# IN THE COURT OF APPEALS
# OF THE
# STATE OF MISSISSIPPI

**NO. 1999-CA-00855-COA**

**RITA H. HOLZHAUER MARKOFSKI** **APPELLANT**

**v.**

**JAMES L. HOLZHAUER** **APPELLEE**

| | |
|---|---|
| DATE OF TRIAL COURT JUDGMENT: | 04/05/1999 |
| TRIAL JUDGE: | HON. DOROTHY WINSTON COLOM |
| COURT FROM WHICH APPEALED: | LOWNDES COUNTY CHANCERY COURT |
| ATTORNEYS FOR APPELLANT: | THOMAS L. SEGREST |
| | WILLIAM J. RITCHIE |
| ATTORNEY FOR APPELLEE: | HAL H. H. MCCLANAHAN |
| NATURE OF THE CASE: | CIVIL - DOMESTIC RELATIONS |
| TRIAL COURT DISPOSITION: | RITA'S PETITION FOR MODIFICATION OF CHILD SUPPORT DENIED. VISITATION SCHEDULE SET BY THE COURT. PETITION FOR CONTEMPT AGAINST JAMES DENIED. JAMES ORDERED TO PAY RITA $23, 906 FOR MEDICAL EXPENSES DUE TO FAILURE TO PROVIDE ADEQUATE HEALTH INSURANCE COVERAGE. JAMES' CLAIMS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND ALIENATION OF THE AFFECTIONS OF HIS SON ARE DENIED. BOTH PARTIES' PETITION FOR ATTORNEYS FEES ARE DENIED. |
| DISPOSITION: | AFFIRMED IN PART AND REVERSED AND REMANDED IN PART-10/16/01 |
| MOTION FOR REHEARING FILED: | |
| CERTIORARI FILED: | |
| MANDATE ISSUED: | 11/6/2001 |

BEFORE KING, P.J., BRIDGES, AND IRVING, JJ.

KING, P.J., FOR THE COURT:

¶1. On May 4, 1994, Rita H. Holzhauer Markofski (Markofski) and James L. Holzhauer were granted a divorce based on irreconcilable differences. The parties executed a child custody, support and property distribution agreement. Pursuant to that agreement, the couple shared joint custody of the one child born during the marriage with primary physical custody given to Ms. Markofski. In August 1997, Mr. Holzhauer

filed a petition for citation of contempt against Ms. Markofski for failure to abide by the agreement. Ms. Markofski responded with a counterclaim for contempt and modification of child support. In a judgment entered on April 5, 1999, the chancellor granted Ms. Markofski the sum of $23,906 with costs and interest as compensation for medical expenses incurred as a result of Mr. Holzhauer's failure to provide her with comparable medical insurance as required by their agreement. The chancellor denied Ms. Markofski's request for contempt citation against Mr. Holzhauer for failure to transfer title to a Camaro vehicle to her daughter, Alexa Scroggins, and for nonpayment of college expenses for the same daughter.

¶2. Aggrieved by the chancellor's ruling, Ms. Markofski has appealed and raised the following issues, which we quote verbatim from her brief: (1) Whether the chancellor abused her discretion in failing to apply the child support guidelines based upon Rita H. Holzhauer Markofski's counterpetition for modification of child support; (2) Whether the chancellor committed manifest error, was clearly erroneous, or applied an erroneous legal standard in failing to order James Holzhauer to turn over the title of the 1993 Camaro to Rita's daughter, Alexa Clay Scroggins; (3) Whether the chancellor committed manifest error, was clearly erroneous, or applied an erroneous legal standard in failing to order James to pay the college expenses of Rita's daughter, Alexa Clay Scroggins; and (4) Whether the chancellor committed manifest error, was clearly erroneous, or applied an erroneous legal standard in failing to award Rita attorney fees.

¶3. Mr. Holzhauer has also appealed and raised the following issues, which we quote verbatim from his brief: (1) The trial court erred as a matter of law and fact in refusing to temporarily suspend James' obligation to support his son; (2) The trial court erred on dismissing the alienation of affection claim; (3) The chancellor erred in overruling the request for damages for intentional infliction of emotional distress; and (4) The chancellor erred in not allowing cross appellant his attorney fees.

¶4. This Court affirms in part and reverses and remands in part.

