that the court below committed a clear error of judgment and the conclusion it reached upon a weighing of the relevant factors." Here, I have such definite and firm conviction that the chancellor committed clear error and that the chancellor's findings were not based upon sufficient evidence.

¶43. The Child Custody, Child Support and Property Settlement Agreement provided the following language for the payment of college expenses:

> Husband and Wife agree to each be responsible for and shall pay one-half (1/2) of all reasonable and necessary costs of a college education for each child, provided that each child applies for and uses every reasonable effort to obtain any available grant-in-aid, pell grant, scholarships and such other financial aid available for assistance in payment of tuition; *that each child maintains full time college status and maintains a 2.0 grade point average*. Reasonable and necessary costs of college education shall be defined as all tuition, books, fees and the costs of on-campus housing, and *any such other costs as may be necessary for the minor children's college education*. . . .

¶44. The trial was held on April 3 and May 2, 2006. On July 10, 2006, the chancellor entered the opinion of the court and made the following findings of fact and conclusions of law on the college expenses:

> At the end of the Fall 2004 semester, Molly's grade point average was 1.40. At the end of the Spring 2005 semester, Molly's grade point average was 1.55. Angela argues that the term "maintains" in the Agreement is ambiguous and should be interpreted on a case-by-case basis of how long each child should have to attain and maintain a 2.0 grade point average. However, this would require constant court intervention to determine case-by-case time periods for grade point averages. Likewise, it would leave all parties, including the children, in a constant state of ambiguity. Instead, this Court chooses to interpret the term "maintains" in a

> reasonable fashion. College students are given specific grade point averages on a semester basis; colleges have determined that a semester is an adequate period of time within which to determine how successfully a student is comprehending information. Therefore, in the absence of a stated period of time, it is reasonable to interpret grade point averages in terms of semesters.
>
> Each of the parties' daughters failed to maintain a 2.0 grade point average after her first semester in college. Therefore, Kevin was relieved of any further obligation to pay their college expenses after their first semesters. While the Court is hesitant to enforce a provision with such a seemingly harsh result, to do otherwise would completely strip the requirement of maintaining a 2.0 grade point average of all meaning.

The chancellor's final judgment was entered on September 11, 2006.

¶45. The essence of the chancellor's decision is that since both daughters failed to have a 2.0 grade point average after their first semester, Kevin's obligation to pay for half of their college education is to be terminated immediately. I cannot conclude that this finding was based on the credible evidence, a totality of the circumstances, or with consideration to the best interests of the children.

A. Molly

¶46. Molly graduated from high school in May 2004. She attended community college during the summer of 2004. She completed three hours of course work, made a C, and had a grade point average of 2.0. In the fall of 2004, Molly attended Mississippi State University, and she earned a 1.50 grade point average. The chancellor's decision stops here. The chancellor determined that since she failed to maintain a 2.0 grade point average then Kevin's obligation to pay for her college education terminated.

¶47. The first problem with this analysis is that Kevin did not seek to modify the child support obligation after this semester. In fact, it was almost six months after the fall semester that Kevin asked for relief. On June 29, 2005, Kevin filed his counterclaim in which he first asked for the court to terminate his obligation for the college expenses of Molly. Based on the timing of this filing,

Kevin was obligated to pay one-half of all college expenses incurred through June 29, 2005, at a minimum. Thus, the chancellor clearly abused his discretion in forgiving Kevin of the obligation to pay for one-half of Molly's college expenses incurred before June 29, 2005. I would remand this case to the chancellor to calculate the amount owed through June 29, 2005, which would include all expenses for the Spring 2005 and Summer 2005 terms.

¶48. The evidence presented revealed that, in the spring of 2005, Molly improved her grade point average to a 1.75, and her overall grade point average, with the community college course transfer, was a 1.55. At this point, Molly's performance was certainly not stellar. However, the evidence presented at trial revealed that Molly attended community college over the summer of 2005. She completed twelve hours and earned high enough grades so that her total grade point average of community college courses was a 3.40. This accomplishment indicates that Molly does in fact have the ability to complete her higher education successfully.

¶49. The only evidence offered from Mississippi State University was a statement on university letterhead that provided, "The information shown is as of the current term. . . . Current Term: Fall Semester 2005." Exhibit 23. This document reveals that Molly was at Mississippi State for the Fall Semester of 2005, and that Molly's "overall" grade point average was a 2.23.

¶50. At the hearing, Kevin did not offer an official transcript showing either child's college performance. Kevin subpoenaed Molly to appear at the hearing. She did and was not asked what her grade point average was. To prevail on his claim, Kevin had the burden of offering credible evidence about Molly's grades. Either a transcript or oral testimony from Molly would suffice. The only credible evidence was the Mississippi State University statement that indicated Molly's overall grade point average, at the time the matter was before the chancellor, was a 2.23.

