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ALABAMA JUDICIAL DATA CENTER
IN THE CIRCUIT COURT OF SHELBY

COUNTY



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Shelby Cnty Judge of Probate, AL
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VIVIAN BAGUER CHARLES VS JOHN WESLEY CHARLES III

SHAW PAUL BERNARD JR
2924 CRESCENT AVE

BIRMINGHAM AL 35209

CASE NUMBER: DR 1999 000573 01
PARTY NUMBER: COO1

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(08/20/2003) MEV

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

VIVIAN BAGUER CHARLES,

Plaintiff,

v.

CASE NO.: DR 99-573.01

JOHN WESLEY CHARLES,

Defendant.

ORDER

This cause is before the Court upon Plaintiff's Petition for Rule Nisi and Modification, and Defendant's Counter Petition to Modify. Having considered the evidence presented, including the ore tenus testimony and demeanor of the parties, the Court finds that the Final Judgment of Divorce is due to be modified. The Court finds that there has been a material change in the parties' circumstances since the entry of the original judgment. The Order entered herein is predicated upon the Court's finding of facts as set forth hereinbelow:

1. Prior to June 2002, Defendant was in full compliance with all obligations as set for the parties Agreement which was incorporated into the Final Judgment of Divorce. Through no fault of his own, Defendant's employment was terminated on April, 30, 2002. Thereafter, he received severance pay in the amount of five (5) weeks salary, plus accrued vacation. Defendant made—virtually no effort to find employment in the State of Alabama, even though Alabama was the only state in which he was licensed to practice law. Defendant instead relocated to the State of Arizona where he has since taken and passed the Arizona Bar examination. It is anticipated that Defendant will soon be gainfully employed as a licensed, practicing attorney in that State. At this time,

however, Defendant is employed as a paralegal with an annual salary of \$35,000.00.

Defendant's child support obligation as set forth hereinbelow is based upon his current income as a paralegal. The Court specifically reserves the amount of Defendant's future child support obligation. Defendant is hereby ORDERED to notify this Court, with copy to Plaintiff, of his change in status upon final admission to the Arizona Bar. Contemporaneously therewith, Defendant shall provide the Court, and the Plaintiff, with an updated CS-41 form.

While Defendant's income has dramatically decreased since the time of the divorce, the Plaintiff's income has dramatically increased. Though Plaintiff's CS-41 gross income is stated at \$7,083.00 per month, evidence proffered at trial is that as of September 2002, Plaintiff was earning an annual salary of \$61,022.00. In addition, Plaintiff had received bonuses totaling \$30,686.83, for a total 2002 income of \$91,708.83. Plaintiff incurs an \$11.34 deduction per pay period for dental insurance. Plaintiff's salary is paid to her on a bi-weekly basis. When normalized to a monthly rate, Plaintiff's gross income for 2002 was in the amount of \$7,642.40 per month, and her medical insurance expense was in the amount of \$24.57 per month. Defendant's monthly income as a paralegal is at the current rate of \$2,916.66. The Court finds that the parties' combined incomes exceed the Child Support Guidelines. The Court has, nevertheless, used a form CS-42 merely as a record of its computation for the child support ordered herein, and said form CS-42 is hereby made a part of the record in this case.

Based upon the foregoing, it is ORDERED that paragraph 14 of the parties' Agreement is hereby deleted in its entirety, and the following is substituted therefor:

Defendant shall pay to Plaintiff for the support and maintenance of the minor child of the parties the sum of TWO EIGHTY-SEVEN and 50/100 DOLLARS (\$287.50)

per month commencing on August 1, 2003, and on the 1st day of each month thereafter during the minority and dependency of the minor child.

The payment of child support beyond the child's nineteenth birthday is specifically deleted by this Order.

