NO. XX-07-00051-CV

IN THE

XXX COURT OF APPEALS

AT XXX, TEXAS

IN THE INTEREST OF:

[CHILDREN'S NAMES REDACTED],

CHILDREN

BRIEF OF APPELLANT, XXX

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES & COUNSEL

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STATEMENT OF THE CASE

This was a suit for registration of a foreign judgment, a motion to modify in suit affecting the parent-child relationship, and a motion for contempt for alleged failure to pay child and spousal support, all brought by Ms. Appellee against Mr. Appellant. Mr. Appellant's appeal of this case, however, concerns only child support and spousal support amounts adjudged by the trial court to have been due but unpaid in full over the years 2003 and 2004.

The case was tried to the XXX Judicial District Court of XXX County, Texas, the Hon. XXX presiding. Judge XXX signed an Order In Suit To Modify Parent-Child Relationship on October 18, 2006. (I CR 44) (copy attached under Tab A).

Mr. Appellant, acting pro se, filed a Motion for New Trial (II CR 2) and a Request for Findings of Fact and Conclusions of Law (II CR 5), both on October 31, 2006.

Judge XXX signed Findings of Fact and Conclusions of Law on December 11, 2006. (I CR 73) (copy attached under Tab B).

Mr. Appellant, through counsel, timely served a Notice of Appeal and mailed it to the XXX County District Clerk on January 13, 2007. (I CR 76). The Notice of Appeal was received by the District Clerk and file-stamped on January 18, 2007. (I CR 76).

ISSUES PRESENTED

Issue 1: The trial court erred by granting Ms. Appellee a judgment for child support arrearages for the years 2003 and 2004 because the trial court incorrectly concluded that Mr. Appellant had unilaterally reduced his child support obligation after Ms. Appellee moved to XXX when, in fact, the Arkansas court that divorced the parties approved their written agreement that Mr. Appellant would move to XXX to be nearer his children and that his child support obligation would be reduced if his income fell after his move.

Issue 2: The trial court erred by granting Ms. Appellee a judgment against Mr. Appellant for past due child support for the years 2003 and 2004 because there was no evidence, or insufficient evidence, to support the trial court's Findings of Fact Nos. 12-14 & 16 upon which the trial court based a judgment of $36,855.60 against Mr. Appellant for past due child support.

Issue 3: The trial court erred by granting Ms. Appellee a judgment for spousal support arrearages for the years 2003 and 2004 because the trial court incorrectly concluded that Mr. Appellant had unilaterally reduced his spousal support obligation after Ms. Appellee moved to XXX when, in fact, the Arkansas court that divorced the parties approved their written agreement that Mr. Appellant would move to XXX to be nearer his children and that his spousal support obligation would be reduced if his income fell after his move.

Issue 4: The trial court erred by granting Ms. Appellee a judgment against Mr. Appellant for past due spousal support for the years 2003 and 2004 because there was no evidence, or insufficient evidence, to support the trial court's Findings of Fact Nos. 10, 11 & 16 upon which the trial court based a judgment of $18,200.00 against Mr. Appellant for past due spousal support.

Issue 5: In the event that the Court sustains any of the Issues set forth above, the trial court further erred by granting Ms. Appellee a judgment against Mr. Appellant for attorney's fees in the amount of $53,567.50 and $1,582.48 in costs because those amounts included attorney's fees and costs incurred with respect to seeking recovery on judgments which now have been reversed in part.

Issue 6: In the event that the Court sustains any of the Issues set forth above, there was no evidence, or insufficient evidence, to support the trial court's Finding of Fact No. 17 upon which the trial court based an award against Mr. Appellant of attorney's fees in the amount of $53,567.50 and $1,582.48 in costs.

STATEMENT OF FACTS

Appellant is XXX. He is called "Mr. Appellant" in this Brief. Appellee is XXX, the former Ms. Appellant, who is called "Ms. Appellee" in this Brief.

Mr. Appellant and Ms. Appellee are the parents of three minor children. By late 2002, Mr. Appellant and Ms. Appellee - both of whom then lived in Arkansas where the children lived with them - decided to separate.

