IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CP-00953-COA

ROBERT D. EVANS **APPELLANT**

v.

BEVERLY B. EVANS **APPELLEE**

DATE OF JUDGMENT:	03/17/2009
TRIAL JUDGE:	HON. BILLY G. BRIDGES
COURT FROM WHICH APPEALED:	WASHINGTON COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	ROBERT D. EVANS (PRO SE)
ATTORNEY FOR APPELLEE:	EVELYN TATUM PORTIE
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	MODIFICATION OF CHILD SUPPORT GRANTED AND AMOUNT REDUCED FROM $2,000 TO $1,000 FOR SIX MONTHS; REQUIRED ROBERT EVANS TO MAINTAIN LIFE INSURANCE, MEDICAL INSURANCE, AND CAR INSURANCE FOR THE PARTIES' MINOR CHILD; AWARDED BEVERLY EVANS $1,000 IN ATTORNEY'S FEES
DISPOSITION:	AFFIRMED IN PART; REVERSED & REMANDED IN PART - 04/26/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

CONSOLIDATED WITH

NO. 2009-CP-01442-COA

ROBERT D. EVANS **APPELLANT**

v.

BEVERLY B. EVANS **APPELLEE**

DATE OF JUDGMENT:	05/13/2009
TRIAL JUDGE:	HON. BILLY G. BRIDGES
COURT FROM WHICH APPEALED:	WASHINGTON COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	ROBERT D. EVANS (PRO SE)
ATTORNEY FOR APPELLEE:	EVELYN TATUM PORTIE
NATURE OF THE CASE:	DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	MODIFICATION OF CHILD SUPPORT GRANTED AND AMOUNT REDUCED FROM $2,000 TO $1,000 FOR SIX MONTHS; REQUIRED ROBERT EVANS TO MAINTAIN LIFE INSURANCE AND MEDICAL INSURANCE FOR THE PARTIES' MINOR CHILD; FOUND ROBERT EVANS IN CONTEMPT FOR FAILING TO PAY $14,750 IN CHILD SUPPORT; AWARDED BEVERLY EVANS $1,300 IN ATTORNEY'S FEES
DISPOSITION:	AFFIRMED IN PART; REVERSED & RENDERED IN PART; REVERSED & REMANDED IN PART - 04/26/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE LEE, C.J., BARNES AND MAXWELL, JJ.

MAXWELL, J., FOR THE COURT:

¶1. The Washington County Chancery Court granted Robert Evans a downward modification of his child-support payments but ordered him to pay an amount greater than required by the child-support guidelines. While the chancellor's deviation from these presumptively correct guidelines may be reasonable, his findings of fact are inadequate to support the reduction. Further, because Robert promptly filed a modification action upon his loss of income, the chancellor's contempt finding and corresponding award of attorney's fees were improper. The chancellor's other award of attorney's fees to Beverly must also be

reversed because it lacks sufficient findings and supporting evidence.

¶2. We therefore reverse the chancellor's child-support reduction and remand for the chancellor to make findings regarding the child-support guidelines and deviation criteria. And we reverse and render on the issue of contempt and reverse and remand the chancellor's assessment of attorney's fees. Because child-support payments vest as they accrue, we affirm the chancellor's refusal to relate the modification order back to an earlier date.[1]

FACTS

I. Background

¶3. In December 1998, Beverly and Robert obtained a divorce based on irreconcilable differences. The chancellor incorporated the terms of the parties' "marital settlement agreement" into his final judgment of divorce. Their agreement called for joint physical and legal custody of the parties' two children. And it required that Robert pay Beverly $2,000 per month in child support, provide health-insurance coverage for the children, and maintain a life-insurance policy for their benefit.

II. Modification and Contempt Actions

¶4. Robert had served as County Attorney for Washington County for twenty years. In early November 2007, he lost his re-election bid. Soon after, on November 14, 2007, Robert filed a motion to modify his child-support payments. It is undisputed that his net loss of income was approximately $3,500 per month.

¶5. The chancellor spent five days hearing the matter. On the third day, January 28, 2009,

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[1] Because Robert timely appealed two of the chancellor's orders, we consider them together in this appeal.

Beverly filed a motion for contempt based on Robert's failure to comply with child-support provisions in the 1998 divorce judgment. The chancellor then reset the matter and heard evidence over two more days in March 2009.

III. The Chancellor's Findings

¶6. The chancellor ruled from the bench that Robert was not in contempt for accruing arrearages because he was financially incapable of complying with the original child-support decree.

¶7. Then, on May 13, 2009, the chancellor entered a written order. The chancellor found a material change in circumstances and decreased Robert's child-support obligation from $2,000 to $1,000 for a period of six months. He also required that Robert maintain a life-insurance policy for the benefit of his son[2] and provide his son's automobile and health insurance. He further ordered Robert pay $1,000 for Beverly's attorney's fees, even though his order contained no finding regarding Beverly's inability to pay her own attorney's fees, nor any finding on the *McKee* factors. The chancellor's order neither mentions contempt nor Robert's liability for arrearages.

¶8. The chancellor later entered a second written order on July 28, 2009, for the stated purpose of clarifying his prior order.[3] In this second order, the chancellor found Robert in contempt for defaulting on $14,750 in child-support payments. He required Robert pay two

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[2] By the time of this hearing, the parties' daughter had reached the age of majority.

[3] The July 28 order contains the same provision reducing Robert's child-support obligation from $2,000 to $1,000 per month for a six-month period. Like the prior order, it also requires Robert to continue to provide life and medical insurance for his son. Both orders were nunc pro tunc, referencing the dates of bench rulings.

installments of $100 each month until this arrearage is paid. Based on the contempt finding, the chancellor awarded Beverly an additional $1,300 in attorney's fees.

IV. Issues Presented

¶9. Robert now appeals arguing the chancellor erred by (1) finding him in contempt, (2) ordering him to pay Beverly's attorney's fees, (3) deviating above the child-support-guideline percentages without sufficient findings, and (4) refusing to relate his modification order back to the date of his originally scheduled hearing.