¶51. On July 25, 2006, after the court's opinion, Angela filed a Motion to Make Addition to the Record. In this motion, Angela attached a document from Mississippi State, which revealed that Molly made a C in College Algebra and a B in Introduction to Physical Education, both three-hour courses, and her overall grade point average, after the Summer Term of 2006, was a 2.10.

¶52. I cannot accept the chancellor's determination that since Molly failed to obtain a 2.0 grade point average after her first semester, Kevin's obligation to pay is terminated. The obligation is on Kevin to file for a modification in a timely manner. He did not. When Kevin filed his counterclaim, Molly's collegiate performance was satisfactory. Molly's efforts should be rewarded, not punished.

¶53. When a parent is ordered to pay sums of money for a child's college expenses, that payment constitutes an award of child support. *Mizell v. Mizell*, 708 So. 2d 55, 60 (¶23) (Miss. 1998). A decrease in that child support cannot be made retroactively. *See Thurman v. Thurman*, 559 So. 2d 1014, 1016 (Miss. 1990). In holding that a chancellor's reduction of past child support payments was manifest error, the supreme court stated that "once child support payments become past due they become vested and cannot be modified." *Id.* (citing *Brand v. Brand*, 482 So. 2d 236, 237 (Miss. 1986); *Hailey v. Holden*, 457 So. 2d 947, 951 (Miss. 1984); *Hambrick v. Prestwood*, 382 So. 2d 474, 476 (Miss. 1980)). "[A] court cannot relieve the civil liability for support payments that have already accrued." *Hailey*, 457 So. 2d at 951 (citing *Lewis v. Lewis*, 213 Miss. 434, 438, 57 So. 2d 163, 165 (1952)).

¶54. Relieving the obligation of a parent to pay for a portion of a child's college expenses should be no different than a modification of child support. The chancellor should consider the totality of the evidence, certainly all evidence through the date of the filing or the hearing, before making such a critical determination that will affect a child of the parties. The chancellor failed to do so. I would

reverse, render, and remand for the chancellor to calculate the amount of Molly's college expenses that are owed by Kevin and enter a judgment in such amount.

B. Ashley

¶55. Ashley presents an even more confusing issue. The original counterclaim did not ask for relief from the requirement to pay for one-half of Ashley's college expenses. On January 27, 2006, Kevin filed a motion for leave to file amended counterclaim that would ask the court to terminate his obligation to pay Ashley's expenses. On February 1, 2006, Angela's attorney consented to Kevin filing an amended counterclaim. Thus, in February 2006, Kevin asserted a claim that his obligation for payment of Ashley's expenses should be terminated.

¶56. The only evidence of Ashley's grades appears to be an e-mail from Ashley to Kevin. It shows that Ashley took 13 course hours, including: English Composition I, three credits, mid-term grade A, final grade F, and twenty-seven absences; Early U. S. History, three credits, mid-term grade F, final grade D, and no information as to the number of absences; College Algebra, three credits, mid-term grade C, final grade D, and four absences; General Psychology, three credits, mid-term grade C, final grade C, and fourteen absences; and an Honors Forum, one credit with a "S" final grade. This report does not indicate her grade point average. Certainly, an F, two Ds and a C does not equal a 2.0 grade point average. However, we do not know how her participation in the Honors Forum would be considered in the calculation of her grade point average. Ashley was not called to testify at the trial, and Kevin did not introduce her official transcript from Mississippi State University.

¶57. On July 25, 2006, after the court's opinion, Angela filed a Motion to Make Addition to the Record. In this motion, Angela attached official transcripts showing that both girls had improved their grades. In the Spring Semester of 2006, Ashley made an A in English Composition I, an A in

Public Speaking, and A in Introduction to Mass Media, and a B in College Algebra. Also, a transcript from Holmes Community College revealed that Ashley made a B in American National Government.

¶58. Hence, I cannot accept the chancellor's determination that Ashley failed to obtain a 2.0 grade point average. Kevin has failed to produce sufficient credible evidence to support such finding. I would reverse and render on the issue of Kevin's obligation to pay one-half of Ashley's college education and would remand for the chancellor to calculate the amount of Ashley's college expenses that are owed by Kevin.

¶59. The chancellor recognized that his strict interpretation of the college expense provision created a harsh result. The chancellor reasoned that "to do otherwise would completely strip the requirement of maintaining a 2.0 grade point average of all meaning." The chancellor's result was indeed harsh. Harsh as to the child whose best interest and welfare he was to place as the "polestar consideration." I am of the opinion that the chancellor abused his discretion in relieving Kevin of his obligation to pay one-half of the college expenses of his daughters. Certainly, the chancellor did not consider the children's best interest or the totality of the circumstances. For these reasons, I respectfully dissent as to Issue II.

LEE, P.J., BARNES AND ISHEE, JJ., JOIN THIS SEPARATE OPINION.