Mr. Appellant and Ms. Appellee engaged in mediation. During mediation, Mr. Appellant and Ms. Appellee reached agreement on numerous issues. They reduced their agreement to writing and signed it on January 9, 2003. That writing is entitled "Memorandum of Understanding: Mediated Separate Maintenance Agreement and Parenting Plan" but is hereafter called the "Mediation Agreement." Mr. Appellant and Ms. Appellee acknowledged that the Mediation Agreement was subject to court approval but wished to adopt it should they become divorced. (I CR 19 paras. 6, 8). A copy of the Mediation Agreement is attached to this Brief under Tab C.

Among other things, the Mediation Agreement required Mr. Appellant to pay child support and spousal support. Child support and spousal support were "based upon Mr. Appellant's estimated net annual after taxes income of $165,000 each year." (I CR 23 para. 27). The total amount of child support and spousal support equaled $5,505 per month, broken down as $3,000 per month in child support and $2,550 per month in spousal support. (*Id.*). Rounded up to the nearest percentage point, $3,000 per month in child support equaled 22% of Mr. Appellant's income of $165,000 per year; $2,550 per month in spousal support equaled 19% of Mr. Appellant's income of $165,000 per year.

When the parties signed the Mediation Agreement, they contemplated that Ms. Appellee

might move to Texas and that Mr. Appellant planned "to move to the same city to be near the children" if she did so. (I CR 25 para. 38). In Arkansas and in Texas, Mr. Appellant has been in the business of XXX. (3 RR 141/4 *et seq.*). Accordingly, Mr. Appellant and Ms. Appellee included Paragraph 38 in the Mediation Agreement, as follows:

> **MOVING**
>
> 38. The parties agree that Ms. Appellee has the option of moving to Texas to be near her family. If and when Ms. Appellee decides to move she will give Mr. Appellant as much notice as possible as he plans to move to the same city to be near the children. He will need to change his business structure. Ms. Appellee is aware that a move may create a shift in Mr. Appellant [*sic*] income. Mr. Appellant will make every effort to maintain his financial agreement. In the event his income is reduced, the financial agreement would be ammended [*sic*] that Mr. Appellant would provide 19% of his net income toward spousal support, and he would provide 22% of his income toward child support.

(I CR 25 para. 38). Ms. Appellee acknowledged at trial that the Mediation Agreement called for reduced child support payments if she moved to Texas should Mr. Appellant's income decline. (5 RR 25/3-25).

On February 6, 2003, the Circuit Court of XXX County, Arkansas, signed a Decree of Separate Maintenance for Mr. Appellant and Ms. Appellee. (I CR 14) (copy attached under Tab D). That court found the terms of the Mediation Agreement to be fair and equitable, approved and confirmed it, attached a copy of it to the Decree of Separate Maintenance and incorporated the Mediation Agreement into the Decree of Separate Maintenance by reference. (I CR 15 para. 4). The court further adopted the Mediation Agreement "as its order herein." (I CR 15).

Later in the Spring, Ms. Appellee informed Mr. Appellant that she was moving to Texas. Having been informed that Ms. Appellee planned to move to XXX, Texas, Mr. Appellant actually moved to XXX before Ms. Appellee moved to Texas. (4 RR 58/24 to 59/12). Ms. Appellee bought her new home in XXX on June 25, 2003, and actually moved in on June 27, 2003. (5 RR 42/25 to 43/6). For Ms. Appellee to clear title to her house in Arkansas, and

culminate the sale there, the divorce had to be finalized. (5 RR 64/17-21). On June 16, 2003, Mr. Appellant and Ms. Appellee were divorced by Divorce Decree signed that date in the Circuit Court of XXX County, Arkansas. (I CR 12) (copy attached under Tab E).

The Arkansas court previously had acknowledged the Mediation Agreement in its Decree of Separate Maintenance on February 6, 2003. Upon divorce, the court again found the terms of the Mediation Agreement to be fair and equitable, approved and confirmed it, attached a copy of it to the Divorce Decree, and incorporated the Mediation Agreement into the Divorce Decree. (I CR 13 para. 4). The court again adopted the Mediation Agreement "as its order herein." (I CR 13) (Tab E).