STANDARD OF REVIEW

¶10. "Chancellors are afforded wide latitude in fashioning equitable remedies in domestic relations matters, and their decisions will not be reversed if the findings of fact are supported by substantial credible evidence in the record." *Henderson v. Henderson*, 757 So. 2d 285, 289 (¶19) (Miss. 2000). We will not disturb a chancellor's factual findings unless the chancellor's decision was manifestly wrong or clearly erroneous, or the chancellor applied an improper legal standard. *Wallace v. Wallace*, 12 So. 3d 572, 575 (¶12) (Miss. Ct. App. 2009). We do not substitute our judgment for the chancellor's, even if we disagree with his findings and would arrive at a different conclusion. *Coggin v. Coggin*, 837 So. 2d 772, 774 (¶3) (Miss. Ct. App. 2003). When reviewing a chancellor's interpretation and application of the law, our standard of review is de novo. *Tucker v. Prisock*, 791 So. 2d 190, 192 (¶10) (Miss. 2001).

¶11. We conduct a heightened review when a chancellor simply adopts one party's findings verbatim. *City of Jackson v. Presley*, 40 So. 3d 520, 522 (¶10) (Miss. 2010). We do so because adopted findings "are not the same as findings independently made by the trial judge

after impartially and judiciously sifting through the conflicts and nuances of the trial testimony and exhibits." *Id.*

¶12. But here we need not apply a heightened review because the chancellor made changes, albeit slight, to Beverly's proposed findings of fact. Further, the chancellor entered a subsequent order for the stated purpose of clarifying his prior order. This order appears to embody the chancellor's independent findings, and Robert does not contend otherwise. Therefore, our familiar manifest-error standard applies.

DISCUSSION

I. Contempt

¶13. Robert claims that because he promptly petitioned for a reduction in his child-support payments, the chancellor erred by finding him in contempt.

¶14. Enforcing compliance with a court order is a matter of civil contempt. *Dennis v. Dennis*, 824 So. 2d 604, 608 (¶8) (Miss. 2002) (explaining that the primary purpose of a civil contempt order "is to enforce the rights of private party litigants or enforce compliance with a court order"). "An adjudication of contempt is a serious matter and must, in the case of civil contempt, be proven by clear and convincing evidence." *Allred v. Allred*, 735 So. 2d 1064, 1067 (¶10) (Miss. Ct. App. 1999) (citing *Masonite Corp. v. Int'l Woodworkers of Am.*, 206 So. 2d 171, 180 (Miss. 1967)); *see also Setser v. Piazza*, 644 So. 2d 1211, 1216 (Miss. 1994); *Shelton v. Shelton*, 653 So. 2d 283, 286 (Miss. 1995). Failure to comply with a court order is prima facie evidence of contempt. *McIntosh v. Dep't of Human Servs.*, 886 So. 2d 721, 724 (¶11) (Miss. 2004). To rebut a prima facie case of contempt, a defendant must show an "inability to pay, that the default was not willful, that the provision [violated] was

ambiguous, or that performance was impossible." Deborah H. Bell, *Bell on Mississippi Family Law* § 11.05[1][a] (1st ed. 2005).

¶15. Parties who are unable to comply with court-ordered child-support payments should promptly petition the chancellor for a reduction of support. *Thurman v. Thurman*, 559 So. 2d 1014, 1016 (Miss. 1990). "Where a party promptly files for a modification . . . of support based on his inability to pay, a finding of contempt is not proper." *Setser*, 644 So. 2d at 1216; *see also Shelton*, 653 So. 2d at 286-87; *Cumberland v. Cumberland*, 564 So. 2d 839, 847 (Miss. 1990), *Thurman v. Thurman*, 559 So. 2d 1014, 1016-17 (Miss. 1990); *Clower v. Clower*, 988 So. 2d 441, 445 (¶11) (Miss. Ct. App. 2008).[4]

¶16. Robert suffered a substantial decrease in income after he lost in his re-election bid for county attorney in early November 2007. He had held the position for twenty years. Robert's net loss of income was approximately $3,500 per month. Based on his financial inability to comply with the original decree, on November 14, 2007, Robert petitioned for a modification of child support. After he began failing to pay the full amount required by the divorce judgment, Beverly filed her contempt action in January 2009.

¶17. The following colloquy from the chancellor's bench ruling on March 17, 2009, shows he found Robert financially unable to meet his child-support obligation:

> By the Court: I guess he hopes, as well as . . . we do, that things are going to get better. But the law is that he can't he [sic] held in contempt if he can't pay.
>
> . . . .

[4] If the defaulting party fails to promptly file a modification action, "he will, in response to the citation for contempt be required to make out a clear case of inability." *Thurman*, 559 So. 2d at 1016.

By the Court:	And I was not going to hold him in contempt today.
By [Beverly's counsel]:	I'm sorry to hear that.
By the Court:	Well, I don't think I can, based on the evidence[.]

But the chancellor apparently later changed his mind. In a written order entered July 28, 2009, the chancellor found Robert in contempt without mentioning his earlier finding of Robert's inability to pay. The chancellor simply stated, "the Court is of the opinion that [Robert] is in [c]ontempt of this Court for his failure to pay the sum of $14,750 in child support as ordered by this Court[.]" Other than citing Robert's failure to make payments, the chancellor offered no other basis for holding him in contempt.

¶18. We find the chancellor erred in his contempt ruling. Because Robert promptly filed for a reduction in child-support payments when his financial circumstances changed, the contempt finding was improper. *See, e.g.*, *Setser*, 644 So. 2d at 1216.[5] To be clear though, Robert's prompt filing of the modification action only precludes a finding of contempt. It does not excuse arrearages. *See Thurman*, 559 So. 2d at 1016-17; *Cumberland*, 564 So. 2d at 847. Robert is still liable for vested child-support payments, as discussed further below.[6]

¶19. The dissent relies on speculation and matters outside the record to find, as Beverly suggests on appeal, that the chancellor properly held Robert in contempt based on his actions prior to the November 2007 election. Yet the record shows that the chancellor on June 14,

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[5] We note that Beverly has not appealed the chancellor's determination that Robert's election defeat constituted a material change in circumstances, and that issue is not before us.

[6] *See* Issue IV.

