

SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI  
NO. 2006-CA-01230

DANNY L. HOLLEY

APPELLANT

VERSUS

WANDA S. HOLLEY

APPELLEE

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record for the Appellant certifies that the following people have an interest in the determination of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. DANNY L. HOLLEY, Appellant
2. MARK G. WILLIAMSON, Attorney for Appellant
3. WANDA S. HOLLEY, Appellee
4. JOHN W. CROWELL, Attorney for Appellee
5. HONORABLE KENNETH BURNS, Chancellor

RESPECTFULLY SUBMITTED, this the 20<sup>th</sup> day of March, 2007.

*Brief of Appellant*

*Mark G. Williamson*  
MARK G. WILLIAMSON

## **TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
I. THE CHANCELLOR’S DECISION TO AWARD ALIMONY WAS MANIFEST ERROR, AN ABUSE OF HIS DISCRETION AND WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE WHEN CONSIDERED WITH THE EQUITABLE DISTRIBUTION, AWARD OF CHILD SUPPORT, OTHER SUPPORT AWARDS AND THE ENTIRETY OF THE RECORD	
II. THE CHANCERY COURT WAS MANIFESTLY WRONG AND CLEARLY ERRONEOUS IN CALCULATING THE INCOME OF THE APPELLANT WHICH SERVED AS THE MAJOR BASIS FOR THE AWARD OF ALIMONY	
III. THE CHANCERY COURT WAS MANIFESTLY WRONG AND CLEARLY ERRONEOUS IN CALCULATING THE EXPENSES AND NEEDS OF THE APPELLEE WHICH SERVED AS A BASIS FOR THE AWARD OF ALIMONY	
IV. THE TRIAL COURT COMMITTED MANIFEST ERROR IN AWARDING PERIODIC ALIMONY INSTEAD OF LUMP SUM ALIMONY AS PROMPTED BY THE SUPREME COURT OPINION	
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	13
ARGUMENT	13
CONCLUSION	46
CERTIFICATE OF SERVICE	47
CERTIFICATE OF MAILING	48

**TABLE OF AUTHORITIES**  
**TABLE OF CASES**

<u>Armstrong v. Armstrong</u> , 618 so.2d 1278, 1280	16
<u>Brendel v. Brendel</u> , 566 So.2d 1269, 1272 (Miss. 1990)	27
<u>Burge v. Burge</u> , 851 So.2d 384 (Miss. Ct. App. 2003)	27
<u>Crowe v. Crowe</u> , 641 So.2d 1100, 1102 (Miss. 1994)	26
<u>Dudley v. Light</u> , 586 So.2d 155, 161 (Miss. 1991)	27
<u>Dunaway v. Dunaway</u> , 749 So.2d 1112 (Miss. 1999)	26
<u>Duncan v. Duncan</u> , 815 So.2d 480, 484 (Miss. Ct. App. 2002)	27, 44
<u>Ferguson v. Ferguson</u> , 639 So.2d 921, 929 (Miss. 1994)	45
<u>Franklin v. Franklin</u> , 864 So.2d 970 (Miss. Ct. App. 2003)	40, 44
<u>Gray v. Gray</u> , 562 So.2d 79, 83 (Miss. 1990)	25, 26
<u>Johnson v. Johnson</u> , 650 So.2d 1281, 1287 (Miss. 1995)	24
<u>Lauro v. Lauro</u> , 847 So.2d 849 (Miss. 2003)	45
<u>LaRue v. LaRue</u> , 172 W. Va. 158, 304 S.E. 2d 312, 334 (1983)	45
<u>Long v. Long</u> , 928 So.2d 1001 (Miss. 2006)	45
<u>Mace v. Mace</u> , 818 So.2d 1130 (Miss. 1990)	45
<u>Monroe v. Monroe</u> , 612 So.2d 353, 357 (Miss. 1991)	25
<u>Taylor v. Taylor</u> , 348 So.2d 1341, 1344 (Miss. 1977)	27
<u>Tilley v. Tilley</u> , 610 So.2d 348, 354 (Miss. 1992)	25, 27, 40
<u>Saucier v. Saucier</u> , 830 So.2d 1261 (Miss. Ct. App. 2002)	40
<u>Watson v. Watson</u> , 882 So.2d 95 (Miss. 2004)	40, 44

## STATEMENT OF THE ISSUES

- I. **THE CHANCELLOR'S DECISION TO AWARD ALIMONY WAS MANIFEST ERROR, AN ABUSE OF HIS DISCRETION AND WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE WHEN CONSIDERED WITH THE EQUITABLE DISTRIBUTION, AWARD OF CHILD SUPPORT, OTHER SUPPORT AWARDS AND THE ENTIRETY OF THE RECORD**
- II. **THE CHANCERY COURT WAS MANIFESTLY WRONG AND CLEARLY ERRONEOUS IN CALCULATING THE INCOME OF THE APPELLANT WHICH SERVED AS THE MAJOR BASIS FOR THE AWARD OF ALIMONY**
- III. **THE CHANCERY COURT WAS MANIFESTLY WRONG AND CLEARLY ERRONEOUS IN CALCULATING THE EXPENSES AND NEEDS OF THE APPELLEE WHICH SERVED AS A BASIS FOR THE AWARD OF ALIMONY**
- IV. **THE TRIAL COURT COMMITTED MANIFEST ERROR IN AWARDING PERIODIC ALIMONY INSTEAD OF LUMP SUM ALIMONY AS PROMPTED BY THE SUPREME COURT OPINION**

## STATEMENT OF THE CASE

- A. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

This matter was initially begun when Wanda S. Holley filed a Complaint for Separate Maintenance on June 29, 2001, in Cause Number 2001-0443 in this Court. Danny L. Holley filed an Answer to this Complaint on August 28, 2001. On December 10, 2001, Danny L. Holley (hereinafter Dan) filed a Bill for Divorce in Cause Number 2001-0793 in this Court seeking a divorce on the ground of irreconcilable differences and a ruling on all equitable matters. On December 12, 2001, Wanda S. Holley (hereinafter Wanda) filed her Answer to the Bill for Divorce and a Counterclaim for divorce, seeking a divorce on the ground of adultery, custody of the three

children of the parties, child support, alimony, exclusive ownership of the marital residence, a division of marital property, attorney's fees and costs. By agreed order Cause Number 2001-0443 was consolidated with Cause Number 2001-0793 and this matter set for trial on December 17, 2001.

The case was tried on December 17<sup>th</sup> and 18<sup>th</sup>, 2001. On February 15, 2002, the Court below entered its Judgment, granting Wanda a divorce from Dan on the grounds of uncondoned adultery. Legal and physical custody of the minor children of the parties was awarded to Wanda. Dan was awarded reasonable rights of visitation with the children. Wanda was ordered to facilitate and encourage this visitation. Dan was ordered to abstain from the use of alcohol or drugs during his visitation with the children. Dan was ordered to pay unto Wanda child support in the sum of \$400.00 per child per month, for a total of \$1,200.00 per month, beginning on March 1, 2002, and a like sum on the first day of each month thereafter. Dan was ordered to continue to provide health insurance coverage for each child, for so long as he is obligated to pay child support for that child, and was ordered to bear the cost of any deductible and 65% of the cost of medical, dental or other health related expenses for each child that is not covered by insurance, and Wanda 35% of said expenses. The Court found that the parties had previously established separate accounts for the children's education and appointed Wanda as the sole custodian of these accounts and she is permitted to use those funds for any college expenses. After those funds are consumed, the Court ordered Dan to pay 65% of all additional sums required for the children's college related expenses (tuition, books, room and board) and ordered Wanda to pay 35% of all of such additional sums, provided the children demonstrate an aptitude for college and diligently pursue a college education.

Wanda was awarded the following property:

<u>Asset</u>	<u>Value</u>
Residence house and lot, with Wanda to pay	

the remaining mortgage of \$78,000.00	\$315,000.00
Furnishings, except those hereinafter awarded to Dan	12,700.00
2001 Volvo	27,500.00
1987 Volvo	2,500.00
Her jewelry	3,500.00
Checking account (Wanda)	1,243.00
Savings (joint)	90,258.00
IRA (Wanda)	16,391.00
401(k) (Wanda)	44,387.00
Watkins, Ward & Stafford (Wanda)	12,044.00
Along with the mortgage debt, Wanda shall be responsible for her outstanding accounts of and her partnership loan of	6,333.00 17,447.00

Wanda received marital assets with a value of \$525,523.00 and a net value of \$423,446.00.

Dan was awarded the following property:

<u>Asset</u>	<u>Value</u>
1997 Ford	13,000.00
Gun, boat, 4 wheeler, golf clubs, smoker, hunting & fishing equipment	3,465.00
Checking account (Dan)	10,746.00
Savings (joint)	25,000.00
401(k) (Dan)	317,000.00
IRA (Dan)	629.00
Profit sharing (Dan)	10,098.00
Bed, mattress & box springs, dining room table & chairs & the upstairs den couch	2,300.00

Dan received marital assets with a net value of \$382,238.00.

Dan was ordered to pay Wanda periodic alimony in the sum of \$2,000.00 per month, for a period of sixty (60) months, beginning on the 1<sup>st</sup> day of March, 2002, and continuing on the 1<sup>st</sup> day of each month thereafter for the next 59 months. So long as Dan's child support or college expense obligations shall be effective, he was ordered to maintain life insurance on his life in an amount not less than \$50,000 for each child with the children or child named as beneficiaries. In addition, so

long as Dan's alimony obligations shall be effective, he was ordered to maintain life insurance on his life in an amount no less than \$100,000 with Wanda as beneficiary.

Aggrieved of the terms of the Judgment, Dan appeals. Dan filed his Notice of Appeal on February 25, 2002, Designation of the Record on February 28, 2002 and Certificate of Compliance on March 1, 2002. Dan sought an appeal with supersedeas on March 15, 2002 regarding alimony. On April 25, 2002 the Supersedeas Bond and the Writ of Supersedeas were filed, subject to the entry of the order granting supersedeas. On May 8, 2002 the order granting supersedeas was filed which cleared the way for the approval of the Supersedeas Bond and the issuance of the Writ of Supersedeas. Dan is paying the Court ordered child support of \$1,200.00 per month, but the Court ordered alimony payment of \$2,000.00 per month is suspended pending the outcome of his appeal. The distribution of all assets and all other matters ordered by the Court has been completed.