As anticipated by Mr. Appellant and Ms. Appellee, Mr. Appellant's income plummeted upon his move to Texas because he had to begin his business anew. At trial, Ms. Appellee conceded that Mr. Appellant's income did not remain the same after Mr. Appellant's move to Texas. (5 RR 46/14-25). Mr. Appellant attempted to pay child support of $3,000 per month and spousal support of $2,550 per month, but he was not successful. Ms. Appellee testified that Mr. Appellant made the following child support and spousal support payments in 2003 (PX 29) and 2004 (PX 30):[1]

Payments Made by Mr. Appellant - Year 2003

	Child Support	**Spousal Support**
January	$3,000	$2,550

[1] Although the evidence at trial also addressed child support payments from 2005 to the date of trial, the trial court reduced Mr. Appellant's child support payments to $1,650 per month retroactive to January 2005, based on the trial court's calculation that $1,650 equals 22% of Mr. Appellant's by then monthly income of $7,500 per month. See Findings of Fact and Conclusions of Law (I CR 73 para. 8) (copy attached under Tab B). In this appeal, Mr. Appellant complains about child support over the years 2003 and 2004 only and accordingly omits evidence postdating 2004.

February	$3,000	$2,550
March	$3,000	$2,550
April	$3,000	$2,550
May	$3,000	$2,550
June	$3,000	$2,550

***** parties move to Texas *****

July	$3,000	$1,000
August	$0	$0
September	$0	$0
October	$3,000	$2,020
November	$0	$0
December	$0	$0
Totals:	**$24,000**	**$18,320**

Payments Made by Mr. Appellant - Year 2004

	Child Support	**Spousal Support**
January	$1,000	$0
February	$500	$0
March	$0	n/a[2]
April	$1,500	
May	$1,500	
June	$1,500	
July	$1,381.29	
August	$1,381.50	
September	$1,385	
October	$1,385	
November	$1,385	
December	$1,385	

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[2] The Mediation Agreement called for spousal support payments through 2007. However, under Arkansas law, spousal support terminates upon remarriage. Ark. Code § 9-12-312(a)(1)(A). Ms. Appellee married XXX on February 28, 2004. (4 RR 93/11-15). The trial court correctly found that Mr. Appellant's obligation to pay alimony ended on that date. Although spousal support figures after February 2004 are part of Ms. Appellee's Exhibit 30, they are not repeated here to avoid confusion over the total amount of child support and spousal maintenance at issue in this appeal.

Totals: **$14,302.79** **$0**

Mr. Appellant does not dispute that Ms. Appellee correctly set forth the amounts he paid, but he does dispute the amounts she contended he should have paid because his income had gone down.

Mr. Appellant made every effort to keep Ms. Appellee updated on his financial situation. On June 20, 2003, during the midst of the parties' move to Texas, Mr. Appellant sent Ms. Appellee a note outlining his projected financial outlook, stating he would try his best to send $4,000 per month and hoped to be making more money soon. (PX 13). In November 2003 Mr. Appellant sent another note, recapping how much money he had paid that year, again outlining his financial situation, and promising a Profit & Loss Statement showing his income. (PX 14). On January 8, 2004, Mr. Appellant emailed Ms. Appellee about his financial situation and expressed hope that his earnings would increase the coming year. (PX 17).

In fact, Mr. Appellant resumed regular payments of child support by April 2004 in the amount of $1,500 per month, dropping to $1,385 per month by early Fall 2004. On April 13, 2004, Mr. Appellant sent Ms. Appellee an email in which he stated that his gross personal income for 2003 equaled $75,343 but that he had made most of that money prior to the parties' move to Texas. (PX 15). Mr. Appellant testified that he mailed a copy of his Profit & Loss Statement for the period July 2003 to July 2004 (PX 18) to Ms. Appellee, together with his 2003 federal income tax return. (3 RR 108/24 to 109/18). Ms. Appellee conceded receiving that Profit & Loss Statement, plus an earlier one covering the period June 2003 to December 2003, but she denied receiving the tax return. (4 RR 65/1-8; 5 RR 46/14 to 47/15).

Mr. Appellant's brother, XXX, who is a XXX based in XXX, testified without contradiction that since 2003 he had loaned Mr. Appellant approximately $215,000. (7 RR 55/11 to 56/10). Of this sum, XXX estimated that he loaned Mr. Appellant approximately $25,000 in 2003 and $10,000 in 2004. (7 RR 65/17-24). Mr. Appellant testified that only

because of these loans and credit card borrowings had he been able to pay his living expenses and the child support and spousal support in the amounts he had managed. (3 RR 168/5 to 169/25).