2. The Court finds that the Defendant has relocated to the State of Arizona where he has become, and intends to remain, a permanent resident. Defendant is, therefore, entitled to a modification of his visitation schedule. The Defendant's visitation schedule included in paragraph 13. (a) of the parties Agreement is hereby deleted in its entirety, and the following is substituted therefor:

The Defendant shall have the right to have his minor child with him as follows:

1. Six (6) weeks during each summer at a time to be selected by the Defendant, provided, however, that he shall have mailed by registered mail a written notice to the Plaintiff of the dates of his intended visitation at least thirty (30) days prior to such visitation.
2. One (1) week each Christmas, beginning on December 26.
3. Every even year AEA (Spring Break) visitation from 8:00 p.m. on Saturday until 6:00 p.m. Friday.
4. Any other times the Defendant is in the town in which the minor child resides.
5. During any periods of visitation, upon reaching the age of twelve (12) years the said child may travel by commercial airliner provided;
 - (a.) The Defendant shall pay all air fares for the transportation of the said child.
 - (b.) The flights shall be either non-stop or direct and no change of planes will be involved until the child reaches the age of fourteen (14) years.
 - (c.) All travel arrangements shall be made by the Defendant.

- (d.) The Defendant shall notify the Plaintiff not less than ten (10) days of the date of the visitation, of the date, time, airline and flight number of the proposed carrier.
 - (e.) The Defendant shall send to the Plaintiff the round trip airline tickets or shall insure that they will be at the air terminal ready for said child at time of departure.
 - (f.) Plaintiff shall be required to deliver the said child to the nearest commercial airport offering direct flight service to the airport at which the Defendant will receive the child, not to be in excess of 150 miles from Plaintiff's residence. The Plaintiff shall also pick up the said child at the termination of the periods of visitation.
 - (g.) The Defendant shall insure that either he or the child notifies the Plaintiff of the arrival of the child as soon as possible after the child is met by him.
 - (h.) At the end of the period of visitation, the Defendant shall notify the Plaintiff of the date, time, carrier and flight number of the child's return. The Defendant shall notify the Plaintiff twenty-four (24) hours prior to the time of departure.
 - (i.) On the return of the child, the Plaintiff shall insure that either she or the child notifies the Defendant of the child's return.
 - (j.) The child at all times shall be accompanied by an adult during air travel.
6. OTHER VISITATION: The visitation rights for Defendant, as provided herein, are intended by the Court to be the minimum visitation schedule to which Defendant is entitled. The parties are encouraged to extend Defendant's visitation, as herein allowed, as the child grows older, and as may be in the best interest of said child, and to reschedule by mutual agreement any visitation which is inconvenient for the parties or interferes with the child's extra curricular activities, with both parties to keep in mind the best interest of the said child.

The following paragraphs are hereby added to paragraph 13.

13. (c) Neither party shall at any time allow an unrelated person of the opposite sex to remain with that party after 10:00 P.M. when the children are present.

- (d) Neither party shall in any way attempt to harass harm, hinder, decrease, or destroy the natural love of the child for the other parent; Neither parent shall make disparaging remarks or otherwise speak badly of the other parent to the other party or to, or in the presence of, the child, and both parents shall make every effort to prevent others from doing so. Further, the parties shall strive to maintain harmonious relations for the parties' child.
- (e) The parties are encouraged to establish e-mail communication between the minor child and her father.

3. As a result of Defendant's loss of employment with Protective Life, he no longer maintains the Protective Life Insurance Company policy number G-374 in the amount of \$50,000.00 which was provided for Defendant as an employment benefit. Accordingly, paragraph 28 of the parties' Agreement is hereby modified by deleting the amount of \$225,000.00, and substituting the amount of \$175,000.00. Paragraph 30 of the Agreement is hereby modified by deleting reference to the Protective Life Insurance Company policy. In all other respects paragraphs 28 through 32 of the parties' Agreement remain in full force and effect.

4. The Court finds that the Defendant is entitled to a modification of paragraph 26 of the parties' Agreement. The Court finds that both parties benefit greatly from Plaintiff's employer funded health insurance, but that some distribution of payment for non-covered medical expenses is appropriate. Paragraph 26 is, therefore, modified by deleting said paragraph in its entirety and substituting the following therefor:

Plaintiff is to maintain hospitalization, medical, dental and optical insurance on the dependent child of the parties. All un-reimbursed medical costs for the minor child shall be split with the Defendant responsible for seventy-five percent (75%) of the un-reimbursed costs, and Plaintiff responsible for twenty-five percent (25%) of said costs. Medical costs shall include hospitalization, dental, orthopedic, optical, prescription drug and other reasonable and necessary medical expenses incurred on behalf of the dependent child.