## FACTS

¶5. The Holzhauers were married on January 2, 1982, in Little Rock, Arkansas. They lived together until their separation on January 1, 1994, in Lowndes County, Mississippi. Ms. Markofski had two children from a previous marriage, Alexa Scroggins and Sara Scroggins, neither of whom was adopted by Mr. Holzhauer. Mr. Holzhauer initially agreed to pay Ms. Markofski $1,000 per month for child support. On March 25, 1997, an agreed order was entered raising the child support to $1,500 per month.

¶6. On August 8, 1997, Mr. Holzhauer petitioned the chancery court to cite Ms. Markofski for contempt and other relief. Things requested included custody of his son along with damages for alienation of the son's affection and intentional infliction of emotional distress by Rita Holzhauer, and attorney's fees.

¶7. On December 4, 1997 and January 8, 1998, Ms. Markofski filed responses to Mr. Holzhauer's requests and filed counterclaims for citation for contempt and for modification of former decree where she requested an increase in child support, $5,000 for college expenses for Alexa, delivery of title to the Mazda now in Alexa's possession, comparable health insurance to that which existed on the date of the divorce, and reasonable attorney fees.

¶8. On April 23, 1998, Ms. Holzhauer Markofski filed an amended counterclaim for citation for contempt, modification of former decree and other relief to include an amount of $20,000 for Alexa's college expenses.

¶9. On June 23rd, 24th, and 29th, 1998, the chancellor conducted a hearing on both parties' motions. During the hearing, the son testified that while he loved his father, he did not want to live with him and would not stay with his father even if ordered to do so by the court. Subsequently, Mr. Holzhauer abandoned his request for a change in custody and asked the court to temporarily suspend his obligation to pay child support. During the course of the proceeding, the son amended his testimony by stating that he loved his father, but did not want to visit or live with him, but he would do so if ordered by the court.

¶10. After considering all of the evidence, the chancellor ordered the following:

> (1) That Mr. Holzhauer should continue to pay $1,500 per month as child support for the support and maintenance of the minor child;
>
> (2) That Mr. Holzhauer should have visitation with his son for two weeks in the summer and one week at Christmas each year. He should also have visitation during spring break from school and for Thanksgiving holidays in odd numbered years, with additional visitation as agreed to by the parties;
>
> (3) That Ms. Holzhauer Markofski be awarded $23,906 with costs and interest to
>
> compensate her for medical expenses she incurred as a result of Mr. Holzhauer's
>
> failure to provide her with a comparable medical insurance policy as agreed to in their separation agreement;
>
> (4) That Mr. Holzhauer continue to be required to provide comparable medical insurance for Ms. Holzhauer-Markofski according to the terms of the parties' separation agreement;
>
> (5) That there was insufficient evidence presented at trial that Ms. Holzhauer Markofski did not timely respond to requests for information regarding her medical insurance coverage, as would estop her from asserting her claims for reimbursement of medical expenses;
>
> (6) That there was insufficient cause for a finding of contempt against Mr. Holzhauer regarding not transferring title to a Camaro vehicle or for his nonpayment of college expenses for Ms. Holzhauer Markofski's daughter, Alexa Scroggins;
>
> (7) That Mr. Holzhauer's claims for damages for intentional infliction of emotional distress and alienation of affection of his relationship with his son are without merit and should be denied; and
>
> (8) That both parties' request for attorneys fees should be denied, as each is capable of paying his or her own attorney's fees.

## ISSUES AND ANALYSIS

## STANDARD OF REVIEW

¶11. When a domestic relations case is on appellate review, a chancellor's factual findings will not be disturbed unless the court's actions were manifestly wrong, the court abused its discretion, or applied an erroneous legal standard. *Wright v. Wright*, 737 So. 2d 408 (¶5) (Miss. Ct. App. 1998) (citing *Sandlin v. Sandlin*, 699 So. 2d 1198, 1203 (Miss. 1997)); *Johnson v. Johnson*, 650 So. 2d 1281, 1285 (Miss. 1994); *Crow v. Crow*, 622 So. 2d 1226, 1228 (Miss. 1993); *Gregg v. Montgomery*, 587 So. 2d 928,

931 (Miss. 1991).

**I.**

**Whether the chancellor abused her discretion in failing to apply the child support guidelines based upon Rita H. Holzhauer Markofski's counterpetition for modification of child support.**

¶12. Ms. Markofski contends that the chancellor erred in continuing to allow Mr. Holzhauer to pay $1,500 for child support which was agreed upon by both parties. Ms. Markofski suggests that the evidence demonstrated a substantial change in circumstances which warranted an increase in child support. Among those changes were a decrease in her income, an increase in Mr. Holzhauer's income and increased needs by the child due to his age and size.