Mr. Appellant's Profit & Loss Statements supported his testimony. Respondent's Exhibit 1 shows Mr. Appellant's net income from July to December 2003. Mr. Appellant's monthly net income fluctuated during that period between a low of <$10,232.12> in August 2003 to a high of $9,877.46 in September 2003, with a net loss for that half-year period of <$9,271.41>. It is of note that Mr. Appellant's payment of $3,000 in child support and $2,020 in October 2003 took place immediately following Mr. Appellant's only truly profitable month in 2003. (See payment chart earlier in this Brief.). Mr. Appellant's income improved in 2004. In that year he made child support payments in all but one month, and his average monthly child support payment equaled $1,191.90. The monthly fluctuations, and the total income for the year 2004 of $91,350.41, are shown in Respondent's Exhibit 2.

Despite the parties' agreement to reduce child and spousal support if Mr. Appellant's income dropped after his move to Texas, the payments of child support and spousal support Mr. Appellant had made, and the explanations Mr. Appellant provided, Ms. Appellee subsequently registered the Arkansas Divorce Decree in Texas on July 15, 2004 (I CR 2), then in December 2004 filed suit to modify the Arkansas Divorce Decree (I CR 5). She also cited Mr. Appellant for contempt of court for failing to pay $3,000 per month in child support and $2,550 per month in spousal support since the parties had moved to Texas. (I CR 28).

To summarize, Ms. Appellee contended at trial that Mr. Appellant was in arrears $33,697.21 in child support for 2003 and 2004. She also claimed that Mr. Appellant was in arrears $29,980 in spousal support, but after the trial court's ruling that spousal support terminated upon remarriage under Arkansas law, the amount of that claim was reduced to

$17,380.[3] Mr. Appellant contended that, given the reduction in his income, he had actually slightly overpaid Ms. Appellee.

Throughout the trial court proceedings, both parties argued to the trial court that Arkansas law applied to the case, and both parties provided the trial court with briefs concerning Arkansas law. *See* Tex. R. Evid. 202.

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[3] The trial court erred by calculating that sum to be $18,200. Findings of Fact Nos. 11 & 16 (I CR 74) (Tab B).

ISSUES RESTATED

Issue 1: The trial court erred by granting Ms. Appellee a judgment for child support arrearages for the years 2003 and 2004 because the trial court incorrectly concluded that Mr. Appellant had unilaterally reduced his child support obligation after Ms. Appellee moved to XXX when, in fact, the Arkansas court that divorced the parties approved their written agreement that Mr. Appellant would move to XXX to be nearer his children and that his child support obligation would be reduced if his income fell after his move.

Issue 2: The trial court erred by granting Ms. Appellee a judgment against Mr. Appellant for past due child support for the years 2003 and 2004 because there was no evidence, or insufficient evidence, to support the trial court's Findings of Fact Nos. 12-14 & 16 upon which the trial court based a judgment of $36,855.60 against Mr. Appellant for past due child support.

Issue 3: The trial court erred by granting Ms. Appellee a judgment for spousal support arrearages for the years 2003 and 2004 because the trial court incorrectly concluded that Mr. Appellant had unilaterally reduced his spousal support obligation after Ms. Appellee moved to XXX when, in fact, the Arkansas court that divorced the parties approved their written agreement that Mr. Appellant would move to XXX to be nearer his children and that his spousal support obligation would be reduced if his income fell after his move.

Issue 4: The trial court erred by granting Ms. Appellee a judgment against Mr. Appellant for past due spousal support for the years 2003 and 2004 because there was no evidence, or insufficient evidence, to support the trial court's Findings of Fact Nos. 10, 11 & 16 upon which the trial court based a judgment of $18,200.00 against Mr. Appellant for past due spousal support.

Issue 5: In the event that the Court sustains any of the Issues set forth above, the trial court further erred by granting Ms. Appellee a judgment against Mr. Appellant for attorney's fees in the amount of $53,567.50 and $1,582.48 in costs because those amounts included attorney's fees and costs incurred with respect to seeking recovery on judgments which now have been reversed in part.

