IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2017-CA-01644-COA

JERRY CHRISTOPHER COLLADO **APPELLANT**

VS.

JENNIFER JORDAN COLLADO **APPELLEE**

ON APPEAL FROM THE CHANCERY COURT
OF RANKIN COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEE

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. Their representations are made in order that the Justices of the Supreme Court and/or the Justices of the Court of Appeals may evaluate possible disqualification or recusal.

A. Honorable John C. McLaurin, Chancellor; PO Box 1437, Brandon MS 39043

B. Honorable Haydn Roberts, Chancellor; PO Box 1437, Brandon MS 39043

C. Jerry Christopher Collado, Appellant

D. Jennifer Jordan Collado (Tyndall), Appellee

E. Heather M. Aby, Attorney for Appellant, Lalor Baily & Aby, PLLC, 2506 Lakeland Drive, Suite 203, Jackson MS 39232

F. Gary Lee Williams, Attorney for Appellee, Gary Williams Law, PLLC, Post Office Box 1561, Brandon, Mississippi 39043

Dated, this the 13th day of December 2018.

/s/ Gary Lee Williams
Gary Lee Williams, *Attorney for Appellee*

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

SUPREME COURT OF MISSISSIPPI

MISSISSIPPI COURT OF APPEALS

SECONDARY SOURCES

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BRIEF OF THE APPELLEE

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This is an appeal from an Order entered by Chancery Court Judge John C. McLaurin granting a Modification to a previous *Judgment of Divorce Irreconcilable Differences* to Jennifer Jordan Collado (now "Tyndall" due to remarriage) and Jerry Christopher Collado, wherein the Court found that Jerry Christopher Collado was not burdened by the payment of private school tuition and ordered that he shall continue to pay the private school tuition of the parties four (4) minor children over his objection based solely on financial reasons.

B. COURSE OF THE PROCEEDINGS.

Appellant, Jerry Christopher Collado (hereinafter "Chris") and Appellee Jennifer Jordan Collado (now "Tyndall" due to remarriage and hereinafter "Jennifer") were divorced by the entry of *a Judgment of Divorce on Irreconcilable Difference* on May 19, 2016, which was accompanied by a *Child Custody and Property Settlement Agreement* in Civil Action 2015-1579 in the Rankin County Chancery Court. (Clerks Papers "C.P." 19-40)

(R.E. 4). On March 14, 2017, Jennifer filed her *Petition for Modification of Former Judgment of Divorce and Other Relief*. (C.P. 41-45). On March 30, 2017, Jennifer filed *Petitioner Jennifer Jordan Collado's (Tyndall) Verified Petition for Emergency Relief* regarding payment of private school tuition by Chris. (C.P. 47-50). On April 6, 2017, an *Order on Petitioner's Petition for Emergency Relief* was entered by Chancellor Haydn Roberts denying Petitioner's request for Emergency Relief. (C.P. 51). On July 24, 2017, Chris filed his *Answer to Petition for Modification of Former Judgment of Divorce and Other Relief; and Counter Complaint for Modification, Contempt, and Other Relief.* (C.P. 52-58).

On July 31, 2017, the final hearing was conducted. (Trial Transcript (hereinafter "T.T.") 1-223.) The case was tried over the course of one day and concluded with the ruling of the court on July 31, 2017. (T.T. 194-203). A Judgment was entered on August 11, 2017, modifying the previous Judgment and requiring Chris to continue payment of private school tuition for the minor children of the parties until graduation from high school. (C.P. 59-62) (R.E. 2).

On August 21, 2017, Chris filed his *Motion for Reconsideration and Amendment of Prior Judgment.*[1] On August 21, 2017, Jennifer also filed a *Motion for Reconsideration* (C.P. 64-66). On September 25, 2017, the Court heard arguments from both parties regarding said Motions. (T.T. 204-222). On October 31, 2017, the Court rendered an *Order Denying Motions for Reconsideration and Amendment of Judgment*, but did clarify other aspects of the Judgment. (C.P. 67-68) (R.E. 3).

[1] Appellee could not find a copy of the Motion for Reconsideration in the Clerk's Papers as it may have been inadvertently omitted.

On November 21, 2017, Chris filed his *Notice of Appeal*, commensurate with MISS. R. APP. P 4(a). (C.P. 69-70) and then filed a Corrected Notice of Appeal on November 27, 2017. (C.P. 71-72).