2008, dismissed Beverly's previous contempt action. Though she later filed another contempt petition on January 28, 2009, it concerned Robert's alleged nonpayment of child support since January 2008. Beverly made clear several times during the hearing that she only sought to hold Robert in contempt for his nonpayment from January 2008 forward,[7] and that is apparently what the chancellor did. In fact, Beverly's attorney admitted that Robert "was caught up" with his support payments in December 2007. There is simply no record support that the chancellor relied on Robert's actions prior to the November 2007 election when finding him in contempt.

¶20. For these reasons, we reverse and render the chancellor's contempt finding.

II. Attorney's Fees

¶21. The chancellor first awarded Beverly $1,000 in attorney's fees incurred in the modification action. He later awarded Beverly an additional $1,300 in attorney's fees based on his finding that Robert was in contempt. We will address the separate awards in turn.

A. Modification Matter

¶22. The matter of awarding attorney's fees is largely entrusted to the sound discretion of the chancellor. *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982). We are reluctant to disturb a chancellor's discretionary determination whether to award attorney's fees or the

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[7] For example, during the hearing, Beverly's attorney stated:

> [A]s of January, '08, [Robert] fell behind. We're seeking in our contempt motion – he's behind going way back to January, 2008. I would contend that he was caught up December, '07, and his contempt of court action starts January, '08, when he was failing to pay and he was under an order to do that[.]

amount of any award. *Smith v. Smith*, 614 So. 2d 394, 398 (Miss. 1993). Attorney's fees may only be awarded to a party who has shown an inability to pay his or her own fees. *Voda v. Voda*, 731 So. 2d 1152, 1157 (¶29) (Miss. 1999); *Pacheco v. Pacheco*, 770 So. 2d 1007, 1012 (¶26) (Miss. Ct. App. 2000).[8] When awarding attorney's fees, chancellors are instructed to make specific findings regarding the recipient's ability to pay. *Hankins v. Hankins*, 729 So. 2d 1283, 1286 (¶13) (Miss. 1999). And chancellors should apply the *McKee* factors in determining the proper amount of the award:

> [A] sum sufficient to secure [a] competent attorney is the criterion by which we are directed. The fee depends on consideration of, in addition to the relative financial ability of the parties, the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, as well as the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case.

McKee, 418 So. 2d at 767 (internal citation omitted).

¶23. The chancellor awarded Beverly $1,000 in attorney's fees in the modification action, but made no finding regarding Beverly's inability to pay her attorney. Nor did he apply the *McKee* factors. Our supreme court has held that "[a] trial court abuses its discretion by awarding attorney's fees without first finding that the party is unable to pay the fees." *Hankins*, 729 So. 2d at 1286 (¶13). While there is some proof supporting Beverly's inability to pay, there is also evidence that in October 2008 she acquired $15,500 utilizing her home

[8] An exception to this rule is contempt actions, where attorney's fees may be properly assessed against the offending party without regard to the recipient's inability to pay. *See Bounds v. Bounds*, 935 So. 2d 407, 412 (¶¶17-19) (Miss. Ct. App. 2006). Fees awarded on this basis, though, should not exceed the expense incurred as a result of the contemptuous conduct. *Hanshaw v. Hanshaw*, 55 So. 3d 143, 148 (¶17) (Miss. 2011).

equity. No proof was presented concerning what Beverly did with these funds. Nor did Beverly testify regarding her ability to pay her attorney.

¶24. We also emphasize that the chancellor failed to consider Robert's financial situation. Where neither party is able to pay more than his or her own fees, an award of attorney's fees is inappropriate. *Sarver v. Sarver*, 687 So. 2d 749, 755 (Miss. 1997), *overruled on other grounds by Pearson v. Pearson*, 761 So. 2d 157 (Miss. 2000); *see also* Bell, at § 12.01[6][b] (explaining that the chancellor should consider the parties' financial disparity).

¶25. In addition, an award of attorney's fees must be supported by sufficient evidence for an accurate assessment of fees. *See McKee*, 418 So. 2d at 767 (reversing and remanding award based on insufficient evidence); *Powell v. Powell*, 644 So. 2d 269, 276 (Miss. 1994) (same). An itemized bill is not always required. Estimates may support an award in some circumstances if the estimates clearly explain "the method used in approximating the hours consumed on a case." *McKee*, 418 So. 2d at 767; *see also Watkins v. Watkins*, 748 So. 2d 808, 813 (¶¶13-14) (Miss. Ct. App. 1999). While this court has held that a chancellor's failure to apply the *McKee* factors is not necessarily itself reversible error, *see Miley v. Daniel*, 37 So. 3d 84, 87 (¶7) (Miss. Ct. App. 2009), the proof must at least support an accurate assessment of fees under the *McKee* criteria. *Bumgarner v. Bumgarner*, 475 So. 2d 455, 456 (Miss. 1985).[9] Here, the evidentiary basis supporting the $1,000 award is not clear from the record.

[9] While Beverly's attorney provided some figures as to her hourly rate during debate over attorney's fees in the contempt action, she offered nothing to support the $1,000 estimate in the modification case.

¶26. Therefore, we must remand the issue of attorney's fees for further consideration. On remand, any award of attorney's fees must be supported with findings concerning Beverly's inability to pay and the reasonableness of the award under the *McKee* factors.

B. Contempt Matter

¶27. Attorney's fees are properly assessed against a party found to be in contempt. *Mount v. Mount*, 624 So. 2d 1001, 1005 (Miss. 1993). But here, as already discussed, the chancellor erred by finding Robert in contempt.[10] Since the chancellor based the subsequent award of $1,300 in attorney's fees solely on an erroneous contempt finding, we reverse and render this award. *Moses v. Moses*, 879 So. 2d 1036, 1041 (¶¶21-22) (Miss. 2004); *Cumberland*, 564 So. 2d at 845.

III. Deviation from the Guideline Percentages

¶28. The chancellor ordered a downward modification—reducing Robert's monthly child-support payments from $2,000 to $1,000 due to Robert's loss of income. But it is undisputed that $1,000 still considerably exceeds the presumptively correct amount under the child-support guidelines. Robert contends the chancellor's deviation from the support guidelines lacks adequate findings.