Issue 6: In the event that the Court sustains any of the Issues set forth above, there was no evidence, or insufficient evidence, to support the trial court's Finding of Fact No. 17 upon which the trial court based an award against Mr. Appellant of attorney's fees in the amount of $53,567.50 and $1,582.48 in costs.

SUMMARY OF ARGUMENT

Mr. Appellant and Ms. Appellee lived in Arkansas. When they contemplated divorce, they entered into a Mediation Agreement requiring Mr. Appellant to pay child support of $3,000 per month and spousal support of $2,550 per month. The parties acknowledged in the Mediation Agreement that Ms. Appellee might move to Texas and that if she did so, Mr. Appellant would follow to be near the parties' children. The Mediation Agreement recognized that if Mr. Appellant moved to XXX, he would have to start over in his XXX business such that his income likely would be reduced. The Mediation Agreement stated that Mr. Appellant's child support obligation would be 22% of his income and that his spousal support would be 19% of his income if he moved to XXX and his income dropped. An Arkansas court approved the Mediation agreement in a Decree of Separate Maintenance. Ms. Appellee and Mr. Appellant then moved to the XXX area. When the move was nearly completed the parties were divorced in Arkansas. The Arksanas court again approved the Mediation Agreement. As feared by the parties, Mr. Appellant's income dropped, and he was unable to pay the total of $5,550 per month in child and spousal support. Despite the parties' agreement, Ms. Appellee sued Mr. Appellant for child support payments of $3,000 per month and spousal support payments of $2,550 per month. The trial court granted judgment in favor of Ms. Appellee on her argument that Mr. Appellant had "unilaterally" reduced his support obligations, even though the Arkansas court had twice ordered that should Mr. Appellant's income drop after his move to Texas, his support obligations would equal the specified percentages of his income. Mr. Appellant appeals the judgment for child support and for spousal support for the years 2003 and 2004.

ARGUMENT

Although these four Issues deal with two subjects - child support and spousal support - they are argued together because under Arkansas law, the issues raised in this appeal concerning child support and spousal support are subject to the same body of law. *Bethell v. Bethell,* 208 Ark. 409, 597 S.W.2d 576 (1980).

Issue 1: The trial court erred by granting Ms. Appellee a judgment for child support arrearages for the years 2003 and 2004 because the trial court incorrectly concluded that Mr. Appellant had unilaterally reduced his child support obligation after Ms. Appellee moved to XXX when, in fact, the Arkansas court that divorced the parties approved their written agreement that Mr. Appellant would move to XXX to be nearer his children and that his child support obligation would be reduced if his income fell after his move.

Issue 2: The trial court erred by granting Ms. Appellee a judgment against Mr. Appellant for past due child support for the years 2003 and 2004 because there was no evidence, or insufficient evidence, to support the trial court's Findings of Fact Nos. 12-14 & 16 upon which the trial court based a judgment of $36,855.60 against Mr. Appellant for past due child support.

Issue 3: The trial court erred by granting Ms. Appellee a judgment for spousal support arrearages for the years 2003 and 2004 because the trial court incorrectly concluded that Mr. Appellant had unilaterally reduced his spousal support obligation after Ms. Appellee moved to XXX when, in fact, the Arkansas court that divorced the parties approved their written agreement that Mr. Appellant would move to XXX to be nearer his children and that his spousal support obligation would be reduced if his income fell after his move.

Issue 4: The trial court erred by granting Ms. Appellee a judgment against Mr. Appellant for past due spousal support for the years 2003 and 2004 because there was no evidence, or insufficient evidence, to support the trial court's Findings of Fact Nos. 10, 11 & 16 upon which the trial court based a judgment of $18,200.00 against Mr. Appellant for past due spousal support.

Arkansas law, like Texas law, has long provided that a child support obligor lacks the power to unilaterally terminate or reduce child support. These cases often have come about when a divorce decree has made no provision for reduction of child support upon the majority of

one of the children. An oft-cited case on this point is *Jerry v. Jerry,* 235 Ark. 589, 361 S.W.2d 92 (1962), in which the Arkansas Supreme Court held that a father had no unilateral right to change the amount of child support upon a child's majority because the court alone held that power.