C. STATEMENT OF RELEVANT FACTS

On May 19th, 2016 the parties were divorced of and from each other by the Rankin County Chancery Court. (CP 19-40) (R.E. 4). The *Judgment of Divorce* and all provisions of the Child Custody and Property Settlement Agreement (hereinafter "CCPSA") were agreed to by the parties. *Id.* Four children were born of the marriage, namely: D.S.C., a male born on January 20, 2001; K.N.C., a male born on August 24, 2003, R.A.C., a male born on May 17, 2005, and L.I.C., a female born on February 14, 2009. *Id*.

The CCPSA provided as follows with regard to the payment of private school education:

> Husband agrees to pay for the minor children's private school education, so long as the parties jointly agree for the children to be enrolled in private school, including tuition and registration fees, continuing through each child obtained a high school diploma. Husband agrees to pay unto Wife $250.00 per child each year for the purchase of school clothes and uniforms. Said monies shall be paid in equal installments with one-half being due and payable on December 1 each and every year.
> (C.P.30) (R.E. 4) .

Less than nine months after agreeing to pay for the four (4) minor children's private school education, sometime in February of 2017, Chris told Jennifer "that he was no longer going to pay for all four (4) children to go to private school, even though he'd been paying that---paying for private school for them since [the oldest child] was in

preschool, so 16 years; and he only wanted to pay for two children, and he felt like the younger two children would be fine to go to public school." (T.T. 25:3-10).

On March 14, 2017, Jennifer filed her *Petition for Modification of Former Judgment of Divorce and Other Relief.* (C.P 41-45). In said Petition, Jennifer requested a Modification of Payment of Private School. *Id.* Jennifer's purpose in requesting a modification was that sending two children to private school and two children to public school was not workable or in the best interest of the minor children and that Jennifer could not afford the tuition for the two children that Chris refused to pay for. *Id.* Jennifer requested a modification seeking the following relief, " That Respondent be responsible for payment of the minor children's private school education, including but not limited to tuition and registration gees and continuing through each child obtaining a high school diploma." *Id.*

Following all testimony and evidence presented to the Court, the Chancellor modified the CCPSA and ordered Chris responsible for payment of private school tuition at Park Place Christian Academy until graduation. (C.P. 59-62) (T.T. 201:9-20) (R.E. 2)

II. SUMMARY OF THE ARGUMENT

The Chancellor properly modified the previous Judgment requiring Chris to pay for the private school of the four (4) minor children. Chris argues that he was not required to pay for the private school education of the minor children pursuant to the laws of Contract. However, Mississippi case law has repeatedly held that "[p]re-college tuition is considered part of child support, not an extraordinary expense." *Moses v. Moses*, 879 So.2d 1043, 1048(¶

14) (Miss.Ct.App.2004). Thus, the private school tuition normally must be considered as child support. *Davis v. Davis*, 983 So.2d 358 (Miss. App., 2008). Jennifer properly sought a modification of child support after Chris refused to pay for two of the four children's private school education. A party seeking a child-support modification must show a material change in circumstances arising subsequent to the original divorce decree. *Short v. Short*, 131 So.3d 1200 (Miss. App., 2013) *quoting Pipkin v. Dolan*, 788 So.2d 834, 837 (¶ 7) (Miss.Ct.App.2001). The Court found that Chris did not disagree with the children attending the private school in question; rather Chris stated that he could no longer afford to send the children to private school. (T.T. 207:10-22). The Court heard all the evidence regarding the income of Chris and found the decision of Chris to not pay for the education of his minor children based solely on his claim that he cannot afford it was in direct contradiction to the evidence and testimony presented before the Court. (T.T. 200:7 – 201:20). Therefore, no abuse of discretion, manifest error, or inappropriate application of a legal standard was committed by the chancellor in this proceeding. Chris's issues are without merit and this Court should affirm the Judgment of the lower Court.