Dan filed his Brief of the Appellant on August 28, 2002 listing the following two (2) issues:

- I. The Chancery Court erred in the amount of its award of periodic alimony to Wanda S. Holley
- II. The Chancery Court erred in the amount of its award of child support to Wanda S. Holley.

Wanda filed her Brief of the Appellee on October 30, 2002.

On August 12, 2003 the Court of Appeals affirmed the Judgment of the Lowndes County Chancery Court as to child support and unanimously reversed and rendered as to alimony. Wanda filed a Motion for Rehearing on August 21, 2003 on the issue of alimony. Dan filed an opposition to Motion for Rehearing on September 11, 2003. The Motion for Rehearing was denied on October 28, 2003. Wanda filed a Petition for Writ of Certiorari on the issue of alimony on November 10, 2003. Dan filed a Response in Opposition to the Petition for Writ of Certiorari on November 18, 2003. The Petition for Writ of Certiorari was granted on July 8, 2004. On September 16, 2004 the

Supreme Court reversed the Court of Appeals' decision and the Chancellor's judgment as to alimony and remanded this case to the Chancery Court for determination of the appropriate type and amount of alimony consistent with its opinion. On September 30, 2004 Dan filed a Motion for Rehearing. Wanda filed a response to Motion for Rehearing on October 8, 2004. The Motion for Rehearing was denied on December 2, 2004.

On remand of this case to the Lowndes County Chancery Court, this case was set for trial on May 17, 2006. On the day of trial, the parties agreed not to reopen the evidence and agreed to have the Chancellor reconsider the evidence presented during the original trial. On June 29, 2006, the Chancellor entered his Judgment. Dan was ordered to pay Wanda periodic alimony in the sum of \$750.00 per month. Judge Gore decided this case on February 15, 2002, and directed that the alimony he ordered begin on March 1, 2002. With this Court's award, Wanda is entitled to accrued alimony through July 1, 2006 of \$39,750.00. The Court does not believe it is just to require Dan to pay all the alimony arrears at one time, but it is appropriate that a portion of the alimony arrears be paid over time. Wanda is awarded a judgment against Dan for \$39,750.00 for alimony in arrears. Execution or other process is stayed so long as Dan shall pay \$500.00 per month on the arrearage. The Court believes, as shown by the Court of Appeals and the Supreme Court decisions, that Dan had an arguable basis for his appeal and therefore no interest is awarded. Payments of current alimony and on the judgment shall begin on July 1, 2006, and shall continue on the first day of each month and continue until the remarriage of Wanda or the death of either party.

Aggrieved of the terms of the Judgment, Dan appeals. Dan filed his Notice of Appeal on July 27, 2006, Designation of the Record and Certificate of Compliance on August 2, 2006.

**B. FACTS**

Danny Leroy Holley (Dan), 42 years of age at the time of trial, and Wanda Sloan



Holley (Wanda), 43 years of age at the time of trial, were married on September 25, 1982 (R2-3, 90), and separated late February 2001, when Dan moved from the family home. (R96)

Dan and Wanda have three children, Hope Marie Holley, born September 11, 1984, 17 years of age at the time of trial, Daniel Sloan Holley, born February 25, 1986, 15 years of age at the time of trial and John Hampton Holley, born September 13, 1989, 12 years of age at the time of trial. (R3, 90-91) All three children lived with Dan and Wanda while they were together and with Wanda since the separation. (R3, 91)

Dan is employed with A. G. Edwards & Sons, a stock brokerage firm in their Columbus, Mississippi office. He has worked for them since September of 1988. Dan is the branch manager and a broker for A. G. Edwards & Sons. Dan does not get a salary for being branch manager. Dan does not receive a salary for being a broker. He is not guaranteed any money at all for working there. Dan makes his money as a broker from transaction fees which are essentially commissions. There is a small transaction fee or commission that A. G. Edwards & Sons charges its clients on transactions. If a transaction is for one of Dan's clients, the firm gets 65 percent of the commission and Dan gets the other 35 percent. (R144, 173-174)

Wanda is a partner at the accounting firm of Watkins, Ward & Stafford and works out of their Columbus, Mississippi office. (R90) Wanda grosses \$6,112.00 a month. (Exhibit D-13) Wanda is guaranteed a salary or a guaranteed payment to partner each month and a bonus every year. (R144)

Dan and Wanda jointly own a four bedroom three and a half bath home at 310 Greenbriar in Cady Hills Subdivision in Columbus, Mississippi. (R155-156) Dan and Wanda built the house. (R208) Dan and Wanda did not have the house and lot appraised. Dan placed the value of the house at \$300,000.00 and Wanda valued it at \$275,000.00. (R41) Both valuations were arrived at without

taking into consideration the \$40,000.00 that the parties paid for the lot. (R208) The insured value of the home reflected in the homeowners's policy was \$293,000.00. (R155, 207-208, Exh. P-6) There is only one mortgage owed on the house in the approximate amount of \$78,000.00. (R125) At the time of trial, Wanda and the three children were living in the home. (R91)

Dan had no liabilities other than the home mortgage. (Exhibit D-2) Wanda had two additional liabilities other than the home mortgage. First, she has a note to Watkins, Ward & Stafford of \$17,447.00, which represents the balance of what she owes the firm for buying into the partnership. It's financed over ten years. Every year Watkins, Ward & Stafford takes approximately one-tenth of it out of her bonus before she gets her bonus at year end. Second, under the liability section of her December Rule 8.05 financial form, she has \$6,630.00 listed as accounts, representing various bills. Those various bills are footnoted at the bottom of the page of her December Rule 8.05 financial form and are as follows: Country Club-\$680.00, House interest-\$1,429.00, BP Visa-\$255.00, Miller Tire-\$16.00, Johnson-\$42.00, David Curtis-\$507.00, McRae's-\$1,119.00 and Visa-\$2,581.00. The \$6,630.00 worth of various bills were not outstanding when Dan and Wanda separated. These are bills that Wanda did not have the money to pay. (R126, Exh. D-13)

Dan has the household furnishings valued at \$25,000.00. Dan felt \$40,000.00 or \$50,000.00 more accurately represented the value of the household furnishings, but conservatively set a figure of \$25,000.00. (R210) Wanda valued the household furnishings at \$11,500.00. (Exhibit D-14) Dan valued the personal property he wanted at \$3,465.00. Wanda valued the personal property he wanted at \$5,465.00. Dan and Wanda valued her ring at \$3,500.00. (Exhibits P-5, D-14) Dan valued the 2001 Volvo at \$30,000.00, which was what they paid for the car. The list price had been \$34,000.00, \$35,000.00 or \$36,000.00. They got a very good bargain on it and paying cash for it like they did may have helped with the purchase price as well. (R214) Wanda valued the 2001 Volvo at

\$25,000.00. Dan and Wanda valued the 1987 Volvo at \$2,500.00 and the 1997 Ford at \$13,000.00. Dan and Wanda agreed on the balances in Dan's checking account of \$10,746.00, Wanda's checking account of \$1,243.00, the joint savings account of \$7,422.00, the money market account of \$107,836.00, Dan's 401-k of \$317,000.00, Wanda's 401-k of \$44,387.00, Dan's IRA of \$629.00, Wanda's IRA of \$16,391.00, Dan's profit sharing of \$10,098.00 and the value of Wanda's partnership interest in Watkins, Ward and Stafford of \$12,044.00. (Exhibits P-5, D-14)

Dan made a lot of money the last three to five years. The stock market has been phenomenal. It's something that we have never seen in history. (R182) In the last three to five years the stock market was experiencing unprecedented growth. The NASDAQ went from trading around 1,000 to trading over 5,000. (R270-271) Dan's gross earnings in 1996 amounted to \$95,456.00. (R76) Dan's gross earnings in 1997 amounted to \$108,687.00. (R77) Dan's gross earnings in 1998 amounted to \$126,259.00. Dan's gross earnings in 1999 amounted to \$172,015.00. Dan's gross earnings in 2000 amounted to \$211,641.00. (R78) Dan's gross earnings in 2001 amounted to \$136,000.00. (R74)

A lot of Dan's income during these years came from bonuses. These bonuses were earned during the preceding year and paid the next year. Dan started getting these bonuses around 1996. Dan is not going to be entitled to a bonus in 2002. (R74-75) 1996, 1997, 1998, 1999, 2000 were the best years they have ever had in the market and Dan did get bonuses. (R78-79) In 2001 alone, Dan received bonuses totaling \$47,127.00, of which \$13,497.00 was a bonus for being a broker and \$33,630.00 was a bonus for being a manager. Dan's fiscal year ends in February. Dan's 2001 bonuses totaling \$47,127.00, were derived from what went on from March 1, 2000 until the end of February, 2001. (R179-180, Exh. D-3) Dan knows for certain he won't get a bonus in 2002. (R79)

At the time of trial, the market was bad. (R182) Wanda knew that the stock market had taken

a drastic turn for the worst the past year. Wanda also acknowledged that Dan's earning potential is tied in directly with the market. (R146) The NASDAQ went from trading over 5,000 to about 1,400. At the time of trial, the NASDAQ was struggling up to about 1,700. This downward spiral had occurred over the last year, but it really hit the industry hard in the last six or seven months. There are people literally wiped out. (R271) In Dan's business they are having massive lay-offs. (R182)

Dan's drinking was an issue with Wanda. (R93) Before Wanda was willing to let Dan return home, she partially conditioned his return on him seeking treatment for his drinking problem. (R96) Dan recognized that his drinking was a problem and decided to do something about it. (R95) Dan informed A. G. Edwards & Sons, Inc. that he was going into rehab, checking into COPAC. (R96) Dan went to COPAC on April 1 or April 2 of 2001. (R180) Dan stayed at COPAC for six weeks. He got released and returned to Columbus around the middle of May 2001. (R101) Dan attends AA meetings daily. (R16)