¶13. The relevant portion of the statutory child support guidelines, Miss. Code Ann. Section 43-19-101 (Rev. 2000), provides:

> (1) The following child support award guidelines shall be a rebuttable presumption in all judicial or administrative proceedings regarding the awarding or modifying of child support awards in this state:
>
> Number Of Children Percentage Of Adjusted Gross Income
>
> Due Support That Should Be Awarded For Support
>
> 1 14%
>
> 2 20%
>
> 3 22%
>
> 4 24%
>
> 5 or more 26%
>
> * * * *
>
> (4) In cases in which adjusted gross income as defined in this section is more than Fifty Thousand Dollars ($50,000.00) or less than Five Thousand Dollars ($5,000.00), the court shall make a written finding in the record as to whether or not the application of the guidelines established in this section is reasonable.

¶14. Ms. Markofski and the minor child testified that his extracurricular and recreational activities required additional money. As a demonstration of the need for additional money, Ms. Markofski tendered the following list of the child's estimated expenditures for 1998:

> A) School Related Items $8,800
>
> B) Recreational Items $21,300
>
> (includes $13,000 for a swimming pool)
>
> C) Entertainment $16,130

D) Food and clothing $17,800

E) Sporting & Athletic Related Items $15,900

F) Other Items $3,800

(pet care and vet bills)

G) totals for year $83,730

H) monthly average $6,978

¶15. To justify a modification of the child support payments, Ms. Markofski had to demonstrate a material change in the circumstances of one or more of the interested parties arising after the entry of the original agreement. *Havens v. Broocks*, 728 So. 2d 580 (¶8) (Miss. Ct. App. 1998) (citing *McEachern v. McEachern*, 605 So. 2d 809, 815 (Miss. 1992)).

¶16. The chancellor found no substantial change in circumstances which occurred that could not have been anticipated by the parties since their divorce. She also determined pursuant to Miss. Code Ann. Section 43-19-101(4) (Rev. 2000) that monthly child support in the amount of $5,425.42 would be an unreasonable amount given the son's age and his reasonable needs, and the support guidelines were therefore inappropriate. The chancellor determined that Mr. Holzhauer's current child support obligation of $1,500 per month was a sufficient amount to provide for a healthy teenage boy. Given the record before this Court, we cannot say that the chancellor's actions were manifestly wrong or that they constituted an abuse of discretion.

**II.**

**Whether the chancellor committed manifest error, was clearly erroneous, or applied an erroneous legal standard in failing to order James Holzhauer to turn over the title of the 1993 Camaro to Rita's daughter, Alexa Clay Scroggins.**

¶17. Ms. Markofski contends that since Mr. Holzhauer agreed to convey to his step-daughter Alexa the 1993 Camaro in the separation agreement, that the chancellor should have required that Mr. Holzhauer either transfer title to the Camaro or transfer title to the vehicle which replaced the Camaro.

¶18. The separation agreement, incorporated in the final judgment of divorce, constituted a valid contract between Mr. Holzhauer and Ms. Markofski. *East v. East*, 493 So. 2d 927, 932 (Miss. 1986). After the divorce was entered, Alexa notified Mr. Holzhauer of mechanical difficulties with the Camaro. Mr. Holzhauer traded the Camaro for a Mazda 626 automobile, which Alexa has driven since that time.

¶19. Accordingly, the chancellor determined that since Mr. Holzhauer no longer had title to the Camaro, he could not perform this portion of the separation agreement and that the vehicle was traded with Alexa's knowledge. The chancellor noted that Alexa may seek to enforce any agreement she and Mr. Holzhauer had regarding the vehicle if she elects to do so, but concluded that because this action is between Mr. Holzhauer and Ms. Markofski only, the proper parties were not before the court for such a determination.

¶20. However, we find that the proper parties were before the court to have this matter addressed. Mr.

Holzhauer agreed to transfer title to Alexa as a part of the resolution of support claims and property rights between Mr. Holzhauer and Ms. Markofski. *Ivison v. Ivison,* 762 So. 2d 329 (¶14) (Miss. 2000). Therefore, Ms. Markofski could bring this claim. Finding error in the failure to decide Alexa's entitlement to the Camaro, this Court reverses and remands on this issue.