III. ARGUMENT

A. Standard of Review

This Court "will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *Sanderson v. Sanderson* , 824 So.2d 623, 625–26 (¶ 8) (Miss. 2002). Chancellors are given broad discretion in the area of modification of child support. *Morris v. Stacy* , 641 So.2d 1194, 1196 (Miss. 1994). "[T]he process of weighing evidence and arriving at an award of child support is essentially an exercise in fact-finding," which restricts this Court's review significantly. *Bell v. Bell*, 206

So.3d 1254 (Miss. App., 2016) *quoting Clausel v. Clausel* , 714 So.2d 265, 266–67 (¶ 6) (Miss. 1998) and *Gillespie v. Gillespie* , 594 So.2d 620, 622 (Miss. 1992).

B. Private School Tuition is Child Support and is Subject to Modification

Chris appeals claiming the Court erred by not enforcing the four corners of the CCPSA based upon the law of contracts. However, Chris's argument is without merit because Jennifer brought forward a Petition for Modification. It appears that Chris is making the same argument as Kent Davis, suggesting, "that the educational provision in the divorce decree was a contractual provision and, thus, could not be modified." *Davis v. Davis*, 983 So.2d 358 (Miss. App., 2008). However, "[a]s to private school tuition, Mississippi case law has repeatedly held that "[p]re-college tuition is considered part of child support, not an extraordinary expense." *Moses v. Moses*, 879 So.2d 1043, 1048(¶ 14) (Miss.Ct.App.2004). Thus, the private school tuition normally must be considered as child support." *Davis*, 983 So.2d 358 (Miss. App., 2008). As a result, Chris cannot rely on contract law in enforcing the CCPSA, because child support (i.e., pre-college tuition) is always subject to modification.

"A chancellor may modify child support if there has been a substantial or material change in the circumstances of one or more of the interested parties [–] the father, the mother, and the child or children [–] arising subsequent to the entry of the decree to be modified." *Id.* quoting *Curry v. Frazier* , 119 So.3d 362, 366 (¶ 15) (Miss. Ct. App. 2013). In February of 2017, Chris told Jennifer that he was no longer going to pay for all four children to attend private school. (T.T. 25:3-5). Chris only wanted to pay for the older two children and felt like the younger two would be fine in public school. (T.T. 25: 7-10). Clearly, there is a substantial or material change in the circumstances of the children when two of four children may have to change schools due to their father's decision to no longer pay private school tuition and they will also be subject to being separated from their siblings and subject

to a different school environment. Jennifer testified that she could not take two kids to one school and two kids to another school and trying to orchestrate all that would entail. (T.T. 25:29 – 26:3). Jennifer also testified that she is not financially able to afford the tuition of the younger two children because she was a stay at home mom for 19 years and is having to go back to work to build a career. (T.T. 53:2-6).

The children are excelling at Park Place Christian Academy. Kaden has received awards for all A's and Science Achievement Award. (T.T. 27, 29). Kaden also plays basketball at Park Place. (T.T. 32). Dante has received awards for A&B honor roll. (T.T. 27). Dante also plays soccer, track and plays guitar in the school worship team. (T.T. 33:4-6 and 48:2-6). Rylan (one of the two youngest) received awards for all A's honor roll, a Certificate of Scholarship of High Honors, and an athletic award. (T.T. 27-28). Rylan also play soccer and basketball at Park Place Christian Academy. (T.T. 31:24-28). Jennifer testified that she doesn't think Rylan could make those teams at Pearl Public Schools. (T.T. 32:18-24). Layla (one of the youngest two) has received awards for all A's honor roll, Good Samaritan Award (exhibiting Christian character and service), athletic award, and Art Achievement award. (T.T. 29:15-23). The Court was well within it's right to modify the previous judgment requiring Chris to pay the private school education for all four children where they are excelling socially and academically and Chris has the financial means to afford it.

Park Place Christian Academy has tiered tuition for parents that have more than one child attending the school. *See generally* (R.E. 5 "Exhibit P-3"). Dante (the oldest) would have tuition of $430.00 per month. (T.T. 35:22-23). Kaden would have tuition of $397.00 per month. (T.T. 35:26-28). Rylan would have tuition of $359.00 per month. (T.T. 36:5-7). Layla would have tuition of $330.00 per month. (T.T. 36:11-12). Given that Chris testified

that he could only afford the two oldest children, the amount that Chris says that he could not afford (the youngest two children) is $689.00 per month.