In a later case, the Arkansas Supreme Court faced the situation where the parties allegedly had agreed to reduce child support upon the majority of a child even though the decree contained no such provision. The Court did not reach that issue, however, because the existence of the agreement was disputed by the mother, and the trial court found as a fact that there had been no such agreement. *Thompson v. Thompson,* 254 Ark. 881, 496 S.W.2d 425 (1973). The *Thompson* Court went on to recommend to the Bar that "litigation such as this could be avoided by setting forth in the decree under what circumstances monthly child support and alimony payments terminate without the necessity of court intervention." *Id.* at 884, 496 at 427.

The Court will note that the *Thompson* Court spoke of both child support and alimony. In fact, in Arkansas, both child support and alimony are covered by the same statute, Ark. Code § 9-12-312. In a more recent case involving alimony, the Arkansas Supreme Court made this point explicitly:

> Insofar as dealing with arrearages in payments is concerned, it has been pointed out that there is an analogy in cases involving alimony and those involving child support, *Brun v. Rembert,* 227 Ark. 241, 297 S.W.2d 940. Within limitations attributable to the overriding concern of the courts for the welfare of children, cases involving child support arrearages have been considered as precedential in cases involving alimony arrearages and vice versa.

Bethell v. Bethell, 208 Ark. 409, 415, 597 S.W.2d 576, 578 (1980). In *Bethell,* the Arkansas Supreme Court applied that body of law to case where the father and the mother admittedly agreed to reduce spousal support, albeit without benefit of a court order authorizing the change.

Because *Bethell's* facts were different from the facts in *Thompson* - where the trial court had found as a fact that there was no agreement between the parties - the result was different.

When the *Bethell* mother later attempted to recover the allegedly past-due spousal support, the Arkansas Supreme Court found that the mother had both waived her right to demand those sums and was estopped by her conduct to do so: Had the father known that the mother would later breach their agreement, then the father could have approached the court for relief. Instead, he relied on the agreement to lower spousal support.

These Arkansas cases are instructive of how this Court should decide this case. Ms. Appellee argued at trial that Mr. Appellant unilaterally reduced his child support without benefit of a court order. This argument is incorrect for at least three reasons:

- First, Mr. Appellant's reduction was not unilateral. He and Ms. Appellee acknowledged that Mr. Appellant intended to move to the XXX area to be near his children should Ms. Appellee move there. The parties explicitly recognized that Mr. Appellant's move might cause his income to drop. If Mr. Appellant's income dropped, then he would pay, respectively 22% of his income in child support and 19% in spousal support. Although there was a dispute between the parties at trial over how much Mr. Appellant's income had dropped, there was no dispute that Mr. Appellant and Ms. Appellee had entered into this agreement. Further, Ms. Appellee acknowledged at trial that the Mediation Agreement called for reduced child support payments if she moved to Texas should Mr. Appellant's income decline (5 RR 25/3-25) and further admitted that his income has not stayed the same. (5 RR 46/14-25).
- Second, the agreement between the parties was subjected to court approval. Prior to either one of the parties moving to Texas, the Circuit Court of XXX County, on February 6, 2003, approved a Decree of Separate Maintenance by which the court found that terms of the Mediation Agreement were fair and equitable, the court approved and confirmed the Mediation Agreement, the court attached a copy of the Mediation Agreement to the Decree of Separate Maintenance, and the court incorporated the Mediation Agreement into

the Decree of Separate Maintenance by reference. (I CR 15 para. 4). The court further adopted the Mediation Agreement "as its order herein." (I CR 15) (Tab D).

- Finally, immediately before Ms. Appellee moved to Texas in late June 2003, the parties were divorced. Ms. Appellee testified that the divorce had to be done so that she had clear title to her Arkansas house which she was selling to buy her house in Texas. At this time, Mr. Appellant already had moved to Texas. (5 RR 64/17-21). Thus, with the Arkansas court again approved the Mediation Agreement and adopted it as its order at the very time that the parties' moves to to Texas were being concluded. (I CR 12) (Tab E).