When Dan got back from COPAC, quite a bit of his clientele had left him. (R180) Dan lost 25 to 30 clients while he was away at COPAC. (R184) Wanda was aware that Dan had lost clients. In fact, while Dan was in COPAC, Wanda and the children took a vacation to Florida with a couple that closed their accounts with Dan. They were also clients of Wanda. (R146) Wanda knew of three mutual clients that she and Dan shared that have left Dan. Wanda acknowledged that losing clients adversely affects Dan's income. (R148)

Dan experienced a 40 percent drop in his production for 2001 in comparison with year 2000. His production information was supplied to him by his company on a Financial Consultant Production Profile document. (R183-184, Exh. P-1) Dan attributes the 40 percent drop in his production to the economic environment and the loss of clients. (R184) The entire branch office of A. G. Edwards & Sons, Inc. in Columbus, Mississippi where Dan works experienced a 33.45

percent drop in production in 2001 in comparison with year 2000. The document that reflects this information is the Branch Production Profile. Production is not profits. There are five brokers in this office. (R185, Exh. P-2) Dan attributes the 33.45 percent drop in the branch office's production to economic environment. His drop in production is higher because he has lost more clients than the other brokers in the office. (R186) The entire branch office of A. G. Edwards & Sons, Inc. in Columbus, Mississippi where Dan works experienced a 45 percent drop in profits for 2001 in comparison with year 2000. The document that reflects this information is the Profit and Loss Report. (R191-193, Exh. P-4)

Dan gets a bonus as a broker only if he reaches a certain level of production. The lowest level of production you have to reach to receive a broker's bonus is \$275,000.00. Dan's year to date production is \$164,000.00 with only two and one-half months left this fiscal year. (R186-188, Exh. P-3) Dan's broker bonus he received in 2001, for his production from March 1, 2000 until the end of February 2001 was \$13,497.00. (R179-180, Exh. D-3) Dan knows for certain he won't get a bonus in 2002. (R79)

Dan gets a manager's bonus only if the profit margin for this office reaches 14 percent or greater. The Profit and Loss Report reflects that the profit margin is only a little bit better than 10 percent. Dan is not going to receive a manager's bonus this year. (R188-193, Exh. P-4) Dan's manager bonus he received in 2001, based upon the profit margin from March 1, 2000 until the end of February 2001 was \$33,630.00. (R179-180, Exh. D-3)

Dan's gross earnings in 2001 amounted to \$136,000.00. (R74) This included bonuses he was paid in 2001 which amounted to \$47,000.00. (R179) Dan's deductions for 2001 amounted to \$57,000.00. (R39, Exh. D-3) Subtracting the bonuses and deductions from his gross earnings leaves Dan with net income of \$32,000.00 for 2001.

Dan's average monthly gross income for the past 8 months since he has been back from rehab, excluding one isolated event in August or September, is approximately \$4,791.00. Based on the \$4,791.00, Dan's average monthly adjusted gross income is \$3,111.00. Based on the \$4,791.00, Dan's average monthly net income is \$1,774.73. Dan's monthly living expenses are \$3,565.00. (R33-34, 175, 194, Exh. D-2) In regards to the one isolated event, Dan's gross income for August was approximately \$15,000.00. In August, Dan had a single trade involving two and one half million dollars from which he received a \$10,000.00 commission. This was a one time event that he can't depend on coming along and may never come along again. Subtracting the \$10,000.00 commission from the \$15,000.00 leaves a gross income for August of \$5,000.00. (R176) The last time Dan had a trade of this size was in January of 1991 almost 11 years ago. (R272)

Dan's monthly gross income, for each month that he has been back from rehab, starting with May of 2001, the month he returned from rehab, was \$3,624.03. June's gross income was \$5,128.00. For July his gross income was \$6,107.17. August's gross income was \$3,741.50. September's gross income was \$15,011.11, which included the \$10,000.00 commission he received from that one isolated transaction. For October his gross income was \$4,946.09. November's gross income was \$7,857.23 and December's gross income was \$4,861.43. (R176-178, Exh. D-3)

Dan testified that the only true and accurate way to calculate his future monthly income is to look at what the real numbers reflect while the market is in this current economic condition. (R271) Even if the market comes back, Dan fears that he won't because you've got to have a good environment and a large, affluent client base, which he has lost. He hopes to replace these clients, but is limited because there are not a lot of people in Columbus with money to invest. (R272)

Wanda's gross monthly income was \$6,112.00. Her net was \$3,245.00. She testified her monthly living expenses were \$8,359.00. (Exhibit D-13) Wanda is requesting \$1,500.00 a month

in child support and \$2,500.00 a month in alimony. She is willing to accept the \$4,000.00 a month even though it will leave her over \$1,000.00 in the hole each month. (R133-134)

Wanda had a lot of expenses in November of 2001 that were not recurring expenses or that did not come up very often. She had car insurance due on both her vehicle and the vehicle the children drive. The house interest was coming due. Her life insurance, which is paid annually, was due and her car tag was due. Dan was willing to help her out if she needed any money from him that month. Wanda waited until all of the bills came in so she could see how short she was going to be and informed Dan she did need some money from him that month. Dan wanted a breakdown of how she spent her money each month so Wanda gave him a breakdown. Dan wanted further clarification of her expenses so Wanda gave him an additional breakdown of where she was spending her money. Dan wanted to know how much money she needed from him and Wanda said she needed \$600.00 from him to make it through the month. (R107-108, 263) Wanda's monthly net income from August through November 2001 of \$2,318.00 was \$927.00 less than her December 2001 net income of \$3,245.00. (Exhibits D-11, D-12, D-13)

Wanda testified that she did not have to go to the money market account, savings account or any other account to meet her monthly bills. (R135-136) Wanda testified that from June 2001 until the day of trial that she had charged items on credit cards and incurred other debts totaling \$6,630.00. (R136-138, Exh. D-13) Wanda testified that from June 2001 until the day of trial that Dan had only given her \$4,000.00 worth of support. June through December is 7 months. Dividing 7 into \$4,000.00 equals approximately \$570.00 a month. On average, Dan gave her \$570.00 per month. (R138) When you divide 7 into \$6,630.00, which is the total of bills she had incurred and not paid over those 7 months, you get \$990.00. Adding the \$570.00 and the \$990.00 together equals \$1,560.00. (R139) Wanda testified that she had been able to meet her monthly expenses for the past

7 months with approximately \$1,560.00 each month from these other two sources. (R140, 142-143)  
Wanda's monthly net income from August through November 2001 of \$2,318.00 was \$927.00 less than her December 2001 net income of \$3,245.00. (Exhibits D-11, D12, D-13)

### **SUMMARY OF THE ARGUMENT**

Dan's arguments pertain to financial matters. First of all, he feels that the award of alimony to Wanda, in combination with the amount of the award of child support and other financial responsibilities placed upon him by the Court below are excessive, leaving him without sufficient funds with which to provide himself a decent standard of living especially when you take into consideration the distribution of the marital assets.

Dan also feels that the Chancellor miscalculated his income, which caused the Chancellor to incorrectly determine that he was financially able to pay alimony. Dan also feels that the Chancellor miscalculated Wanda's monthly expenses, which caused the Chancellor to overestimate her true needs. Dan also feels that the Supreme Court sent this case back to determine if lump sum alimony was appropriate not periodic alimony.

Dan feels that the above constitutes an abuse of the Chancellor's discretion, was against the overwhelming weight of the evidence and was clear and manifest error.

### **ARGUMENT**

**I. THE CHANCELLOR'S DECISION TO AWARD ALIMONY WAS MANIFEST ERROR, AN ABUSE OF HIS DISCRETION AND WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE WHEN CONSIDERED WITH THE EQUITABLE DISTRIBUTION, AWARD OF CHILD SUPPORT, OTHER SUPPORT AWARDS AND THE ENTIRETY OF THE RECORD**

Dan was ordered to pay unto Wanda child support in the sum of \$400.00 per child per month, for a total of \$1,200.00 per month, beginning on March 1, 2002, and a like sum on the first day of each month thereafter. Dan was ordered to continue to provide health insurance coverage for each



child, for so long as he is obligated to pay child support for that child, and was ordered to bear the cost of any deductible and 65% of the cost of medical, dental or other health related expenses for each child that is not covered by insurance, and Wanda 35% of said expenses. The Court found that the parties had previously established separate accounts for the children's education and appointed Wanda as the sole custodian of these accounts and she is permitted to use those funds for any college expenses. After those funds are consumed, the Court ordered Dan to pay 65% of all additional sums required for the children's college related expenses (tuition, books, room and board) and ordered Wanda to pay 35% of all of such additional sums, provided the children demonstrate an aptitude for college and diligently pursue a college education. So long as Dan's child support or college expense obligations shall be effective, he was ordered to maintain life insurance on his life in an amount not less than \$50,000 for each child with the children or child named as beneficiaries.

Wanda was awarded the following property:

<u>Asset</u>	<u>Value</u>
Residence house and lot, with Wanda to pay the remaining mortgage of \$78,000.00	\$315,000.00
Furnishings, except those hereinafter awarded to Dan	12,700.00
2001 Volvo	27,500.00
1987 Volvo	2,500.00
Her jewelry	3,500.00
Checking account (Wanda)	1,243.00
Savings (joint)	90,258.00
IRA (Wanda)	16,391.00
401(k) (Wanda)	44,387.00
Watkins, Ward & Stafford (Wanda)	12,044.00
Along with the mortgage debt, Wanda shall be responsible for her outstanding accounts of	6,333.00
and her partnership loan of	17,447.00

Wanda received marital assets with a value of \$525,523.00 and a net value of \$423,446.00.

Dan was awarded the following property:

<u>Asset</u>	<u>Value</u>
1997 Ford	13,000.00
Gun, boat, 4 wheeler, golf clubs, smoker, hunting & fishing equipment	3,465.00
Checking account (Dan)	10,746.00
Savings (joint)	25,000.00
401(k) (Dan)	317,000.00
IRA (Dan)	629.00
Profit sharing (Dan)	10,098.00
Bed, mattress & box springs, dining room table & chairs & the upstairs den couch	2,300.00

Dan received marital assets with a net value of \$382,238.00.