5. Plaintiff contends that Defendant should be held in contempt of court for his failure to pay his child support obligation, and to make other payments required under the parties' Agreement. The Court finds that as a result of Defendant's employment situation, he has proffered mitigating circumstances, and the Court finds that the Defendant has not willfully failed to comply with the Orders of this Court. Moreover, Plaintiff acknowledges that she too did not comply with the Agreement of the parties entered into on October 25, 2001, which the Court deems to be an agreed upon modification of paragraph 39 to the Final Judgment of Divorce. The Court hereby ratifies and approves of the parties' modification of paragraph 39 in accordance with their written Agreement of October 25, 2001. The Court finds that said paragraph 39 was illusory, in that the award to the Defendant of \$10,000.00 equity in the residence was not due and owing until a closing on the sale of the residence. This event may never take place. The October 25, 2001, Agreement rectified this inequity.

Pursuant to the October 25, 2001, Agreement, Plaintiff agreed to pay Defendant "\$9,000.00, or the greatest sum possible, from each of my springtime bonuses (a.k.a. "Gains sharing") excepting only such amounts as we may mutually agree upon in writing, until this \$9,000.00 balance is paid...." The evidence is undisputed that in the Spring of 2002, Plaintiff received her gains sharing bonus in the amount of \$22,157.11. She did not pay the \$9,000.00, and there was no writing whereby the parties mutually agreed upon Defendant accepting a lesser amount. Plaintiff's failure to make the required payment to Defendant exacerbated his financial situation. At present, Plaintiff is still indebted to Defendant in the amount of \$7,750.00, as the unpaid portion of the amount due to him under paragraph 39, and the subsequent Agreement of October 25, 2001.

While the foregoing circumstances may mitigate the finding of contempt, they do not relieve Defendant from his obligation to make timely child support payments and to continue to make all other Court Ordered payments unless and until that Order is modified. This Defendant has failed to do so.

It is undisputed that Defendant failed to make child support payments for the months of June, July, August and September of 2002. Defendant's child support arrearage for these months is in the amount of \$2,008.00 (4 months x \$502.00). At the end of September Defendant filed his Counter Petition to Modify. He was unemployed at that time. The Court finds that had he chosen to do so, with his education and experience, Defendant could have at virtually any time obtained permanent or temporary employment as a paralegal with a salary comparable to his current salary of \$35,000.00 per year. The Court imputes this very conservative amount of income to Defendant during the time of his unemployment/under-employment. Consequently, the Defendant's monthly child support arrearage from October 1, 2002, through the date of this Order is in an amount equal to the current monthly child support of \$287.50, as set forth hereinabove. The total arrearage from October 1, 2002, through July 2003, is, therefore, in the amount of \$2,875.00 (10 months x \$287.50). The total arrearage through the date of this Order is, therefore, in the amount of \$4,883.00. Judgment is hereby entered in favor of Plaintiff and against Defendant for child support arrearage in the amount of \$4,883.00. Defendant is entitled to a credit against this arrearage in the amount of any payments made subsequent to May 1, 2003.

6. The undisputed evidence is that Defendant has failed to make payment to Plaintiff for medical expenses paid for the benefit of the minor child in the amount of \$370.47. Defendant is entitled to reimbursement for that amount. Judgment is hereby entered in favor of Plaintiff and against Defendant for un-reimbursed medical expenses in the amount of \$370.47.

7. Both parties indicated that they wish for the minor child to continue to participate in private school and in her extracurricular activities as contemplated in the original judgment. It is anticipated that Defendant's future income will be comparable to his income at the time of said judgment, and Defendant's Petition to Modify these portions of the original judgment is, therefore,

Denied. Further, the undisputed evidence is that Defendant is obligated to Plaintiff for reimbursement of expenses for tuition and extracurricular activities in the amount of \$3,010.66. Judgment is hereby entered in favor of Plaintiff and against Defendant for reimbursement of tuition and extra curricular activities in the amount of \$3,010.66.