At the time of the entry of the Judgment of Divorce (when Chris was paying tuition for all four children), the following circumstances existed. Chris was paying $2000.00 per month in child support. (T.T. 108-110). Chris was also paying the mortgage on Jennifer's home of $2600.00 and would have continued to pay a reduced payment of $2075.00 after one year towards her mortgage if Jennifer had not remarried. *Id.* As a result of Jennifer's remarriage, Chris was no longer responsible for the mortgage on Jennifer's home and his child support increased from $2000.00 to $3000.00 per month. *Id.* The math is simple; Chris was paying $4075.00 toward child support and Jennifer's mortgage. After Jennifer got remarried, Chris was paying $3000.00 in child support and $0.00 towards her mortgage. Jennifer brought forward her *Petition for Modification* requesting Chris to pay private school expenses because Chris was objecting to payment of private school tuition in the amount of $689.00 monthly when his monthly expenses actually decreased by $1075.00.

Chris also listed his monthly-adjusted gross income at $9,640.54 per month on his 8.05 Financial Statement. *See* (R.E. 6). However, when going through his bank deposits at trial, it appeared that Chris deposited over the course of June 2016 to May 2017 over $148,000.00.[2] See T.T. 110 – 115. *Also see* (R.E. 7). Which actually equals a monthly average of deposits in the amount of $12,333.33. (T.T. 115:21-23). Chris's 8.05 Financial Affidavit shows that he only spends $75.00 more than his income he had listed on the 8.05. *See* (R.E. 6). His bank deposits versus his 8.05 financial statement expenses show that he should

[2] This amount was arrived at after backing out of the total the higher of his two income tax returns that were deposited that year and any deposits he made from a Home Equity Line of Credit.

actually have a surplus of $2617.79 at the end of each month on average. Clearly enough to afford the $75.00 that he claims he was "upside down" on his 8.05 financial statement.

Chris also listed his gross total monthly income at $16,985.23 on his 8.05 Financial Statement. (R.E. 6). The yearly average of that amount is $203,822.76. However, on Chris's home loan application, he listed his yearly income at $210,000.00 for 2016. (R.E. 7 - p 137 of 180). Also, in Chris's home loan application, Chris listed that his annual income was $213,384.00. . (R.E. 7 - p 125 of 180). This is another instance, wherein Chris either willfully or negligently understated his yearly income on his 8.05 Financial Statement by $6,177.24 or $9,561.24 respectively. Again, clearly enough to afford the $75.00 that he claims he was "upside down" on his 8.05 financial statement.

Another example of Chris either willfully or negligently understating his income on his 8.05 financial statement was derived from the pay stub attached to his 8.05 financial Statement (R.E. 6 p.174 of 180). Fortunately, this pay stub was period ending on July 15, 2017. *Id.* The total income on Chris's paystub was $124,982.95. *Id.* The pay for July 2, 2017 through July 15, 2017 was $7,863.53. *Id.* Subtracting the current income from his pay stub would make Chris's pay for a period of 6 months and one day $117,119.42. During cross-examination, Chris admitted that if $8000.00 (rather than $7,863.53) out of the total was removed and that number was doubled it would equal $232,000.00. (T.T. 129:6-12). $232,000.00 is a much larger number than the yearly average of $203,822.76 that was listed on Chris's 8.05 Financial Affidavit. Again, the difference clearly being enough to afford the $75.00 that he claims he was "upside down" on his 8.05 financial statement.

"[T]he process of weighing evidence and arriving at an award of child support is essentially an exercise in fact-finding, which restricts this Court's review significantly." *Bell v. Bell*, 206 So.3d 1254 (Miss. App., 2016) *quoting Clausel v. Clausel* , 714 So.2d 265, 266–67 (¶ 6)

(Miss. 1998) and *Gillespie v. Gillespie* , 594 So.2d 620, 622 (Miss. 1992). Chancellor McLaurin heard all the evidence about the children's success at Park Place Academy and heard Chris's only objection being that he could not afford the tuition. The Court found, "he's been paying the tuition for a period of a number of years when his income has arisen – has risen each and every year. He's poised this year to make more money than he's ever made, and yet he – **he talks out of both sides of his mouth** because he says, I really want the children to continue to go to Park Place. **I think it's in their best interest to do so**, but I can't afford to pay for the two younger children. The figures don't agree with that contention. Mr. Collado is making good money. **He's making more money this year than he's ever made**." (T.T. 200:13-27). *Emphasis added.* The Court further found during the *Motion of Reconsideration*,