**III.**

**Whether the chancellor committed manifest error, was clearly erroneous, or applied an erroneous legal standard in failing to order James to pay the college expenses of Rita's daughter, Alexa Clay Scroggins.**

¶21. Ms. Markofski contends that the chancellor committed manifest error in failing to order Mr. Holzhauer to pay the college expenses of her daughter, Alexa. In the separation agreement, Mr. Holzhauer agreed to pay all reasonable schooling expenses, provided that he approved of the college.

¶22. In her brief, Ms. Markofski acknowledges that Mr. Holzhauer is under no obligation to provide support for her daughter, Alexa. However, she does contend that based on the separation agreement, Mr. Holzhauer is obligated to pay reasonable college expenses.

¶23. The record reveals that Mr. Holzhauer provided money to Alexa for her first year at the University of Southern Mississippi, but did not continue to pay for her expenses. The chancellor determined that the separation agreement was too vague regarding the circumstances under which Mr. Holzhauer would be required to pay for Alexa's college education. The language in the agreement states that:

> Husband agrees to pay all reasonable schooling expenses to Darlington for Alexa Clay Scroggins, his stepdaughter. Husband further agrees to pay Alexa Clay Scroggins reasonable college expenses, provided he approves of said college.

¶24. The chancellor found that there was no indication of what was covered under "expenses." The chancellor also found that under the present circumstances, it would be unreasonable to require a man to pay for the college education of a former stepchild who accused him of molesting her, charges of which he was eventually acquitted. *Hambrick v. Prestwood***,** 382 So. 2d 474, 477 (Miss. 1980).

¶25. Our review of the chancery court's opinion on this issue does not reveal an abuse of discretion. We affirm the chancellor's refusal to require Mr. Holzhauer to pay for the college expenses of Alexa.

**IV.**

**Whether the chancellor committed manifest error, was clearly erroneous, or applied an erroneous legal standard in failing to award Rita attorney fees.**

¶26. Ms. Markofski contends that Mr. Holzhauer should be required to pay her attorney fees since the separation agreement states that either party breaching any provision of the agreement which causes legal fees to be incurred shall be responsible for paying the legal fees of the non-breaching party.

¶27. Here, Ms. Markofski claims that Mr. Holzhauer breached the agreement by refusing to transfer title on the automobile to her daughter, Alexa, and by failing to pay Alexa's college expenses. The chancellor determined that from the evidence presented, attorney fees were not appropriate, and concluded that both

parties were financially capable of paying their respective attorney fees. The award of attorney fees and court costs is a matter within the sound discretion of the trial court. *Kergosien v. Kergosien*, 471 So. 2d 1206, 1207 (Miss. 1985). There is nothing in the record to suggest abuse of the chancellor's discretion.

**MR. HOLZHAUER'S CROSS-APPEAL**

**I.**

**Did the trial court err as a matter of law and fact in refusing to temporarily suspend James' obligation to support his son?**

¶28. Mr. Holzhauer contends that the chancellor erred by refusing to temporarily suspend his obligation to support his son pending his son's decision to resume a normal relationship with him. Mr. Holzhauer's son stated that he did not want to visit or live with his father at any time when first asked about visitation with his father. Subsequently, Mr. Holzhauer's son stated that he would visit with the father if the court ordered him to do so. Here, the chancellor relied on *Caldwell v. Caldwell*, 579 So. 2d 543, 548 (Miss. 1991) which states that:

> The amount of money that the noncustodial parent is required to pay for the support of his minor children should not be determined by the amount of love the children show toward that parent. The proper inquiry, as we have often stated, is what is in the best interest of the child. In reaching that conclusion, the chancellor must balance the needs of the child against the parent's financial ability to meet those needs. (quoting *Holston v. Holston*, 58 Md. App. 308, 473 A. 2d 459, 463 (1984), cert. denied, 300 Md. 484, 479 A.2d 372 (1984)).

The chancellor determined that the best interest of the child necessitated support from Mr. Holzhauer. The record contains substantial evidence to support this finding.

**II.**

**Did the trial court err in dismissing the alienation of affection claim?**

¶29. Mr. Holzhauer contends that Rita Holzhauer Markofski caused his relationship with his son to dissipate. He claims that prior to the son living primarily with Ms. Markofski, he enjoyed an outstanding relationship with his son. However, the chancellor found this claim to be without merit and denied Mr. Holzhauer's claim for damages since there was no evidence presented on this issue to prove his claim. We find this claim to be without merit as well.