Dan was ordered to pay Wanda periodic alimony in the sum of \$750.00 per month. Judge Gore decided this case on February 15, 2002, and directed that the alimony he ordered begin on March 1, 2002. With this Court's award, Wanda is entitled to accrued alimony through July 1, 2006 of \$39,750.00. The Court does not believe it is just to require Dan to pay all the alimony arrears at one time, but it is appropriate that a portion of the alimony arrears be paid over time. Wanda is awarded a judgment against Dan for \$39,750.00 for alimony in arrears. Execution or other process is stayed so long as Dan shall pay \$500.00 per month on the arrearage. The Court believes, as shown by the Court of Appeals and the Supreme Court decisions, that Dan had an arguable basis for his appeal and therefore no interest is awarded. Payments of current alimony and on the judgment shall begin on July 1, 2006, and shall continue on the first day of each month and continue until the remarriage of Wanda or the death of either party. In addition, so long as Dan's alimony obligations shall be effective, he was ordered to maintain life insurance on his life in an amount no less than \$100,000 with Wanda as beneficiary.

In awarding alimony, the following factors must be considered:

(1) The income and expenses of the parties; (2) the health and earning capacities of the parties; (3) the needs of each party; (4) the obligations and assets of each party; (5) the length of the marriage; (6) the presence or absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide, child care; (7) the age of the parties; (8) the standard of living of the parties, both during the marriage and at the time of the support determination; (9) the tax consequences of the spousal support order; (10) fault or misconduct; (11) wasteful dissipation of assets by either party; or (12) any other factor deemed by the Court to be “just and equitable” in connection with the setting of spousal support. Armstrong v. Armstrong, 618 So.2d 1278, 1280 (Miss. 1993).

**1. Income and expenses of the parties.** At the time of trial, December of 2001, Wanda’s monthly gross income from her partnership in the accounting firm of Watkins, Ward & Stafford was \$6,112.00. Her net was \$3,245.00 per month. Wanda is guaranteed her salary each month which is a guaranteed payment to partner and is guaranteed a bonus every year. Wanda is withholding taxes from her salary at the tax rate of 46%. As branch manager and broker with the stock brokerage firm of A. G. Edwards & Sons, Dan is not guaranteed any income. Dan’s income fluctuates. Dan’s average monthly gross income for 2001, excluding the 2 ½ million dollar trade, from which he received a \$10,000.00 commission, was \$6,690.00. (A trade of that size has only happened to Dan once before and that was over 10 years ago.) Dan’s average monthly adjusted gross income for 2001 was \$4,843.00. Dan is withholding taxes from his salary at an average tax rate of 22%.

**2. The health and earning capacities of the parties.** Wanda is 43 and is in good health. Wanda is a partner in the accounting firm of Watkins, Ward & Stafford. As a partner, her future is secure and her income and partnership interest will continue to grow. Dan is 42 years old and is in fair health. Dan made a lot of money during the previous five years before this case went to trial in

2001. The stock market had been phenomenal. It was something that we had never seen before in the history of the stock market. In the last five years, prior to 2001, the stock market was experiencing unprecedented growth. The NASDAQ went from trading around 1,000 to trading over 5,000. However, at the time of trial in 2001, the stock market was crashing. At trial, Wanda even testified that she knew the stock market had taken a drastic turn for the worst in 2001. Wanda also acknowledged that Dan's earning potential is tied in directly with the stock market. The NASDAQ went from trading over 5,000 to about 1,400. This downward spiral had occurred during 2001. There are people literally wiped out. Brokerage firms were having massive lay-offs.

Dan experienced a 40% drop in his production for 2001 in comparison with 2000. His production information was supplied to him by his company on a Financial Consultant Production Profile document. Dan attributes the 40% drop in his production to the economic environment and the loss of clients. The entire branch office of A. G. Edwards & Sons, Inc. in Columbus, Mississippi where Dan works experienced a 33.45% drop in production in 2001 in comparison with 2000. The document that reflects this information is the Branch Production Profile. There are five brokers in this office. Dan attributes the 33.45% drop in the branch office's production to the economic environment and the loss of clients. Dan's drop in production is slightly higher because he has lost more clients than the other brokers in the office. The entire branch office of A. G. Edwards & Sons, Inc. in Columbus, Mississippi where Dan works experienced a 45% drop in profits for 2001 in comparison with 2000. The document that reflects this information is the Profit and Loss Report.

Dan gets a bonus as a broker only if he reaches a certain level of production. The lowest level of production you have to reach to receive a broker's bonus is \$275,000.00. Dan's year to date production is \$164,000.00 with only 2 ½ months left this fiscal year. Dan's broker bonus he received in 2001, for his production from March 1, 2000 until the end of February 2001 was

\$13,497.00. Dan knows for certain he won't get a bonus in 2002 because his production in 2001 is over \$100,000.00 lower than what it was in 2000.

Dan gets a manager's bonus only if the profit margin for this office reaches 14% or greater. The Profit and Loss Report reflects that the profit margin is only a little bit better than 10%. Dan is not going to receive a manager's bonus this year. Dan's manager bonus he received in 2001, based upon the profit margin from March 1, 2000 until the end of February 2001 was \$33,630.00.

It is reasonable to use income averaging when all of the conditions remain constant. However, in this case you have a stock broker whose income and earning potential are tied in directly with the stock market and the condition of the stock market is not under Dan's control. For the first 5 years of the 6 years referred to by the Court, the stock market was experiencing unprecedented growth. Over these first 5 years, the NASDAQ went from trading around 1,000 to trading over 5,000. This type of growth was something that had never been seen before in the history of the stock market. If the conditions that had existed over these 5 years were the same conditions that existed during the sixth year, the year this case went to trial, (2001), then averaging and using Dan's income from the previous year upon which to determine his financial ability or lack thereof to pay alimony would be fair and reasonable. However, the conditions that existed during the sixth year, the year this case went to trial, (2001), were not the conditions that existed during the preceding 5 years. The stock market crashed that sixth year (2001). In one year, this sixth year, (2001), the NASDAQ went from trading over 5,000 to about 1,400. The crash was literally wiping people out. Stock brokerage firms were having massive lay-offs. According to a Financial Consultant Production Profile document generated by Dan's employer, A. G. Edwards & Sons, Inc., which was introduced into evidence, Dan's production for 2001 dropped 40% from what his production was in 2000. This document standing alone might not be enough to prove an unpreventable drop in production and that

is why a Branch Production Profile document generated by Dan's employer, A. G. Edwards & Sons, Inc., was also introduced into evidence. This document showed that the entire branch office of A. G. Edwards & Sons, Inc. experienced a 33.45% drop in production in 2001 from what it was in 2000. And if that was not enough to prove Dan's drop in production was in no way attributable to anything done intentionally by Dan, a Profit and Loss Report generated by A. G. Edwards & Sons, Inc., was introduced into evidence which showed that the entire branch office of A. G. Edwards & Sons, Inc. experienced a 45% drop in profits for 2001 from what profits had been in 2000.

Over 1/3 of Dan's annual gross income over each of those first 5 years was made up of bonuses. These bonuses are calculated using production figures and profits during the preceding year and then paid the next year. A. G. Edwards & Sons, Inc.'s fiscal year ends in February. In March and April of 2001, Dan received bonuses totaling \$47,127.00, which is over 1/3 of Dan's gross income for 2001, which was \$136,010.69. Dan's 2001 bonuses of \$47,127.00, were calculated from the production and profits generated from March 1, 2000 until February 28, 2001. Dan will not be receiving bonuses in 2002 for his production and profits generated from March 1, 2001 until February 28, 2002, because of his 40% drop in production during this time period and because of the 45% drop in profits during this same time period. Therefore, over 1/3 of Dan's annual gross income that he had been receiving over the previous 5 years is gone. Not only is his income reduced by not receiving these bonuses, but production and profits are down 40% and 45% respectively, thereby reducing his income by that much more.

The Trial Court found that Dan had \$3,065.00 a month from which to pay alimony calculated as follows:

\$136,000.00 average income (Which includes the \$47,127.00 in bonuses.)
- 44,463.00 taxes
\$ 91,567.00 ÷ 12 = \$ 7,630.00

\$7,630.00 net income  
 - 3,365.00 projected expenses  
 - 1,200.00 child support  
 \$ 3,065.00

The Trial Court erroneously included \$47,127.00 in bonuses in its calculations of average income which the evidence clearly shows Dan will not be receiving in 2002. Further, the evidence clearly shows that Dan will not be receiving bonuses for years to come.

\$136,000.00 Previous years income	\$44,463.00 taxes
- 47,000.00 Bonuses Dan will not receive in 2002	-17,376.00 taxes generated by the
- 10,000.00 The commission off of a single trade	bonuses
of 2 ½ million dollars in Sept. of 2001,	<del>10,000.00</del> taxes generated by the
which has happened to Dan only 1 time	10,000.00 commission
before in his career as a stock broker &	\$24,087.00 taxes
that was over 10 years ago	
- <u>24,000.00</u> taxes	
\$55,000.00 Average income calculated under current conditions	

$\$55,000.00 \div 12 = \$4,583.00$  (Instead of the \$7,630.00 the Trial Court calculated.)

\$4,583.00 net income  
 - 3,365.00 projected expenses  
 - 1,200.00 child support  
 \$ 18.00

Remember, the alimony and all of the other financial obligations ordered to be paid by Dan will start in 2002, a year in which he will not be receiving bonuses in any amount and where he will be working in a very depressed market where production and profits are down 40% and 45% respectively.

**3. The needs of each party.** Dan's monthly living expenses at the time of trial totaled \$3,365.00. Dan and Wanda separated in February of 2001 and have been separated continuously since that time. At the time of trial, December of 2001, Wanda's monthly gross income from her partnership in the accounting firm of Watkins, Ward & Stafford was \$6,112.00. Her net income was \$3,245.00 per month. Wanda is guaranteed her salary each month which is a guaranteed payment

to partner and is guaranteed a bonus every year. Wanda is withholding taxes from her salary at the tax rate of 46%. Dan is withholding taxes from his salary at an average tax rate of 22%.