8. The undisputed evidence is that Plaintiff has made payment for the vehicle awarded to Defendant in paragraph 45 of the parties' Agreement. Pursuant to said Agreement, Defendant was responsible for making the loan payments that have been made by Plaintiff in the amount of \$4,851.00. Plaintiff is entitled to reimbursement for the amount of said payments. Judgment is hereby entered in favor of Plaintiff and against Defendant for reimbursement of loan expenses in the amount of \$4,851.00.

9. Paragraph 23 of the parties' Agreement is hereby deleted in its entirety and the following is substituted therefor:

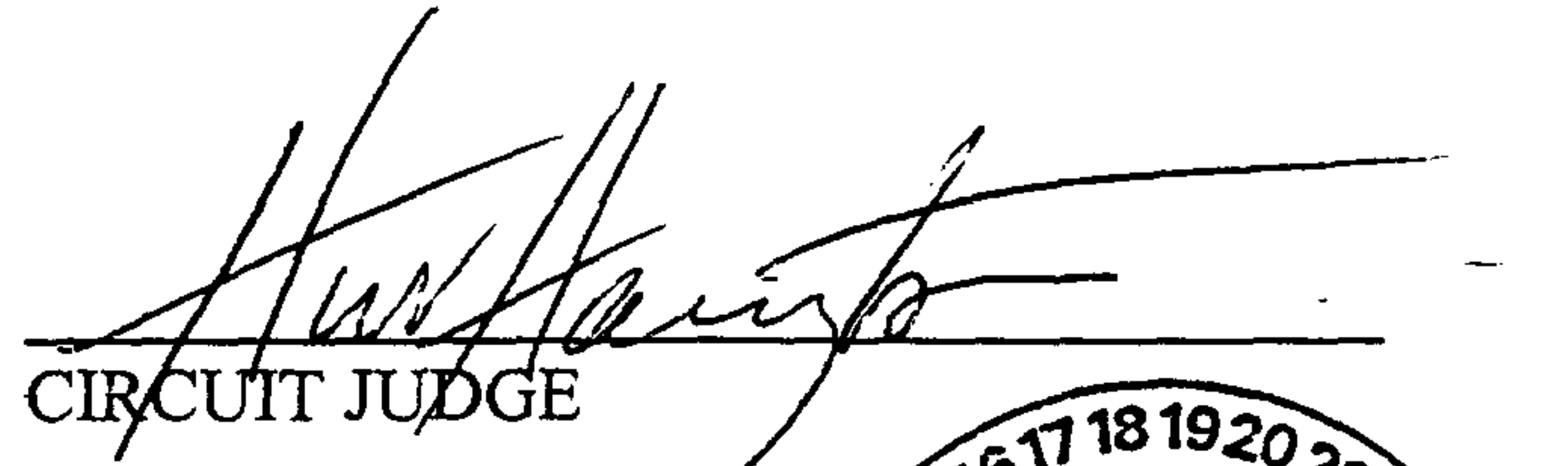
The parties shall exchange W-2 forms, 1099 forms, schedule C forms, K-1 forms or other such evidence of annual income on or before March 31st of every year.