¶29. Mississippi Code Annotated section 43-19-101(1) (Rev. 2009) contains the guidelines for ordering child support. Based on the number of minor children, a certain percentage is applied to the payor's adjusted gross income (AGI) to determine the proper amount of support. *Id.* There is a rebuttable presumption the guideline amount is correct both in determining the amount of the initial award and in modifying that award. *Id.*

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[10] *See* Issue I.

¶30. To deviate from the presumptively correct amount, the chancellor must make "a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case as determined under the criteria specified in Section 43-19-103." Miss. Code Ann. § 43-19-101(2) (Rev. 2009). These deviation criteria are:

> (a) Extraordinary medical, psychological, educational or dental expenses.
>
> (b) Independent income of the child.
>
> (c) The payment of both child support and spousal support to the obligee.
>
> (d) Seasonal variations in one or both parents' incomes or expenses.
>
> (e) The age of the child, taking into account the greater needs of older children.
>
> (f) Special needs that have traditionally been met within the family budget even though the fulfilling of those needs will cause the support to exceed the proposed guidelines.
>
> (g) The particular shared parental arrangement, such as where the noncustodial parent spends a great deal of time with the children thereby reducing the financial expenditures incurred by the custodial parent, or the refusal of the noncustodial parent to become involved in the activities of the child, or giving due consideration to the custodial parent's homemaking services.
>
> (h) Total available assets of the obligee, obligor and the child.
>
> (i) Any other adjustment which is needed to achieve an equitable result which may include, but not be limited to, a reasonable and necessary existing expense or debt.

Miss. Code Ann. § 43-19-103(a)-(i) (Rev. 2009).

¶31. In deviating from the guidelines, the chancellor made no findings as to Robert's AGI or the presumptively correct amount based upon the guideline percentages. The chancellor's May 13 order contains a pronouncement that application of the guidelines would be unjust.

Yet he never determined the guideline amount. This court has explained that "[t]he chancellor must apply the guidelines to make the determination that their application would be unjust." *Osborn v. Osborn*, 724 So. 2d 1121, 1125 (¶18) (Miss. Ct. App. 1998). While the chancellor's order perhaps touched on a few of the deviation factors, he made no findings on other important criteria, such as the parties' total available assets.

¶32. The chancellor's May 13 order contains some authority for imputing income based on earning capacity. Supporting this proposition is our decision in *White v. White*, 722 So. 2d 731, 734 (¶21) (Miss. Ct. App. 1998) ("We hereby hold that where temporary financial reverses create an unreliable measure for an award of child support, the chancellor may in his discretion predicate an award on reasonable earning capacity."). But in *White*, the chancellor made specific findings regarding the child-support payor's earning capacity. *Id.* at (¶22). Here, it is unclear (1) whether the chancellor deviated from the guidelines on the basis of Robert's earning capacity, and (2) what monetary amount the chancellor considered Robert's earning capacity to be.

¶33. Beverly alleges Robert made essentially no attempt to get re-elected in November 2007. And she suggests he has made no efforts to find employment since then. She further points to a trip Robert took to Mexico, in early 2009, but Robert's wife claims to have paid virtually all associated expenses. These considerations may well relate to deviation from the guidelines under the "catch all" factor. However, the fact remains that the chancellor failed to consider some other important criteria, such as Robert's available assets.

¶34. Beverly mentions the equitable principle 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 wilful inequity." *Lane v. Lane*, 850 So. 2d 122, 126 (¶11) (Miss. Ct. App. 2002). But Beverly has not shown that Robert was financially able to comply with the original child-support decree, yet deliberately chose not to. And we find no specific conduct by Robert that can be characterized as wilful inequity.

¶35. There is no dispute that Robert's monthly income had decreased by approximately $3,500 since he had lost his job as county attorney. Robert's Rule 8.05 financial disclosure indicates his gross monthly income had been reduced to $1,288. His testimony at the hearing evinced his gross income for 2008 was $14,840, which amounts to a monthly gross income of approximately $1,236.66. Instead of calculating Robert's AGI, the chancellor found:

> By the Court: I'm going to say at this time that your income has been cut at least 50%. So, I'm going to reduce [child-support payments] to $1,000[.]
>
> . . . .
>
> By Mr. Evans: Well, I don't understand where the guidelines are. They don't even come into place.
>
> By the Court: I don't think the court has to follow guidelines.
>
> By Mr. Evans: They have to look at them. That *McGowan* case said –
>
> By the Court: Yes, sir, they have to, but this case is such a mess at this time[,] and I think, as I say, your income has probably been reduced at least that much.
>
> By Mr. Evans: Well, Judge, you're ordering me to pay her more than I'm making, as far as the records show.
>
> By the Court: Yes, sir.

Apparently, based on this finding, the chancellor modified Robert's child-support payments from $2,000 to $1,000. The chancellor also ordered that Robert provide his son's car and

health insurance, as well as maintain a life-insurance policy with his son as a beneficiary.[11]

¶36. The process of weighing evidence and arriving at a proper award "is essentially an exercise in fact-finding, which customarily significantly restrains [the appellate court's] review." *Gray v. Gray*, 745 So. 2d 234, 236 (¶10) (Miss. 1999). But when the chancellor departs from the guidelines due to the special circumstances of the case, "a written finding must appear on the record sufficient to overcome the presumption that such a deviation is inappropriate." *Kilgore v. Fuller*, 741 So. 2d 351, 354 (¶11) (Miss. Ct. App. 1999).