Wanda testified and her original 8.05 financial statement showed that from May of 2001 through November of 2001, Wanda's monthly gross income was \$5,229.00. Her monthly net income from May of 2001 through November of 2001 was \$2,318.00. Wanda testified and her original 8.05 financial statement showed that she had monthly living expenses from May of 2001 through November of 2001 of \$7,431.00. This left Wanda with a net monthly need of \$5,113.00.

Net monthly living expenses (May-November of 2001)	\$ 7,431.00
Net monthly income (May-November of 2001)	- <u>2,318.00</u>
Net monthly need (May-November of 2001)	\$5,113.00
Net monthly need in May of 2001	\$5,113.00
Net monthly need in June of 2001	\$5,113.00
Net monthly need in July of 2001	\$5,113.00
Net monthly need in August of 2001	\$5,113.00
Net monthly need in September of 2001	\$5,113.00
Net monthly need in October of 2001	\$5,113.00
Net monthly need in November of 2001	<u>\$5,113.00</u>
Total	\$35,791.00

Wanda testified and her amended 8.05 financial statement dated December 14, 2001 showed that in December of 2001 Wanda's monthly gross income was \$6,112.00. Her monthly net income in December of 2001 was \$3,245.00. Wanda testified and her amended 8.05 financial statement dated December 14, 2001 showed that in December of 2001 she had monthly living expenses of \$8,359.00. This left Wanda with a net monthly need of \$5,114.00.

Net monthly living expenses (December of 2001)	\$8,359.00
Net monthly income (December of 2001)	- <u>3,245.00</u>
Net monthly need (December of 2001)	\$5,114.00

This case was tried on December 17<sup>th</sup> and 18<sup>th</sup>, 2001. Where is the \$35,791.00 debt Wanda would have had to incur from May of 2001 until the trial date if her net monthly need was \$5,113.00



each month as she testified? Wanda testified and her amended 8.05 financial statement dated December 14, 2001 listed only 3 debts.

1.) Marital home mortgage	\$78,000.00
2.) Wanda's partnership buy-in	\$17,447.00
3.) Accounts	\$ 6,630.00

The \$6,630.00 consisted of the following:

1.) Country Club	\$ 680.00
2.) House interest	\$ 1,429.00
3.) BP Visa	\$ 255.00
4.) Miller Tire	\$ 16.00
5.) Johnson	\$ 42.00
6.) David Curtis	\$ 1,507.00
7.) McRae's	\$ 1,119.00
8.) Visa	\$ 2,581.00
Total	\$ 6,630.00

Alleged net monthly need (May-November 2001)	\$ 35,791.00
Accrued debt (May-November 2001)	<u>- 6,630.00</u>
	\$ 29,161.00

Wanda testified that from May of 2001 through the first day of trial, December 17, 2001, that Dan had only given her \$4,000.00.

Alleged net monthly need (May-November 2001)	\$ 35,791.00
Accrued debt (May-November 2001)	- 6,630.00
Dan's financial support to Wanda	<u>- 4,000.00</u>
(May-December 17, 2001)	\$ 25,161.00

Where is this \$25,161.00 debt Wanda would have had to incur from May of 2001 until the trial date if her net monthly need was \$5,113.00 each month as she testified. Wanda reluctantly admitted on cross-examination that she did not have to withdraw any money from their investments or from any other sources, from May of 2001 through the trial date of December 17, 2001 in order to pay her monthly expenses. Wanda testified that her salary, Dan's \$4,000.00 he gave her from May of 2001 through November of 2001 and the \$6,630.00 debt she accumulated from May of 2001 through November of 2001 paid all of her monthly expenses from May of 2001 through the trial date

of December 17, 2001.

How could she argue with her own records? She couldn't and she didn't. She is after all a partner in an accounting firm and these were her own records.

Wanda's net monthly income	\$ 3,245.00	
Dan's financial support to Wanda (May 2001-November 2001) (\$4,000.00 ÷ 7 = \$571.42)	+ 570.00	
Accrued debt (May 2001 -November 2001) (\$6,630.00 ÷ 7 = \$947.14)	+ <u>945.00</u>	
	\$ 4,760.00	Wanda's true monthly living expenses
Wanda's true monthly living expenses	\$ 4,760.00	
Wanda's net monthly income (taxes deducted at the rate of 46%)	- <u>3,245.00</u>	
	\$ 1,515.00	
Dan's payment of child support	- <u>1,200.00</u>	
Net monthly need	\$ 315.00	

4. **The obligations and assets of each party.** Dan's average monthly gross income for 2001, excluding the 2 ½ million dollar trade from which he received a \$10,000.00 commission, was \$6,690.00. (A trade of that size has only happened to Dan once before and that was over 10 years ago.) Dan's average monthly adjusted gross income for 2001 was \$4,843.00. Dan's monthly living expenses totaled \$3,365.00. Yet Dan was ordered to pay \$750.00 in periodic alimony, a \$500.00 payment on the alimony arrearage of \$39,750.00 and \$1,200.00 in child support each month for a total of \$2,450.00 of support to Wanda per month.

\$ 4,843.00 monthly adjusted gross income
- <u>3,365.00</u> projected expenses
\$ 1,478.00
- <u>1,200.00</u> child support
\$ 278.00

Further, Dan is ordered to pay and provide the health insurance coverage for the children and ordered

to pay all deductibles and 65% of the cost of medical, dental or other health related expenses for each child that is not covered by insurance. Further, after the education funds set up by the parties for their children are consumed, Dan is ordered to pay 65% of all additional sums required for the children's college related expenses. Further, for as long as Dan's child support or college expense obligations shall be effective, Dan was ordered to maintain life insurance on his life in an amount not less than \$50,000.00 for each child with the children or child named as beneficiaries. In addition, so long as Dan's alimony obligations shall be effective, Dan was ordered to maintain life insurance on his life in an amount no less than \$100,000.00 with Wanda as beneficiary.

Dan has his truck worth \$13,000.00, a few personal items valued at \$3,465.00, a checking account with a balance of \$10,746.00, savings of \$25,000.00, a 401-k with \$317,000.00, an IRA worth \$629.00, a profit sharing plan with a balance of \$10,098.00, and furnishings totaling \$2,300.00. Giving Dan marital assets with a net value of \$382,238.00.

Wanda has a \$78,000.00 mortgage, a note with Watkins, Ward & Stafford of \$17,447.00, approximately ten percent of which is paid annually by her firm holding it out of her year end bonus, and charge accounts of \$6,630.00. Wanda has the house valued at \$315,000.00, furnishings of \$12,700.00, a 2001 Volvo worth \$27,500.00, a 1987 Volvo worth \$2,500.00, jewelry worth \$3,500.00, her checking account with a balance of \$1,243.00, savings of \$90,258.00, an IRA worth \$16,391.00, a 401-k with \$44,387.00 and her partnership interest in Watkins, Ward & Stafford of \$12,044.00. Giving Wanda marital assets with a net value of \$423,446.00.

"If there are sufficient marital assets which, when equitably divided and considered with each spouse's non-marital assets, will adequately provide for both parties, no more need be done."

Johnson v. Johnson, 650 So.2d 1281, 1287 ( Miss. 1995.)

**5. The length of the marriage.** Nineteen (19) years.

in an old, one bedroom carriage house with no heat. On the other hand, Wanda's standard of living never changed after Dan left the marital home in February of 2001. She never testified that she had to alter a single aspect of her life after Dan left. She continued to live in the manner to which she had become accustomed while Dan was still in the marital home. She maintained her membership at the local country club for herself and the children, she was able to pay for and remain in the marital home with the children, she and the children drove the same vehicles, she still sent the children to private schools, took a vacation to Florida with the children and she fed and clothed herself and the children.

9. **The tax consequences of the spousal support order.** Alimony is taxable to Wanda and tax deductible to Dan.

10. **Fault or misconduct.** The Court found that Dan was at fault in the breakup of the marriage.

11. **Wasteful dissipation of assets by either party.** Neither party committed waste of the marital assets during the marriage.

12. **Any other factor deemed by the Court to be "just and equitable" in connection with the setting of spousal support.** In making a determination as to an award of periodic alimony, the Chancellor has a duty to not only consider the above referenced factors, but also was required to consider Dan's needs to continue to lead a reasonably comfortable post-divorce life in fashioning its relief. Dunaway v. Dunaway, 749 So.2d 1112 (Miss. 1999); Gray v. Gray, 562 So.2d 79, 83 (Miss. 1990). Two of the important considerations in the award of periodic alimony are the earning capacity of the husband and his necessary living expenses. Crowe v. Crowe, 641 So.2d 1100, 1102 (Miss. 1994).

In Mississippi, alimony should be awarded to the wife in accordance with her needs with

consideration being given to the ability of the husband to make the payments. Dudley v. Light, 586 So.2d 155, 161 (Miss. 1991); Brendel v. Brendel, 566 So.2d 1269, 1272 (Miss. 1990). The alimony awarded to Wanda clearly exceeds her needs and exceeds Dan's ability to pay.

Alimony is not a punishment and should not be so used. Taylor v. Taylor, 348 So.2d 1341, 1344 (Miss. 1977). It appears however, from the heavy financial burden placed upon Dan, as compared to Wanda's reasonable needs, that the alimony awarded by the Chancellor is, in fact, punitive in nature.

In Tilley v. Tilley, 610 So.2d 348 (Miss. 1992), this Court found that the Chancellor abused his discretion in ordering the appellant to pay aggregate monthly support beyond his means. Dan has demonstrated that he cannot pay the alimony, household obligations, child support and other financial obligations placed upon him by the Court below, and still maintain a reasonable standard of living. See Duncan v. Duncan, 815 So.2d 480, 484 (Miss. App. 2002).