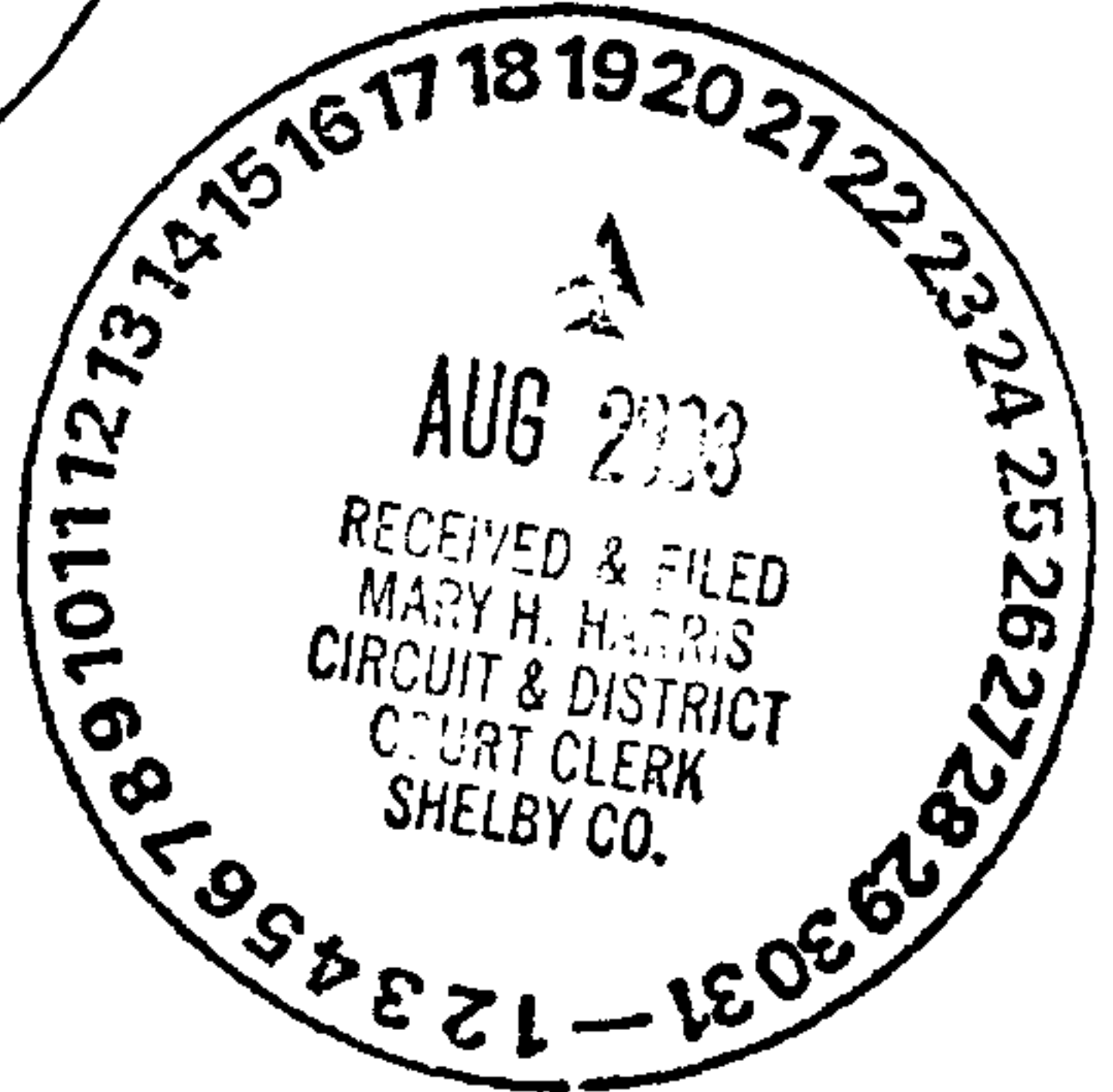
10. Defendant's Petition to Modify paragraphs 19 and 20 of the Agreement, which pertains to the payment of college expenses is hereby denied without prejudice to either party who may file a petition to modify these paragraphs at a future, more appropriate time.

11. The Court finds that the Plaintiff is entitled to a reasonable attorney's fee and expenses incurred in this action. The Court finds that a reasonable attorney's fee and expenses is in the total amount of \$8,072.24. Defendant shall satisfy this obligation by remittance to Plaintiff of payment in the amount of \$322.24, which shall be made within thirty (30) days of the date of this Order. Upon Plaintiff's receipt of said payment, her obligation for payment pursuant to paragraph 39 of the original judgment, as modified hereinabove, shall be satisfied.

12. Unless specifically addressed hereinabove, other relief requested by either of the parties is hereby denied, and unless modified hereinabove, all provisions of the Court's Final Judgment of Divorce entered on November 30, 1999, remain in full force and effect.

DONE and ORDERED this 19th day of August, 2003.


CIRCUIT JUDGE



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