¶37. On numerous occasions, our courts have reversed child-support awards deviating from the guideline amounts without being supported by adequate findings. *Gray*, 745 So. 2d at 237 (¶14) (remand necessary because chancellor deviated above guideline amounts without finding payor's AGI or applying deviation factors); *Clausel v. Clausel*, 714 So. 2d 265, 267 (¶8) (Miss. 1998) (remand necessary because chancellor's upward deviation from guideline amounts not supported by any finding regarding payor's ability to pay); *Dufour v. Dufour*, 631 So. 2d 192, 194-95 (Miss. 1994) (reversal necessary where chancellor made no reference to guidelines and failed to determine payor's income); *Osborn v. Osborn*, 724 So. 2d 1121, 1124-25 (¶¶12-20) (Miss. Ct. App. 1998) (reversal required because no findings regarding payor's AGI). This court's observation in *Kilgore* holds true today: "We have found no authority for permitting the support award to be totally unanchored from the guidelines. There can be a deviation, but not a total disregarding of them." *Kilgore*, 741 So. 2d at 354

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[11] This court has observed that "there is substantial authority for including all child-related expenses in the determination of whether the guidelines have properly been applied[.]" *Kilgore v. Fuller*, 741 So. 2d 351, 356 (¶17) (Miss. Ct. App. 1999) (citing *Johnston v. Johnston*, 722 So. 2d 453, 462 (Miss. 1998)).

(¶12). Indeed, the statute containing the guidelines explicitly requires chancellors to make specific findings under the deviation criteria should they deem deviation from the presumptively correct amounts appropriate. Miss. Code Ann. § 43-19-101(2).

¶38. While the dissent appears to agree with our analysis that the chancellor's deviation from the guidelines is not supported by sufficient findings, it goes a step further and finds no material change in circumstances has occurred. Respectfully, that issue is not before us. Beverly has not cross-appealed the chancellor's determination that a material change occurred. And indeed, the dissent overlooks that it was Beverly's attorney who drafted the order finding a material change had occurred, which the chancellor adopted almost verbatim. We decline to hold the chancellor in error on an issue that has not been appealed.

¶39. Though the chancellor may well be correct that a deviation above the presumptively correct guideline amounts is warranted, he must provide adequate findings to support the deviation. We reverse and remand on this issue with instructions that the chancellor calculate the proper award according to the guidelines and justify any deviation with specific findings.

IV. Relation Back

¶40. Robert argues Beverly engaged in delay tactics in an effort to increase the number of vested child-support payments. He cites Beverly filing a motion for continuance and later filing a motion for contempt, which prompted the court to again reset the matter.

¶41. It is well settled that a reduction in support does not relate back to the date of the filing of a modification action. *Cumberland*, 564 So. 2d at 847. "If a modification is granted, the paying party is responsible for any support payments which vest during litigation of the motion for modification." *Setser*, 644 So. 2d at 1215-16. "[C]hild support payments vest in

the child as they accrue." *Tanner v. Roland*, 598 So. 2d 783, 786 (Miss. 1992). Child-support payments belong to the child, not to the parent, who only receives the "benefits under a fiduciary duty to hold and use them for the benefit of the child." *Cumberland*, 564 So. 2d at 847. Once child-support payments vest, "they cannot be modified or forgiven by the courts." *Tanner*, 598 So. 2d at 786. "Each payment that becomes due and remains unpaid becomes a judgment against the supporting parent." *Id.* (citation and quotations omitted).

¶42. Robert admits the order does not relate back to the date he filed his motion for modification. But he insists the order should relate back to the date of the first hearing on the modification matter. He cites no authority to support this argument. Child-support payments that accrue while the modification action is pending become vested and cannot be forgiven by the courts. Our courts have never carved out his suggested exception, and we decline to do so today. Instead, we reiterate the principle that "[a]ny modification granted will take effect on the date of the judgment granting the modification." *Howard v. Howard*, 968 So. 2d 961, 977 (¶41) (Miss. Ct. App. 2007) (citing *Cumberland*, 564 So. 2d at 847).

¶43. We find no error in the chancellor's refusal to have his modification order relate back to an earlier date.

¶44. **THE JUDGMENT OF THE WASHINGTON COUNTY CHANCERY COURT IS AFFIRMED IN PART, REVERSED AND RENDERED IN PART, AND REVERSED AND REMANDED IN PART FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED EQUALLY BETWEEN THE PARTIES.**

LEE, C.J., GRIFFIS, P.J., BARNES, ISHEE AND ROBERTS, JJ., CONCUR. CARLTON, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION. IRVING, P.J., CONCURS IN PART AND DISSENTS IN PART WITHOUT SEPARATE WRITTEN OPINION. MYERS, J., NOT PARTICIPATING.

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

¶45. I respectfully concur in part and dissent in part with the majority's opinion.

¶46. I concur with the majority's decision to reverse the chancellor's findings regarding the child-support modification. I agree the downward modification of child support lacked sufficient on-the-record findings, but I further submit the record reveals a lack of evidence sufficient to constitute an unanticipated material change in circumstances justifying a downward modification in child support from that ordered in the original judicial decree. To support any such finding of a downward modification of child support, jurisprudence recognizes that the burden to prove an unanticipated[12] material change belonged to Robert Evans. *See Meeks v. Meeks*, 757 So. 2d 364, 367 (¶11) (Miss. Ct. App. 2000) (finding the party seeking modification bears the burden of proving entitlement to the modification, which includes proof on the issue of the unexpected nature to the changes in circumstances); *Tedford v. Dempsey,* 437 So. 2d 410, 418 (Miss. 1983) (providing a foreseeable slight change in income fails to constitute an unanticipated material change). *See also* Miss. Code Ann. § 25-3-9 (Rev. 2010) (authorizing the salary for part-time elected county prosecuting attorneys). Therefore, in my view, in addition to finding that insufficient on-the-record

[12] Robert admitted in his testimony that he knew that he could lose his re-election for political office when he entered into the negotiated settlement in this case. Mississippi Code Annotated section 25-3-9(2)(h) (Rev. 2010) set the salary of the county prosecuting attorney at $25,000, with $1,000 to defray secretarial costs. The position received a substantial increase, effective October 2004, by statute, tying the salary to the salary amount of the county supervisors.

findings as to the deviation[13] from the statutory child-support guidelines exist, I find that the chancellor's downward child-support modification also lacked a sufficient evidentiary basis[14] to support the chancellor's downward modification.