In short, the parties agreed that Mr. Appellant's child support and spousal support obligations would be reduced if his income fell after the parties' contemplated move to Texas. An Arkansas court approved that agreement and adopted it as the court's order before the move took place. At as time when the parties' move had been nearly completed, the Arkansas court again approved the parties' agreement and adopted it as the order of the court. It simply cannot be said that Mr. Appellant unilaterally reduced his child support without court approval when not only the reduction but the very percentages to be used for reduction are set forth in two court orders, one signed before the move and the other when the move was nearly completed.

In additional support of Mr. Appellant's position is *Smith v. Johnson,* No. CA97-328, 1997 Ark. App. LEXIS 795 (Nov. 19, 1997) (copy attached under Tab F; Mr. Appellant requests the Court to take judicial notice of this opinion). The facts in *Smith* are nearly identical to the facts in the case at bar. *Smith* was not designated by the Arkansas Court of Appeals for publication, and under Arkansas court rules the opinion may not be cited to an Arkansas court or even referred to in a brief. Ark. S. Ct. R. 5-2(d). However, under Texas procedural law, unpublished opinions may be cited to the court although they have no precedential value. Tex. R. App. P. 47.7. Mr. Appellant accordingly brings this case to the Court's attention to show the ruling the Arkansas Court of Appeals made on similar facts.

In *Smith,* the parties agreed that the father would pay child support in an amount equal to 17.75% of his take-home pay. That agreement, like the one between Mr. Appellant and Ms. Appellee, was made part of a court order. The agreement included a floor for child support of $1,500 per month and a ceiling of $2,500 per month within which the amount of child support could vary depending on the father's take-home pay.

To summarize, the father claimed an income reduction and lowered his monthly child support to $1,500. The mother sued him to require him to pay a greater amount. The mother made the precise argument tendered by Ms. Appellee in this case: That reduction in the father's child support, albeit under an agreed court order, was unilateral under the authorities elsewhere discussed in this Brief and therefore should be held to be ineffectual. The trial court rejected the mother's position, holding that the father had not unilaterally reduced child support but had acted pursuant to a court order that had been agreed between the parties.

The mother further argued that the father should have been required to provide certain income reports as a condition to reducing his child support. Although the parties' agreed order contemplated that adjustments to the amount of child support would "coincide with" the provision of these reports, the provision of such reports did not "make adjustments conditional upon the provision of such reports." *Smith* at 3 (Tab F).

Ms. Appellee has pursued a similar argument in this case because the parties' Mediation Agreement includes this language:

> After taxes are filed each year, Ms. Appellee will receive a copy of Mr. Appellant's tax returns. If an adjustment is in order according to the Family Child Support Chart one will be initiated at that time. Either party can ask their attorney to do the necessary legal work.

(I CR 23, para. 27). Ms. Appellee testified at trial that she did not receive any of Mr. Appellant's tax returns until after suit was filed and therefore that Mr. Appellant failed to fulfill a condition precedent to reducing child support and spousal support upon his move to Texas when

his income plummeted.

The Court should reject Ms. Appellee's argument for at least three reasons:

- First, the clause requiring the provision of tax returns is not a condition to a reduction of child support upon Mr. Appellant's move to XXX to be near his children. The clause about tax returns contains no such language; neither does the "Moving" clause. The clauses are located in different parts of the Mediation Agreement, addressing different matters. Compare the reference to "Monthly Expenses" (I CR 22) with the reference to "Moving" (I CR 25) (Tab C).
- Second, the parties contemplated Mr. Appellant's income would drop immediately upon his move to Texas. At the time of that move - June 2003 - Mr. Appellant's next income tax return could not be filed before the end of 2003 and was not be due to be filed until April 2004. It simply is not tenable to say that the parties' agreement that Mr. Appellant would lower his child and spousal support to agreed percentage levels upon his move to Texas in 2003 would be contingent upon his filing of a tax return the following year and providing Ms. Appellee with a copy of it.
- Although the Mediation Agreement does not require it, Mr. Appellant did provide Ms. Appellee with a Profit & Loss Statement of his earnings, a fact that Ms. Appellee admitted. Further, as recited in the Statement of Facts above, Mr. Appellant sent Ms. Appellee numerous communications about his financial status. It should not go unnoticed by the Court that even after his move to Texas, over the period July 2003 through December 2004, Mr. Appellant paid Ms. Appellee $20,302.19 in child support, an average of $1,127.90 per month. Mr. Appellant has not been a shirker about paying child support but did the best he could after his move to Texas to be nearer his children, a circumstance anticipated and agreed to by the parties and twice ordered by the Arkansas court.