For the reasons set forth above, Dan believes that both the award of alimony and the imposition of the other financial responsibilities placed upon him by the Court below obligate him to pay aggregate monthly support well beyond his means. As such, the award of alimony was an abuse of the Court below's discretion, constitutes manifest error, was against the overwhelming weight of the evidence and should be reversed and rendered.

## **II. THE CHANCERY COURT WAS MANIFESTLY WRONG AND CLEARLY ERRONEOUS IN CALCULATING THE INCOME OF THE APPELLANT WHICH SERVED AS THE MAJOR BASIS FOR THE AWARD OF ALIMONY.**

Dan is a stock broker with a fluctuating income. A Chancellor may use income averaging for fluctuating income. Burge v. Burge, 851 So.2d 384 (Miss. Ct. App. 2003). However, income averaging is only appropriate where the conditions that existed in the past are going to be the conditions that exist in the future. One of the reasons for income averaging is to keep someone from

level of production you have to reach to receive a broker's bonus is \$275,000.00. Dan's year to date production is \$164,000.00 with only 2 ½ months left this fiscal year. Dan's broker bonus he received in 2001, for his production from March 1, 2000 until the end of February 2001 was \$13,497.00. Dan knows for certain he won't get a bonus in 2002 because his production in 2001 is over \$100,000.00 lower than what it was in 2000.

Dan gets a manager's bonus only if the profit margin for this office reaches 14% or greater. The Profit and Loss Report reflects that the profit margin is only a little bit better than 10%. Dan is not going to receive a manager's bonus this year. Dan's manager bonus he received in 2001, based upon the profit margin from March 1, 2000 until the end of February 2001 was \$33,630.00.

It is reasonable to use income averaging when all of the conditions remain constant. However, in this case you have a stock broker whose income and earning potential are tied in directly with the stock market and the condition of the stock market is not under Dan's control. For the first 5 years of the 6 years referred to by the Court, the stock market was experiencing unprecedented growth. Over these first 5 years, the NASDAQ went from trading around 1,000 to trading over 5,000. This type of growth was something that had never been seen before in the history of the stock market. If the conditions that had existed over these 5 years were the same conditions that existed during the sixth year, the year this case went to trial, (2001), then averaging and using Dan's income from the previous year upon which to determine his financial ability or lack thereof to pay alimony would be fair and reasonable. However, the conditions that existed during the sixth year, the year this case went to trial, (2001), were not the conditions that existed during the preceding 5 years. The stock market crashed that sixth year (2001). In one year, this sixth year, (2001), the NASDAQ went from trading over 5,000 to about 1,400. The crash was literally wiping people out. Stock brokerage firms were having massive lay-offs. According to a Financial Consultant Production Profile

document generated by Dan's employer, A. G. Edwards & Sons, Inc., which was introduced into evidence, Dan's production for 2001 dropped 40% from what his production was in 2000. This document standing alone might not be enough to prove an unpreventable drop in production and that is why a Branch Production Profile document generated by Dan's employer, A. G. Edwards & Sons, Inc., was also introduced into evidence. This document showed that the entire branch office of A. G. Edwards & Sons, Inc. experienced a 33.45% drop in production in 2001 from what it was in 2000. And if that was not enough to prove Dan's drop in production was in no way attributable to anything done intentionally by Dan, a Profit and Loss Report generated by A. G. Edwards & Sons, Inc., was introduced into evidence which showed that the entire branch office of A. G. Edwards & Sons, Inc. experienced a 45% drop in profits for 2001 from what profits had been in 2000.

Over 1/3 of Dan's annual gross income over each of those first 5 years was made up of bonuses. These bonuses are calculated using production figures and profits during the preceding year and then paid the next year. A. G. Edwards & Sons, Inc.'s fiscal year ends in February. In March and April of 2001, Dan received bonuses totaling \$47,127.00, which is over 1/3 of Dan's gross income for 2001, which was \$136,010.69. Dan's 2001 bonuses of \$47,127.00, were calculated from the production and profits generated from March 1, 2000 until February 28, 2001. Dan will not be receiving bonuses in 2002 for his production and profits generated from March 1, 2001 until February 28, 2002, because of his 40% drop in production during this time period and because of the 45% drop in profits during this same time period. Therefore, over 1/3 of Dan's annual gross income that he had been receiving over the previous 5 years is gone. Not only is his income reduced by not receiving these bonuses, but production and profits are down 40% and 45% respectively, thereby reducing his income by that much more.

The Trial Court found that Dan had \$3,065.00 a month from which to pay alimony calculated

as follows:

\$136,000.00 average income (Which includes the \$47,127.00 in bonuses.)  
- 44,463.00 taxes  
\$ 91,567.00 ÷ 12 = \$ 7,630.00

\$7,630.00 net income  
- 3,365.00 projected expenses  
- 1,200.00 child support  
\$ 3,065.00

The Trial Court erroneously included \$47,127.00 in bonuses in its calculations of average income which the evidence clearly shows Dan will not be receiving in 2002. Further, the evidence clearly shows that Dan will not be receiving bonuses for years to come.

\$136,000.00 Previous years income	\$44,463.00 taxes
- 47,000.00 Bonuses Dan will not receive in 2002	-17,376.00 taxes generated by the
- 10,000.00 The commission off of a single trade	bonuses
of 2 ½ million dollars in Sept. of 2001,	- <u>3,000.00</u> taxes generated by the
which has happened to Dan only 1 time	10,000.00 commission
before in his career as a stock broker &	\$24,087.00 taxes
that was over 10 years ago	
- <u>24,000.00</u> taxes	
\$55,000.00 Average income calculated under current conditions	

\$55,000.00 ÷ 12 = \$4,583.00 (Instead of the \$7,630.00 the Trial Court calculated.)

\$4,583.00 net income  
- 3,365.00 projected expenses  
- 1,200.00 child support  
\$ 18.00

Remember, the alimony and all of the other financial obligations ordered to be paid by Dan will start in 2002, a year in which he will not be receiving bonuses in any amount and where he will be working in a very depressed market where production and profits are down 40% and 45% respectively.

This case went to trial on December 17<sup>th</sup> and 18<sup>th</sup>, 2001 so we can actually see what Dan's earnings were in 2001 on a month by month basis and see what he has available to pay. According



- <u>347.46</u>	additional withholdings excluding retirement
\$2,174.25	

There is not enough left to pay child support of \$1,200.00, the alimony of \$750.00 and the \$500.00 payment on the alimony arrearage. And don't forget, Dan was also Court ordered to pay the cost of any deductible for the health insurance on the children, 65% of all uncovered medical, dental or other health related expenses for each child and 65% of all college expenses for each child after each child's college fund was exhausted.

Dan's monthly gross income on October 10, 2001, was \$4,946.09. After subtracting just taxes of \$1,023.57, Dan's monthly adjusted gross income (net income) that he received on October 10, 2001 was \$3,922.52. (However, in addition to taxes, Dan has a total of \$347.46 withheld each month from his paycheck which does not include his retirement withholding, but includes the health insurance on the children, life insurance, etc...) Yet by the Chancellor's calculations, Dan's monthly adjusted gross income (net income) should have been \$7,630.00.

\$3,922.52	net income
<u>-3,365.00</u>	projected expenses
\$ 557.52	
- <u>347.46</u>	additional withholdings excluding retirement
\$ 210.06	

There is not even enough left to pay child support of \$1,200.00, much less the alimony of \$750.00 and the \$500.00 payment on the alimony arrearage. And don't forget, Dan was also Court ordered to pay the cost of any deductible for the health insurance on the children, 65% of all uncovered medical, dental or other health related expenses for each child and 65% of all college expenses for each child after each child's college fund was exhausted.

Dan's monthly gross income on September 10, 2001, was \$15,011.11. However, this included a \$10,000.00 commission from a single trade involving 2 ½ million dollars. The last time

Dan had a trade of this size was in January of 1991 over 10 years ago. Therefore, in trying to compile an accurate picture of Dan's income and his earning potential over the next few years, the commission off of this single trade should not be included in these calculations. Therefore, Dan's monthly gross income on September 10, 2001 was \$5,011.11. After subtracting just taxes of \$1,490.98, Dan's monthly adjusted gross income (net income) that he received on September 10, 2001 was \$3,520.13. (However, in addition to taxes, Dan has a total of \$347.46 withheld each month from his paycheck which does not include his retirement withholding, but includes the health insurance on the children, life insurance, etc...) Yet by the Chancellor's calculations, Dan's monthly adjusted gross income (net income) should have been \$7,630.00.

\$3,520.13	net income
<u>-3,365.00</u>	projected expenses
\$ 155.13	
<u>- 347.46</u>	additional withholdings excluding retirement
-( \$192.33)	

There is nothing left to pay child support of \$1,200.00, much less the alimony of \$750.00 and the \$500.00 payment on the alimony arrearage. And don't forget, Dan was also Court ordered to pay the cost of any deductible for the health insurance on the children, 65% of all uncovered medical, dental or other health related expenses for each child and 65% of all college expenses for each child after each child's college fund was exhausted.

Dan's monthly gross income on August 10, 2001, was \$3,741.50. After subtracting just taxes of \$651.47, Dan's monthly adjusted gross income (net income) that he received on August 10, 2001 was \$3,090.03. (However, in addition to taxes, Dan has a total of \$347.46 withheld each month from his paycheck which does not include his retirement withholding, but includes the health insurance on the children, life insurance, etc...) Yet by the Chancellor's calculations, Dan's monthly adjusted gross income (net income) should have been \$7,630.00.

\$3,090.03	net income
<u>-3,365.00</u>	projected expenses
-( <u>\$274.97</u> )	
- 347.46	additional withholdings excluding retirement
-( <u>\$622.43</u> )	

There is nothing left to pay child support of \$1,200.00, much less the alimony of \$750.00 and the \$500.00 payment on the alimony arrearage. And don't forget, Dan was also Court ordered to pay the cost of any deductible for the health insurance on the children, 65% of all uncovered medical, dental or other health related expenses for each child and 65% of all college expenses for each child after each child's college fund was exhausted.