¶47. Additionally, I dissent from the decision of the majority to reverse the chancellor's findings as to contempt. We review civil-contempt decisions for manifest error. *Dennis v. Dennis*, 824 So. 2d 604, 608 (¶¶7-8) (Miss. 2002). Also, in an appeal of a contempt order, we will defer to the chancellor about his view of the witnesses, determination of their credibility, and his review of exhibits in that context. *Doyle v. Doyle*, 55 So. 3d 1097, 1110 (¶44) (Miss. Ct. App. 2010). The evidence in this case supports the chancellor's finding Robert in contempt for his non-compliance from January 2008 and forward, and it certainly supports a finding of contempt in response to Beverly Evans's recent January 2009 motion for contempt. Additionally, a review of this case as a whole supports the chancellor's civil-contempt decision providing evidence of credibility and the repeated willfulness of Robert's

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[13] During a previous appeal, the Mississippi Supreme Court affirmed the award of child support in this case that exceeded the statutory guidelines.

[14] The majority opinion states that the adequacy of the on-the-record findings in support on the downward child-support modification falls within the reach of our judicial review, but I find the sufficiency of the evidence in support of the downward modification falls beyond our review on appeal. However, any on-the-record findings in support of a child-support award deviating from the statutory guidelines must be supported by sufficient evidence in the record. Otherwise, the findings in the record are just dangling words with no legs to support them. With respect to the required level of sufficient evidence to support a modification in child support, Mississippi jurisprudence clearly provides that a modification of a child-support award must be supported by evidence of a material unanticipated change. *Tingle v. Tingle,* 573 So. 2d 1389, 1391 (Miss. 1990).

actions,[15] and it shows that Robert possessed unclean hands in seeking his modification.

¶48. Precedent provides that we will only reverse for manifest error; we are required to affirm the chancellor's decision of civil-contempt matters if supported by substantial credible evidence. *Strain v. Strain*, 847 So. 2d 276, 278 (¶4) (Miss. Ct. App. 2003). A review of the record shows substantial evidence to support the chancellor's findings. With respect to whether Robert possesses clean hands, as necessary to receive the equitable relief that he seeks, the record displays a clear pattern of non-compliance by Robert with his child-support obligations since 2005,[16] predating the loss of his election. *See Brawdy v. Howell*, 841 So. 2d 1175, 1179-80 (¶¶14-19) (Miss. Ct. App. 2003) (finding a husband was not entitled to a child-support modification where the husband offered no evidence to show an unanticipated change since the last court order, which was prepared and agreed to by the husband and approved by the court). *See also Bailey v. Bailey*, 724 So. 2d 335, 337 (Miss. 1998) (providing that the clean-hands doctrine prevents a complaining party from obtaining equitable relief when that party is guilty of willful misconduct regarding the matter in issue).[17] The July 28, 2009 findings of fact and conclusions of law, opinion, and order of the

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[15] *See Doyle*, 55 So. 3d at 1110 (¶44) (recognizing the chancellor sits as the fact-finder in civil-contempt proceedings, and appellate courts must give the chancellor great discretion upon review of his fact-heavy decision, reversing only upon manifest error).

[16] We again note that we review civil-contempt decisions for manifest error. *Jones v. Mayo,* 53 So. 3d 832, 838 (¶21) (Miss. Ct. App. 2011) (citing *Dennis v. Dennis*, 824 So. 2d 604, 608 (¶¶7-8) (Miss. 2002)). We also recognize that we review a lower court's denial of attorney's fees for abuse of discretion. *Id.; see also Seghini v. Seghini*, 42 So. 3d 635, 643 (¶31) (Miss. Ct. App. 2010) (reviewing an award of attorney's fees based on a finding of contempt for abuse of discretion).

[17] *See also* 4 Deborah H. Bell, Divorce and Domestic Relations, Encyclopedia of Mississippi Law § 28:23 (Jeffrey Jackson & Mary Miller ed.2001) (providing a review of

chancellor states as follows in pertinent part:

> This matter was heard on May 13, 2009 on [Robert's] (Petitioner's) Motion to Modify as a result of his failure to be re[-]elected County Attorney of Washington County, Mississippi. Following the testimony supporting [Robert's] said motion, the Court clarified its former ruling from a March 17, 2009 hearing in part as hereinafter shown and additionally ruled that [Robert] was in contempt for failure to conform to the Court's original decree or order of divorce dated December 29, 1998[,] but that [Robert] not be sanctioned by incarceration; and the Court reiterated that [Robert's] child support be reduced from $2,000.00 per month to $1,000.00 per month, as ordered in the March 17, 2009 hearing, to be payable $500.00 on the first day of each month and $500.00 on the 15th day of each month, commencing; April 1, 2009; that Plaintiff was in arrears in the amount of $14,750.00 in his payment of child support, which arrearage was to be paid in monthly installments of $200.00, payable $100.00 on the first day of each on the month and $100.00 on the 15th day of each month, commencing April 1, 2009; and that [Robert] pay to [Beverly's] attorney the amount of $1,300.00, together with all costs herein of $133.00, and such amounts of attorney[']s fee and court costs be paid within [sixty] days of said ruling on May 13, 2009; and further, that the reduced amount of $1,000.00 for child support and modified the March 17, 2009 order so that this matter be revisited in six months from May 13, 2009[,] to ascertain if [Robert's] child support be restored to $2,000.00.
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> Following that hearing[,] the Court, by telephone conference, ordered ore tenus that both parties file proposed findings of facts, conclusions of law[,] and order, although [Beverly's] attorney had been ordered in the [c]ourtroom on May 13, 2009[,] to prepare such findings, conclusions[,] and order for the Court. And now, after both parties have presented to the Court their proposed findings, conclusions and order, the Court hereby makes its findings of fact, conclusions of law[,] and order as follows:
>
> FINDINGS OF FACT
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> The Court finds that from the testimony that [Robert] is an able bodied person, capable in his position as an attorney at law of many years of practice to earn a good living, and although he has prosecuted criminal cases for many years as [c]ounty [a]ttorney, he is able to and should be able to use such experience

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jurisprudence finding that no modification is allowed under Mississippi law where the payor has unclean hands, and that the party in arrears is not entitled to a downward modification without establishing inability to pay the arrears).

to defend criminals as a criminal attorney, and should be given six months in order to hone his skills for such. Further, the Court finds that [Beverly's] attorney is entitled to and should be paid the sum of $1,300.00 as reasonable attorney's fee[s] for her services herein, and further, the Court finds that [Robert] should pay all costs herein of $133.00, which fees and costs should be paid within [ninety] days from the date of May 13, 2009. Further, the Court finds that [Robert] shall comply with all other provisions of said [j]udgment of [d]ivorce dated December 29, 1998, as the same apply to life insurance premiums, medical insurance and school tuition for the minor child, Robert Evans.