**III.**

**Did the chancellor err in overruling the request for damages for intentional infliction of emotional distress?**

¶30. Mr. Holzhauer contends that Ms. Markofski actively followed a plan to discredit and/or ruin him professionally and financially. He claims that Ms. Markofski assisted her daughters in bringing charges of sexual molestation against him. Mr. Holzhauer contends that he had to ultimately spend $200,000 to defend himself against these criminal charges. However, Mr. Holzhauer failed to present actual evidence regarding this claim.

¶31. We affirm the chancellor's decision.

**IV.**

**Did the chancellor err in not allowing cross appellant his attorney fees?**

¶32. Mr. Holzhauer contends that had his claims of alienation of affection of his son and intentional infliction of emotional distress not been dismissed, he might have been allowed to recover attorney fees as part of possible damages awarded.

¶33. An award of attorney fees is left to the discretion of the chancellor. *Gray v. Gray*, 745 So. 2d 234 (¶26) (Miss. 1999). "It is well settled in Mississippi that if a party is financially able to pay an attorney, an award of attorney's fees is not appropriate." *Id.* Here, the chancellor determined that each party was capable of paying his or her own attorney fees and denied both parties' request. Due to the discretion afforded the chancellor in this issue, we find that no error was committed.

¶34. **THE JUDGMENT OF THE LOWNDES COUNTY CHANCERY COURT IS AFFIRMED IN PART AND REVERSED AND REMANDED IN PART. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

**BRIDGES, IRVING, MYERS, CHANDLER, AND BRANTLEY, JJ., CONCUR. McMILLIN, C.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY SOUTHWICK, P.J., THOMAS, AND LEE, JJ.**

McMILLIN, C.J., CONCURRING IN PART AND DISSENTING IN PART:

¶35. I respectfully dissent as to that part of the opinion that effectively releases Dr. Holzhauer from any obligation under the property settlement agreement to provide the reasonable college expenses of his former step-daughter, Alexa Scroggins. Dr. Holzhauer's primary defense against the claim was that at the time Ms. Scroggins began her second year at the University of Southern Mississippi his financial situation had deteriorated to the extent that he could not afford to meet his obligation. A demonstrated inability to perform under a court decree is a defense to a claim of contempt. *Clements v. Young*, 481 So. 2d 263, 271 (Miss. 1985). However, a present inability to pay is not a complete defense that excuses any obligation to perform in the future. Rather, until the obligation itself is altered by subsequent appropriate court action, the obligation continues to exist and may be enforced by reducing it to judgment or by appropriate enforcement proceedings at such time as the obligor's financial condition has improved to the extent that he can meet the obligation. *Tanner v. Roland*, 598 So. 2d 783, 786-87 (Miss. 1992).

¶36. I would note that the chancellor, in ruling on the matter, ignored Dr. Holzhauer's inability to pay defense, making no finding of fact in that regard. Instead, the chancellor offered two alternative reasons for finding Dr. Holzhauer's obligation unenforceable.

¶37. First, the chancellor held that a commitment to pay "reasonable college expenses" was too vague because it failed to delineate the specific costs that were captured within the meaning of that term. This is plainly wrong. This Court has found similar provisions definite enough to enforce. *Rogers v. Rogers*, 662 So. 2d 1111, 1116-17 (Miss. 1995); *Harmon v. Yarbrough*, 767 So. 2d 1069 (¶¶11-12) (Miss. Ct. App. 2000) (holding obligor is bound by provision to "provide for said child's higher education"). Certainly, there may be certain costs associated with attending college upon which minds might reasonably differ as to

whether they were included in this descriptive term, but the core costs of matriculating at a recognized institution of higher learning - such as tuition, books, and room and board - are fundamentally a part of the cost of college attendance by any reasonable definition. One can, by brainstorming, think of examples of costs associated with attending college that are less clearly necessary to a successful education, but a recitation of those examples does not render the entire commitment unenforceable for vagueness. Neither does the fact that some of the undisputably vital costs of college may vary widely from institution to institution. The only question raised by such issues is whether, under the circumstances of the particular case, the proposed expenditure under consideration is deemed reasonable or not. That is a matter that can be resolved by appropriate litigation upon the parties' inability to agree. *Id.*