Dan's monthly gross income on July 10, 2001, was \$6,107.17. After subtracting just taxes of \$1,382.22, Dan's monthly adjusted gross income (net income) that he received on July 10, 2001 was \$4,724.95. (However, in addition to taxes, Dan has a total of \$347.46 withheld each month from his paycheck which does not include his retirement withholding, but includes the health insurance on the children, life insurance, etc...) Yet by the Chancellor's calculations, Dan's monthly adjusted gross income (net income) should have been \$7,630.00.

\$4,724.95	net income
<u>-3,365.00</u>	projected expenses
\$1,359.95	
- 347.46	additional withholdings excluding retirement
\$1,012.49	

There is not even enough left to pay child support of \$1,200.00, much less the alimony of \$750.00 and the \$500.00 payment on the alimony arrearage. And don't forget, Dan was also Court ordered to pay the cost of any deductible for the health insurance on the children, 65% of all uncovered medical, dental or other health related expenses for each child and 65% of all college expenses for each child after each child's college fund was exhausted.

Dan's monthly gross income on June 8, 2001, was \$5,128.33. After subtracting just taxes of \$1,098.56, Dan's monthly adjusted gross income (net income) that he received on June 8, 2001 was \$4029.77. (However, in addition to taxes, Dan has a total of \$347.46 withheld each month from his paycheck which does not include his retirement withholding, but includes the health insurance on the children, life insurance, etc...) Yet by the Chancellor's calculations, Dan's monthly adjusted gross income (net income) should have been \$7,630.00.

\$4,029.77	net income
<u>-3,365.00</u>	projected expenses
\$ 664.77	
<u>- 347.46</u>	additional withholdings excluding retirement
\$ 317.31	

There is not even enough left to pay child support of \$1,200.00, much less the alimony of \$750.00 and the \$500.00 payment on the alimony arrearage. And don't forget, Dan was also Court ordered to pay the cost of any deductible for the health insurance on the children, 65% of all uncovered medical, dental or other health related expenses for each child and 65% of all college expenses for each child after each child's college fund was exhausted.

Dan's monthly gross income on May 10, 2001, was \$3,624.03. After subtracting just taxes of \$620.05, Dan's monthly adjusted gross income (net income) that he received on May 10, 2001 was \$3,003.98. (However, in addition to taxes, Dan has a total of \$347.46 withheld each month from his paycheck which does not include his retirement withholding, but includes the health insurance on the children, life insurance, etc...) Yet by the Chancellor's calculations, Dan's monthly adjusted gross income (net income) should have been \$7,630.00.

\$3,003.98	net income
<u>-3,365.00</u>	projected expenses
-( \$361.02)	
<u>- 347.46</u>	additional withholdings excluding retirement
-( \$708.48)	

There is nothing left to pay child support of \$1,200.00, much less the alimony of \$750.00 and the \$500.00 payment on the alimony arrearage. And don't forget, Dan was also Court ordered to pay the cost of any deductible for the health insurance on the children, 65% of all uncovered medical, dental or other health related expenses for each child and 65% of all college expenses for each child after each child's college fund was exhausted.

Dan's monthly gross income on April 10, 2001, was \$10,897.37. After subtracting just taxes of \$3,512.27, Dan's monthly adjusted gross income (net income) that he received on April 10, 2001 was \$7,385.10. (However, in addition to taxes, Dan has a total of \$347.46 withheld each month from his paycheck which does not include his retirement withholding, but includes the health insurance on the children, life insurance, etc...) Yet by the Chancellor's calculations, Dan's monthly adjusted gross income (net income) should have been \$7,630.00.

\$7,385.10	net income
<u>- 3,365.00</u>	projected expenses
\$4,020.10	
<u>- 347.46</u>	additional withholdings excluding retirement
\$3,672.64	

Child support of \$1,200.00 could be paid, alimony of \$750.00 could be paid and the \$500.00 payment on the alimony arrearage could be paid provided the cost of any deductible for the health insurance on the children, 65% of all uncovered medical, dental or other health related expenses for each child and 65% of all college expenses for each child after each child's college fund was exhausted, did not exceed the \$1,222.64 left over after paying the child support and alimony payments.

Dan's monthly gross income on March 9, 2001, was \$10,215.77. After subtracting just taxes of \$3,449.71, Dan's monthly adjusted gross income (net income) that he received on March 9, 2001 was \$6,766.06. (However, in addition to taxes, Dan has a total of \$347.46 withheld each month

from his paycheck which does not include his retirement withholding, but includes the health insurance on the children, life insurance, etc...) Yet by the Chancellor's calculations, Dan's monthly adjusted gross income (net income) should have been \$7,630.00.

\$6,766.06	net income
<u>-3,365.00</u>	projected expenses
\$3,401.06	
<u>- 347.46</u>	additional withholdings excluding retirement
\$3,053.60	

Child support of \$1,200.00 could be paid, alimony of \$750.00 could be paid and the \$500.00 payment on the alimony arrearage could be paid provided the cost of any deductible for the health insurance on the children, 65% of all uncovered medical, dental or other health related expenses for each child and 65% of all college expenses for each child after each child's college fund was exhausted, did not exceed the \$603.60 left over after paying the child support and alimony payments.

Dan's monthly gross income on February 9, 2001, was \$10,352.96. After subtracting just taxes of \$3,505.64, Dan's monthly adjusted gross income (net income) that he received on February 9, 2001 was \$6,847.32. (However, in addition to taxes, Dan has a total of \$347.46 withheld each month from his paycheck which does not include his retirement withholding, but includes the health insurance on the children, life insurance, etc...) Yet by the Chancellor's calculations, Dan's monthly adjusted gross income (net income) should have been \$7,630.00.

\$6,847.32	net income
<u>-3,365.00</u>	projected expenses
\$3,482.32	
<u>- 347.46</u>	additional withholdings excluding retirement
\$3,134.86	

Child support of \$1,200.00 could be paid, alimony of \$750.00 could be paid and the \$500.00 payment on the alimony arrearage could be paid provided the cost of any deductible for the health insurance on the children, 65% of all uncovered medical, dental or other health related expenses for

each child and 65% of all college expenses for each child after each child's college fund was exhausted, did not exceed the \$684.86 left over after paying the child support and alimony payments.

Dan's monthly gross income on January 10, 2001, was \$7,544.84. After subtracting just taxes of \$2,360.77, Dan's monthly adjusted gross income (net income) that he received on January 10, 2001 was \$5,184.07. (However, in addition to taxes, Dan has a total of \$347.46 withheld each month from his paycheck which does not include his retirement withholding, but includes the health insurance on the children, life insurance, etc...) Yet by the Chancellor's calculations, Dan's monthly adjusted gross income (net income) should have been \$7,630.00.

\$5,184.07	net income
<u>-3,365.00</u>	projected expenses
\$1,819.07	
<u>- 347.46</u>	additional withholdings excluding retirement
\$1,471.61	

There is not enough left to pay child support of \$1,200.00, the alimony of \$750.00 and the \$500.00 payment on the alimony arrearage. And don't forget, Dan was also Court ordered to pay the cost of any deductible for the health insurance on the children, 65% of all uncovered medical, dental or other health related expenses for each child and 65% of all college expenses for each child after each child's college fund was exhausted.

All throughout 2001 the stock market was in a downward spiral until it hit bottom. Dan's income was reflective of the plummeting market. The crash of the stock market, Dan's drop in income, his 40% drop in production, the branch office's 33.45% drop in production, the 45% drop in profits for the branch office, his failure to qualify for bonuses which would have been received in 2002, were never disputed. How could it be, there was documentary evidence to verify and substantiate it all. These were the conditions that existed when this case was tried in December of 2001. There was nothing in the record to reflect that these conditions would improve. It is an

undisputed fact that the money is not there to pay the alimony the Chancellor ordered.

Ordering a spouse to make payments beyond his means has been held to be reversible error. Tilley v. Tilley, 610 So.2d 348, 354 (Miss. 1992).

In Saucier v. Saucier, 830 So.2d 1261 (Miss. Ct. App. 2002), the Court reversed and remanded on the issue of alimony because in comparing the income of the parties for purposes of alimony, the Court erred in comparing the wife's income after mandatory deductions with the husband's income after mandatory deductions as well as voluntary deductions including insurance, deferred compensation, and credit union deductions. In the Holley case, the Chancellor overestimated Dan's income by \$47,127.00 as well as not taking into consideration the 40% drop in production and 45% drop in profits which were reducing his income by that much more.

In Franklin v. Franklin, 864 So.2d 970, (Miss. Ct. App. 2003), the Court of Appeals reversed and remanded an award of alimony instructing the Trial Court to revisit and determine the actual monthly income of the husband and to determine the true needs of the wife.

In Watson v. Watson, 882 So.2d 95, (Miss. 2004), the Supreme Court reversed and remanded an award of alimony and the division of marital property, in part because of several calculation errors by the Chancellor.

For the reasons set forth above, Dan believes that the award of alimony, based in part upon the erroneous calculations of Dan's income by the Chancellor, and the imposition of the other financial responsibilities placed upon him, obligate him to pay aggregate monthly support well beyond his means. As such, the award of alimony was an abuse of the Chancellor's discretion, constituted manifest error, was against the overwhelming weight of the evidence and should be reversed and rendered.



**III. THE CHANCERY COURT WAS MANIFESTLY WRONG AND CLEARLY ERRONEOUS IN CALCULATING THE EXPENSES AND NEEDS OF THE APPELLEE WHICH SERVED AS A PARTIAL BASIS FOR THE AWARD OF ALIMONY.**

Dan and Wanda separated in February of 2001 and have been separated continuously since that time. At the time of trial, December of 2001, Wanda's monthly gross income from her partnership in the accounting firm of Watkins, Ward & Stafford was \$6,112.00. Her net income was \$3,245.00 per month. Wanda is guaranteed her salary each month which is a guaranteed payment to partner and is guaranteed a bonus every year. Wanda is withholding taxes from her salary at the tax rate of 46%. Dan is withholding taxes from his salary at an average tax rate of 22%.