OPINION OF THE COURT AND CONCLUSIONS OF LAW

The Court rejects [Robert's] allegations in his [p]roposed [f]indings of [f]acts [a]nd [c]onclusions of [l]aw, except, however, as to his alleged disagreement to [Beverly's] version of her [p]roposed [f]indings of [f]acts and [c]onclusions of [l]aw as to the amount in arrearage, and the Court is of the opinion that [Robert] is in [c]ontempt of this Court for his failure to pay the sum of $14,750[.00] in child support as ordered by this Court on December 29, 1998, and that his said child support should be reduced from $2,000.00 to $1,000.00, and to be paid in the manner and for the time as set out herein in this Court's findings herein. *Price v. Price,* 5 So. 3d 1151, [sic] (Miss. 2009), *Hunt v. Asanov,* 975 So. 2d 899 (Miss. 2008). An award of attorney's fees in a contempt case is proper and is left to the sound discretion of the [c]hancellor . . . . Pursuant to the findings of this Court, the Court hereby orders as follows, to-wit:

ORDER OF THE COURT

IT IS, THEREFORE, ORDERED AND ADJUDGED that [Robert] is in contempt of this Court for his failure to pay child support in the amount of $14,750.00 as ordered by this Court on December 29, 1998, by paying such amount at the rate of $200.00 per month in installments of $100.00 on the first day of each month and $100.00 on the 15th day of each month, commencing June 1, 2009, but that his child support should be reduced from the sum of $2,000.00 to the sum of $1,000.00 commencing April 1, 2009, for a period of six months from May 13, 2009, at which time the Court would revisit this matter for further consideration.

IT IS FURTHER ORDERED AND ADJUDGED that [Robert] pay unto [Beverly's] attorney the sum of $1,300.00, as well as, the costs of this court in the amount of $133.00 within [ninety] days from May 13, 2009.

¶49. Also, relevant to the contempt decision was the willfulness of Robert's actions, which was reflected in the supreme court's opinion that ruled on a previous attempt to modify the support, wherein the Mississippi Supreme Court[18] found that Robert did not deny unilaterally reducing his child-support payments in 2005. *Evans* v. *Evans*, 994 So. 2d 765, 769 (¶12) (Miss. 2008). A further review of the prior proceedings and rulings also reveals that while Robert's appeal was pending before the supreme court,[19] he had already filed the motion to modify his child support on November 14, 2007. The supreme court, in its 2008 opinion, denied Robert's request for a child-support modification due to the emancipation of his daughter, and ordered him to comply with the originally decreed child-support award. The record does not contain evidence that Robert ever complied with the supreme court's prior decision before filing his new modification motion in 2007. Robert, therefore, never purged himself of his unclean hands due to his arrears. Meanwhile, Beverly had also filed another contempt action against Robert in January 2009, arguing that he failed to comply with the court's original child support decree.

¶50. With respect to Robert's actual income, as compared to his capacity to earn income, the law allows the chancellor to impute income to a payor who voluntarily fails to seek work or voluntarily fails to utilize his or her earning capacity and skills. *See Selman v. Selman,*

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[18] A review of the record further reveals that in November 2008, the supreme court affirmed the chancellor's decision not to downwardly modify Robert's child-support payments due to his older daughter's emancipation, but reversed the chancellor's order requiring that Robert pay more for speculative future college expenses of his son. *Evans v. Evans,* 994 So. 2d 765, 773-74 (¶30) (Miss. 2008). The court found that Robert's daughter's emancipation failed to constitute an unanticipated material change. *Id.* at 771 (¶20).

[19] The supreme court did not hand down it decision in this case until November 20, 2008.

722 So. 2d 547, 551-55 (¶¶14-36) (Miss. 1998) (finding that the father's earning capacity, rather than his actual earnings, should be considered, where the father quit his higher paying job to preach at a monthly salary of $700); *Lahmann v. Hallmon,* 722 So. 2d 614, 621 (Miss. 1998) (finding the father voluntarily reduced his income by leaving his construction job to sing two nights per week in a club). With respect to Robert's earning capacity, a review of the record shows that a hearing occurred in the Chancery Court of Washington County on May 28, 2008, to hear motions for contempt filed by both Beverly and Robert and to hear evidence on Robert's motion seeking a downward modification of the child support. The record reflects that, at the hearing, Beverly argued that because Robert failed to comply with the chancellor's previous clear directive ordering him to pay child support, which included the house note obligation, Robert came into court with unclean hands seeking his downward modification. The record further shows that at the close of the hearing, the chancellor denied both Robert's and Beverly's contempt motions, and he denied Robert's request for a downward modification of the child support.[20] The record shows that the chancellor then reset the matter for hearing in September 2008 to consider the matter further, thereby allowing Robert time to obtain another job utilizing his legal skills. The record reveals that, in making this decision, the chancellor found that Robert possessed marketable skills which he had failed to utilize in order to provide financial support for his children, and the chancellor encouraged Robert to utilize his skills as a "professional man and as a lawyer" in

[20] The record shows that the chancellor reviewed the judgment of divorce, which provided that Robert pay $2,000 a month as child support, and noted that on January 1, 2007, the court had ordered Robert to continue to pay $2,000 a month in the manner as provided in the judgment of divorce dated December 29, 1998.

order to gain employment.

¶51. Following the May 2008 hearing, the record shows that the parties continued to return to court for further proceedings in the continuation of Robert's request for a downward modification of his child-support obligations, as well as for the chancellor's assessment of his employment efforts.[21] The record demonstrates that Robert argued, throughout the various hearings, that he suffered a loss of income due to his loss of a re-election bid as county attorney and that Beverly asserted, in response, Robert lacked a desire to be re-elected and failed to invest the effort required for a successful re-election bid. The record further reflects that, throughout the proceedings, the chancellor questioned Robert as to whether he had utilized his twenty years of prosecutorial skills and other legal skills to compensate for the loss of his position as county attorney. The chancellor also questioned Robert as to the expenditures he made during vacations and other things, while failing to improve his income. The record shows that the chancellor noted Robert's loss of his elected position,[22] and readily acknowledged that the law required him to consider Robert's earning capacity, rather than his actual income.