¶38. The second reason advanced by the chancellor to refuse to enforce the agreement was the fact that the stepdaughter accused Dr. Holzhauer of sexually molesting her under circumstances that ultimately led to his indictment and subsequent acquittal. Whether Dr. Holzhauer could avoid his contractual obligation upon proving, by a preponderance of the evidence, that his stepdaughter falsely accused him of sexually improper behavior may be an issue of law upon which a court could properly rule, but that issue is not before this Court on this record. The chancellor made no finding of fact as to whether the charges of sexual impropriety were false, and it is well-settled law that a judgment of acquittal in a criminal prosecution, where the burden of proof is substantially higher than in a civil suit, is not conclusive in a civil suit where the same allegations may have some relevance. *Chatman v. Modern Builders*, 227 Miss. 339, 344, 86 So. 2d 350, 352 (1956). The majority, in affirming the chancellor, cites the case of *Hambrick v. Prestwood* as authority for its holding, apparently on the notion that evidence of a poor relationship between the obligor and the intended beneficiary of the payment is an appropriate ground to excuse performance. *Hambrick v. Prestwood*, 382 So. 2d 474, 477 (Miss. 1980). In that case, the natural father was excused from any responsibility for the costs of college for his nineteen-year-old daughter who had been estranged from him since the age of twelve. *Hambrick*, 382 So. 2d at 477. The *Hambrick* case is, in my view, distinguishable since the obligation in *Hambrick* was not a part of a voluntary commitment on the part of the obligor in the nature of a contractual obligation as it is in the case before us. Instead, in *Hambrick* the claimed entitlement to payment was based solely on the legal obligation of a father to support his minor children, and the father's obligation was excused on the ground that the normal ties of kinship giving rise to such an obligation had, on the unique facts of that case, been irretrievably broken. In the case before us, there was no indication that Dr. Holzhauer's commitment was based on any feelings of affection for his stepdaughter or in recognition of any particular familial bonds that might have arisen during his marriage to the child's mother. Rather, the agreement appears to be nothing more than one of several negotiated financial concessions made by him in the context of obtaining a divorce. *Hambrick* has no particular application because, absent Dr. Holzhauer's voluntary agreement to pay such expenses, it would have been entirely beyond the authority of the chancellor to order such payments. Nevertheless, once Dr. Holzhauer committed contractually to make such payments, it fell within the chancellor's authority to enforce that provision of the agreement. *Varner v. Varner*, 666 So. 2d 493, 496-97 (Miss. 1995). The fact that Dr. Holzhauer may have found his previous commitment distasteful because of the subsequent actions of his former stepdaughter is not, in my view, sufficient grounds to excuse his performance of the obligation altogether.

¶39. Whether Dr. Holzhauer's cessation of payments to meet Alexa Scroggins's reasonable college expenses was based on impossibility of performance brought on by his then-existing deteriorating financial condition or whether it was, in fact, based upon his determination that her post-agreement behavior toward him had voided his obligation is, to a large extent, moot at this point since neither defense appears to have

merit and it is apparent from the record that Dr. Holzhauer, in his present situation, can easily defray the reasonable costs associated with Ms. Scroggins's college attendance for the three years that he has yet to pay. This obligation should be enforced, either in the form of reimbursement for reasonable expenses already expended or in the form of prospective payments for future undergraduate educational efforts by Ms. Scroggins, depending on what the facts would show to be more appropriate on remand. The sole issue not mooted by Dr. Holzhauer's improved financial condition is the issue of attorney's fees for the enforcement of this provision of the divorce settlement agreement, since that would hinge, to some extent, on whether Dr. Holzhauer's earlier failure to pay was wilful or based on impossibility of performance. That, too, is a matter that can and ought to be resolved on remand.

¶40. I would reverse and remand the chancellor's judgment to resolve this issue along the terms set out herein where the dollar amount of Dr. Holzhauer's obligation is determined based on proper evidence of the reasonable costs of Ms. Scroggins's efforts to complete her undergraduate education (proper evidence of which is *not*, as the appellant seems to contend, demonstrated by proof of the amounts of student loans taken out by Ms. Scroggins).

¶41. I agree with the majority's treatment of all the remaining issues.

**SOUTHWICK, P.J., THOMAS AND LEE, JJ., JOIN THIS SEPARATE WRITTEN OPINION.**