Wanda testified and her original 8.05 financial statement showed that from May of 2001 through November of 2001, Wanda's monthly gross income was \$5,229.00. Her monthly net income from May of 2001 through November of 2001 was \$2,318.00. Wanda testified and her original 8.05 financial statement showed that she had monthly living expenses from May of 2001 through November of 2001 of \$7,431.00. This left Wanda with a net monthly need of \$5,113.00.

Net monthly living expenses (May-November of 2001)	\$ 7,431.00
Net monthly income (May-November of 2001)	- <u>2,318.00</u>
Net monthly need (May-November of 2001)	\$5,113.00
Net monthly need in May of 2001	\$5,113.00
Net monthly need in June of 2001	\$5,113.00
Net monthly need in July of 2001	\$5,113.00
Net monthly need in August of 2001	\$5,113.00
Net monthly need in September of 2001	\$5,113.00
Net monthly need in October of 2001	\$5,113.00
Net monthly need in November of 2001	<u>\$5,113.00</u>
Total	\$35,791.00

Wanda testified and her amended 8.05 financial statement dated December 14, 2001 showed that in December of 2001 Wanda's monthly gross income was \$6,112.00. Her monthly net income in December of 2001 was \$3,245.00. Wanda testified and her amended 8.05 financial statement

dated December 14, 2001 showed that in December of 2001 she had monthly living expenses of \$8,359.00. This left Wanda with a net monthly need of \$5,114.00.

Net monthly living expenses (December of 2001)	\$8,359.00
Net monthly income (December of 2001)	<u>- 3,245.00</u>
Net monthly need (December of 2001)	\$5,114.00

This case was tried on December 17<sup>th</sup> and 18<sup>th</sup>, 2001. Where is the \$35,791.00 debt Wanda would have had to incur from May of 2001 until the trial date if her net monthly need was \$5,113.00 each month as she testified? Wanda testified and her amended 8.05 financial statement dated December 14, 2001 listed only 3 debts.

1.) Marital home mortgage	\$78,000.00
2.) Wanda's partnership buy-in	\$17,447.00
3.) Accounts	\$ 6,630.00

The \$6,630.00 consisted of the following:

1.) Country Club	\$ 680.00
2.) House interest	\$ 1,429.00
3.) BP Visa	\$ 255.00
4.) Miller Tire	\$ 16.00
5.) Johnson	\$ 42.00
6.) David Curtis	\$ 507.00
7.) McRae's	\$ 1,119.00
8.) Visa	<u>\$ 2,581.00</u>
Total	\$ 6,630.00

Alleged net monthly need (May-November 2001)	\$ 35,791.00
Accrued debt (May-November 2001)	<u>- 6,630.00</u>
	\$ 29,161.00

Wanda testified that from May of 2001 through the first day of trial, December 17, 2001, that Dan had only given her \$4,000.00.

Alleged net monthly need (May-November 2001)	\$ 35,791.00
Accrued debt (May-November 2001)	- 6,630.00
Dan's financial support to Wanda (May-December 17, 2001)	<u>- 4,000.00</u>
	\$ 25,161.00

Where is this \$25,161.00 debt Wanda would have had to incur from May of 2001 until the trial date if her net monthly need was \$5,113.00 each month as she testified. Wanda reluctantly admitted on cross-examination that she did not have to withdraw any money from their investments or from any other sources, from May of 2001 through the trial date of December 17, 2001 in order to pay her monthly expenses. Wanda testified that her salary, Dan's \$4,000.00 he gave her from May of 2001 through November of 2001 and the \$6,630.00 debt she accumulated from May of 2001 through November of 2001 paid all of her monthly expenses from May of 2001 through the trial date of December 17, 2001.

How could she argue with her own records? She couldn't and she didn't. She is after all a partner in an accounting firm and these were her own records.

Wanda's net monthly income	\$ 3,245.00	
Dan's financial support to Wanda (May 2001-November 2001) (\$4,000.00 ÷ 7 = \$571.42)	+ 570.00	
Accrued debt (May 2001 -November 2001) (\$6,630.00 ÷ 7 = \$947.14)	+ <u>945.00</u>	
	\$ 4,760.00	Wanda's true monthly living expenses
Wanda's true monthly living expenses	\$ 4,760.00	
Wanda's net monthly income (taxes deducted at the rate of 46%)	- <u>3,245.00</u>	
	\$ 1,515.00	
Dan's payment of child support	- <u>1,200.00</u>	
Net monthly need	\$ 315.00	

Wanda's standard of living never changed after Dan left the marital home in February of 2001. She never testified that she had to alter a single aspect of her life after Dan left. She continued to live in the manner to which she had become accustomed while Dan was still in the marital home. She maintained her membership at the local country club for herself and the children, she was able

to pay for and remain in the marital home with the children, she and the children drove the same vehicles, she still sent the children to private schools, took a vacation to Florida with the children and she fed and clothed herself and the children.

In Franklin v. Franklin, 864 So.2d 970 (Miss. Ct. App. 2003), the Court of Appeals reversed and remanded an award of alimony instructing the Trial Court to revisit and determine the actual monthly income of the husband and to determine the true needs of the wife.

In Watson v. Watson, 882 So.2d 95 (Miss. 2004) , the Supreme Court reversed and remanded an award of alimony and the division of marital property, in part because of several calculation errors by the Chancellor.

Wanda tremendously exaggerated her monthly expenses, thereby considerably inflating her true monthly needs. For this reason, Dan believes that the award of alimony, based in part upon these misleading figures, was an abuse of the Chancellor's discretion, constituted manifest error, was against the overwhelming weight of the evidence and should be reversed and rendered.

#### **IV. THE TRIAL COURT COMMITTED MANIFEST ERROR IN AWARDING PERIODIC ALIMONY INSTEAD OF LUMP SUM ALIMONY AS PROMPTED BY THE SUPREME COURT OPINION.**

If the Supreme Court intended for the Trial Court to consider periodic alimony, the Supreme Court would have vacated all aspects of the Chancellor's Judgment relating to financial matters and would have ordered the Trial Court to start all over again. See Duncan v. Duncan, 815 So.2d 480 (Miss. Ct. App. 2002), in which the Court of Appeals said that, "Because we conclude that it is necessary to reverse and remand for consideration of a more equitable level of periodic alimony and because any changes in that award will have an impact on other aspects of the Chancellor's decision, we conclude that it would be proper to simply vacate all aspects of the judgment relating to financial matters and remand for consideration of a financial award that will equitably provide for Mrs.

Duncan while not being so harsh as to Mr. Duncan as to substantially limit his ability to continue in a reasonably financially-secure circumstance.”

In the Holley case which is currently before this Court, the Supreme Court did not vacate all aspects of the judgment relating to financial matters and remand for reconsideration, it simply remanded on the question of alimony. Therefore, it was error for the Trial Court to award periodic alimony.

In respect to revisiting periodic alimony the Supreme Court points our attention to Mace v. Mace, 818 So.2d 1130 (Miss. 2002). The case was remanded for an adequate valuation of a medical practice. The Supreme Court also vacated the award of alimony and the Chancellor instructed to revisit the issue of alimony as alimony and equitable distribution should be considered together.

The Court of Appeals in Long v. Long, 928 So.2d 1001 (Miss. 2006) stated that because we reverse the Chancellor’s equitable division of assets, we must also remand the award of alimony for further proceedings by the Chancellor. On remand, the Chancellor is instructed to revisit the award of alimony after she considers the properly classified and division of marital assets.

This Court has longed recognized the concept that alimony and equitable distribution should be considered together so as to prevent inequity. “Alimony and equitable distribution are distinct concepts, but together they command the entire field of financial settlement of divorce. Therefore, where one expands, the other must recede.” Ferguson v. Ferguson, 639 So.2d 921, 929 (Miss. 1994) (citing LaRue v. LaRue, 172 W. Va. 158, 304 S.E. 2d 312, 334 (1983) (Neely, J., concurring)). “In the final analysis, all awards should be considered together to determine that they are equitable and fair.” *Id.*, Lauro v. Lauro, 847 So.2d 849 (Miss. 2003).

For the reasons set forth above, Dan believes that the Chancellor committed manifest error in awarding periodic alimony instead of lump sum alimony. As such, the award of periodic alimony

should be reversed and rendered.

### CONCLUSION

The facts in this case clearly demonstrate that this Court should reverse and render the alimony awarded by the Court below. The Trial Court's Judgment was clearly erroneous when it ordered the alimony, and other financial obligations which exceeded Dan's ability to pay, and which left him with insufficient income with which to maintain a reasonable standard of living.

Respectfully submitted, this the 2<sup>nd</sup> day of March, 2007.

DANNY L. HOLLEY

BY:

Mark G. Williamson  
MARK G. WILLIAMSON

**CERTIFICATE OF SERVICE**

I, Mark G. Williamson, attorney for the Appellant, hereby certify that I have this date forwarded via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to:

Honorable Kenneth Burns  
Chancellor  
Post Office Drawer 110  
Okolona, MS 38860

Honorable John W. Crowell  
Attorney for Appellee  
Gholson, Hicks & Nichols  
P. O. Box 1111  
Columbus, MS 39703-1111

SO CERTIFIED, this the 20<sup>th</sup> day of March, 2007.

  
MARK G. WILLIAMSON

MARK G. WILLIAMSON  
ATTORNEY AT LAW  
POST OFFICE BOX 1545  
STARKVILLE, MS 39760-1545  
MSB# [REDACTED]

**CERTIFICATE OF MAILING**

I, the undersigned, Mark G. Williamson, do hereby certify that on this the 28<sup>th</sup> day of March, 2007, I personally deposited in the United States Mail, addressed to the Clerk of the Supreme Court of the State of Mississippi the following:

1. The original and three (3) copies of the Brief of Appellant, and
2. Four (4) copies of the Record Excerpts.

This the 28<sup>th</sup> day of March, 2007.

  
MARK G. WILLIAMSON

MARK G. WILLIAMSON  
ATTORNEY AT LAW  
POST OFFICE BOX 1545  
STARKVILLE, MS 39760-1545  
MSB# [REDACTED]