¶52. With respect to the sufficiency of the on-the-record findings as to the downward modification of child support, we must assess whether sufficient evidence exists in the record

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[21] The record reflects that the chancellor conveyed that he was to assess Robert's capacity to earn income.

[22] At the time of the original decree in this case setting child support, Mississippi Code Annotated section 25-3-9 provided that the county prosecuting attorney's salary amounted to $25,000, with a $1,000 to defray secretarial costs. The statutory amendments reflect that the salary stayed the same until it increased substantially, effective October 2004, tying the salary to that of the salary amount of the county supervisors.

to support any such on-the-record findings to downward modification of child support above the statutory guidelines. With respect to the adequacy of the on-the-record findings, and with respect to any existing evidentiary basis to support such findings in order to modify Robert's child-support obligation herein, the record shows that during cross-examination, Robert admitted that he knew that his defeat for re-election was possible,[23] and he denied saying that he did not want to be re-elected, despite the testimony by the children to the contrary. He also testified that his elected position paid very little for many years and that only recently had the salary increased.[24] The record reveals that the chancellor ultimately provided Robert with a downward modification, reducing his child support obligation from $2,000 to $1,000.

¶53. In closing, as to the lack of findings in the record to support a deviation from the child-support guidelines, the majority finds that the chancellor's on-the-record findings are insufficient to support a deviation from the statutory child-support guidelines in this case. I agree, but I assert that I would also reverse the chancellor's downward modification due to a lack of evidentiary sufficiency to support such findings to modify due to a failure to show an unanticipated material change in circumstances as a result of the foreseeable loss of his election. The supreme court, in its previous decision in this case, spoke to the issue of an upward modification of previously decreed child support that already exceeded statutory

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[23] The record shows that Robert did not go door-to-door campaigning and did not seek donations to support his candidacy. The record also indicates that Robert testified that his constituency also changed.

[24] While the majority finds that Robert's failure to be re-elected to his political office resulted in a significant loss of income, I contend that Robert did not lose a large component of his income since in 1998, when the court initially decided the child-support award, Robert received very little compensation for his elected position.

guidelines, and the court explained that such an upward modification required on-the-record findings. *Evans*, 994 So. 2d at 773 (¶26). Further, I find no case law requiring on-the-record findings when a chancellor orders a downward modification of an already awarded, and affirmed, child-support obligation that exceeded statutory guidelines.

¶54. A review of the evidence in this case reflects that Robert sought this modification with unclean hands, and the record lacks sufficient proof of an unanticipated material change. Robert, therefore, failed to present evidence of the unexpected or expected nature of his change in circumstances. As stated, Robert bore the burden to show his entitlement to the downward modification, and he also bore the burden to show how the loss of an elected part-time position constituted an unanticipated material change. The record shows that Robert testified that he knew at the time of the original decree he could lose the election, and the record shows that Beverly testified that Robert's loss of a political election was not an unanticipated material change, as Robert displayed no desire or effort to seek re-election. *See Weeks v. Weeks,* 29 So. 3d 80, 90 (¶44) (Miss. Ct. App. 2009) (citing *Tingle,* 573 So. 2d at 1391) (finding that a material change in the circumstances of the parties warranting a downward modification in child support must be "one that could not have been anticipated by the parties at the time of the original decree.")). Furthermore, I find significance in the supreme court's acknowledgment, in its prior ruling regarding these parties, that the original decree was a judicially approved negotiated arrangement that was freely and voluntarily entered into by the parties at the time of their divorce. *Evans*, 994 So. 2d at 771 (¶18).

¶55. In affirming the chancellor's child-support award of an amount above the statutory guidelines in this case, the supreme court reiterated the principle that on-the-record findings

are required if the chancellor determines that it would be unjust or inappropriate to apply the child-support guidelines as set forth in Mississippi Code Annotated section 43-19-101 (Rev. 2009). *Id.* at 772-73 (¶26) (citing Miss. Code Ann. § 43-19-103 (Rev. 2004)); *see also Draper v. Draper*, 658 So. 2d 866, 869 (Miss. 1995). The supreme court then stated that "[c]oncern, however, over whether the chancellor failed to do so here is abated by Evans's own testimony; in which he claimed that his total child-support expenditures each month throughout the period in question averaged $2,150," an amount which exceeded his child-support obligations. *Evans*, 994 So. 2d at 773 (¶28).

¶56. Furthermore, as to my view on the chancellor's contempt decision and award of attorney's fees, I dissent from the majority's decision to reverse the chancellor's findings as to Robert's contempt, since the record before us, and the supreme court's prior opinion regarding these parties, reflect a willfulness in Robert's failure to comply with court orders and the original decree.[25] I submit that we should affirm the chancellor's findings as to contempt[26] since the contempt decision is supported by substantial, credible evidence in the record.[27] I further submit that the chancellor acted within his discretion in awarded the

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[25] The supreme court's decision provides that, beginning in September 2005, Robert unilaterally decreased the amount of child support that he was paying each month. *Evans,* 994 So. 2d at 768 (¶7). While the chancellor ordered Robert to resume paying his originally decreed $2,000 child-support obligation until the emancipation of his son, he failed to do so. *Id.* Robert, therefore, failed to comply with his child-support obligation, which remained $2,000, until modified by the chancellor on May 13, 2009.

[26] I pause to note that I would also affirm the attorney's fees awarded as a result of the contemptuous conduct.

[27] *See Jones*, 53 So. 3d at 837 (¶15) ("Under the law of the case doctrine and general principles of comity, a successor judge has the same discretion to reconsider an order as would the first judge, but should not overrule the earlier judge's order or judgment merely

attorney's fees to the prevailing party on the issue of contempt.

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because the later judge might have decided matters differently.").