> "my recollection of the totality of the testimony was not so much that he didn't agree that they should remain in private school, he just didn't want to pay for it; and the bulk of the testimony was that he was attempting to show that he was financially unable to continue to pay the tuition there, whereas the evidence showed that he had made more money on the last year of taxes that we had then he'd ever made before…. That even though he was contending that he couldn't afford it, he had greater present ability to afford it than he'd ever had. And I remember the parties – he even testified that -- as I recall, that a Christian education was important for these children and that they were getting that at Park Place and -- I don't remember him testifying that he disagreed with them going there. He just didn't want to pay for it. And so that was the reason that I required him to continue to pay for it, because, as I said, the evidence was that he had a greater present ability to pay for it now than he'd ever had."

(T.T. 279:10-22.)

The Court heard the testimony before it and properly modified the previous Judgment to require that Chris pay for the minor children's private school education. Regardless of the law of contracts, private school tuition has repeatedly been found to be a form of child support and subject to modification and the Chancellor's ruling was supported by substantial evidence.

C. The Court of Equity is a Court of Conscience.

Alternatively, Jennifer makes the following argument in support of the lower court's Judgment. Chris does not disagree with the children attending Park Place Christian Academy; rather he disagrees with paying tuition for the younger two children on the basis that he cannot afford it. (T.T. 90:13-18). There is a history of Chris paying the private school tuition for the entirety of these children's lives. Even if there was no Petition for Modification brought by Jennifer based upon Chris's arbitrary decision for the younger children to attend Park Place Christian Academy, his basis fails as a matter of equity.

> It is more than a trite phrase that the court of equity is a court of conscience; and it is immaterial what rights a party could assert in a court of law,--a court of equity will limit him to those rights of which he could conscientiously avail himself. It has been tersely expressed that nothing but conscience, good faith, and reasonable diligence can call forth the activities of a court of equity, and that when these requisites are wanting, the court is passive and does nothing.
> *Smith v. Dorsey*, 530 So.2d 5 (Miss., 1988) *quoting* Griffith, Mississippi Chancery Practice (2d.Ed.) Sec. 32 (1925). Cf. *Suggs v. Town of Caledonia*, 470 So.2d 1055 (Miss.1985); *Covington County v. Page*, 456 So.2d 739 (Miss.1984); *State v. Stockett*, 249 So.2d 388 (Miss.1971).

The sole and only reason for Chris no longer agreeing for the minor children to be enrolled in Park Place Christian Academy was that he could not afford it. The Court extensively heard testimony of Chris's income and found that he was on pace to make more income than he had ever made. The ink was barely dry on the Judgment of Divorce, before Chris decided to crawfish out of an obligation on a basis that that did not meet the evidence presented to the Court. Chris's sole reason for no longer agreeing to pay for the private school of two of his children was not in good faith and his argument that he could no longer afford the tuition is unconscionable. The Chancery Court is not bound by the construct of

courts of law, rather the Chancery Court can do what is right! In the instant case, Chancellor McLaurin did the right thing

CONCLUSION

The chancellor heard the evidence and testimony presented before the Court and properly found that the previous Judgment should be modified to require that Chris pay the private school tuition of the minor children with no exceptions. Contract Law does not prohibit the Court from modifying child support. Private School Tuition has been held to be child support. Accordingly, Jennifer requests this Court to affirm the Judgment of the lower court and tax the Appellant with all costs.

Alternatively, a Court of Equity is not a Court of Law and is not bound by the same constraints. A Chancellor can apply his conscience, good faith, and reasonable diligence to those who seeks equity. Chancellor McLaurin made the equitable and correct decision in requiring Chris to continue to pay the private school tuition of the minor children when the only basis for his disagreement did not meet the evidence presented to the Court.

Dated, this the 13th day of December, 2018.

s/ Gary Lee Williams
Gary Lee Williams, *Attorney for Appellee*

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system, which sent notification of such filing to the following:

Heather M. Aby Esq., (MSB#100749)
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Further, I hereby certify that I have emailed the document to the Honorable John C. McLaurin Jr., presiding Chancellor

Dated, this the 13th day of December 2018.

s/ Gary Lee Williams
Gary Lee Williams, *Attorney for Appellee*

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