To summarize, Mr. Appellant and Mr. Fulton entered into a Mediation Agreement that

set out child and spousal support; acknowledged that Ms. Appellee might move to Texas, and that if she did, Mr. Appellant would follow to be near the children; and acknowledged that because this move would require Mr. Appellant to "start over" in his business, if his income dropped, then child and spousal support would drop to previously agreed levels. The Arkansas trial court approved and incorporated this agreement as its order prior to either party's move to Texas. The parties actually divorced when the court signed the Divorce Decree on June 16, 2003. By this time, Mr. Appellant had moved to Texas and Ms. Appellee was in the midst of her own move. In short, by the time of the move, the "Moving" section of the Mediation Agreement already had come into effect.

Issue 5: In the event that the Court sustains any of the Issues set forth above, the trial court further erred by granting Ms. Appellee a judgment against Mr. Appellant for attorney's fees in the amount of $53,567.50 and $1,582.48 in costs because those amounts included attorney's fees and costs incurred with respect to seeking recovery on judgments which now have been reversed in part.

Issue 6: In the event that the Court sustains any of the Issues set forth above, there was no evidence, or insufficient evidence, to support the trial court's Finding of Fact No. 17 upon which the trial court based an award against Mr. Appellant of attorney's fees in the amount of $53,567.50 and $1,582.48 in costs.

The trial court found, in Finding of Fact No. 17 (I CR 74), that "Petitioner is entitled to a judgment in he amount of $53,567.50 in attorney's fees and $1,582.48 in costs." These amounts are based upon the testimony of Mr. XXX, counsel for Ms. Appellee. Mr. XXX testified in a global manner that these fees and costs were incurred from inception through the trial of the case. (7 RR 100/10 - 101/9). These fees and costs were not broken down by legal issue (conservatorship, possession, access, child support or spousal support), legal proceeding (registration, contempt, motion to modify) or otherwise. The billing statements introduced in support of this testimony demonstrate that the legal services provided and costs incurred included all aspects of this case. (PX 101).

Effective January 2005, the trial court reduced Mr. Appellant's child support obligation

to $1,650 per month because the trial court concluded that $1,650 per month equaled 22% of Mr. Appellant's monthly income commencing in 2005, which the trial court determined to be $7,500. (I RR 74 para. 8). Mr. Appellant has not challenged this part of the trial court's decision. Thus, Ms. Appellee still has prevailed in this litigation, but should the Court sustain any of the Issues 1 through 4 above, Ms. Appellee' recovery will be far less than the trial court's judgment. When the amount a party is adjudged due is reduced on appeal, then the issue of attorney's fees must be reversed and remanded for redetermination. *Young v. Qualls,* 223 S.W.3d 312 (Tex. 2007) (per curiam); *Barker v. Eckman,* 213 S.W.3d 306 (Tex. 2006). Mr. Appellant requests that the Court sustain his Issues 1 through 4 and remand this case to the trial court for a redetermination of attorney's fees, if any, to be awarded.

Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, Mr. Appellant prays as follows:

1. That the Court reverse the Order In Suit To Modify Parent-Child Relationship with respect to child support arrearages and spousal arrearages for 2003 and 2004 and render its decision otherwise affirming the trial court's decision, except for the issue of attorney's fees, which should be remanded to the trial court for redetermination.
2. Alternatively, the Court reverse the Order In Suit To Modify Parent-Child Relationship with respect to child support arrearages and spousal arrearages for 2003 and 2004 and remand the case for determination of what child support Mr. Appellant should have paid during 2003 and 2004, apply the (undisputed) amounts paid by Mr. Appellant as an offset, determine the extend to which Mr. Appellant overpaid or underpaid, render its decision accordingly, and redetermine the issue of attorney's fees.
3. Mr. Appellant prays for general relief.

Respectfully submitted,

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Certificate of Service

I certify that I have served a true and correct copy of the above and foregoing document on the following persons and by the following means:

XXX

by the following mean(s):

- ☑ certified mail, return receipt requested
- ☐ facsimile
- ☐ hand-delivery

on this 8th day of August, 2007.

Jimmy L. Verner, Jr.