2006-CA-01287

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

DEBORAH WEEKS, APPELLANT

VS.

ROLAND WEEKS, APPELLEE

ON APPEAL FROM
THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT
OF HARRISON COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

1. John Robert White; Attorney for Appellant
2. Pamela Guren Bach; Attorney for Appellant
3. Deborah Weeks; Appellant
4. Henry Laird; Attorney for Appellee
5. Roland Weeks; Appellee
6. Hon. Carter O. Bise; Trial Court Judge

THIS 5th day of March, 2007.

John Robert White
JOHN ROBERT WHITE

Pamela Guren Bach
PAMELA GUREN BACH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **PAGE**

RULES:

TREATISES:

STATEMENT OF THE ISSUES

I. The chancellor erred in finding that Roland Weeks was required only to pay health insurance premiums at a fixed rate and not commensurate with annual increases set by the insurer.

II. The chancellor erred in finding that Roland Weeks had complied with the order requiring him to maintain Debby as an irrevocable beneficiary of an insurance policy on his life.

III. The chancellor erred in finding that Roland Weeks was in compliance with his court-ordered child support obligations.

IV. The chancellor abused his discretion in refusing to consider retroactive modification of child support.

V. The chancellor's refusal to modify the award of alimony was an abuse of discretion and manifest error.

VI. The chancellor abused his discretion in failing to award Debby Weeks' attorney's fees for the appeal and proceedings after remand.

STATEMENT OF THE CASE

This is the second appeal to this Court of issues arising from the divorce of Deborah and Roland Weeks. The initial appeal resulted in a reversal of the lower court's decision and is found at *Weeks v. Weeks*, 832 So. 2d 583 (Miss. Ct. App. 2002). (R.E.2). In *Weeks*, the Mississippi Court of Appeals noted that the Special Chancellor had "placed great weight on the need to divide the assets in such a way to prevent future friction between the couple," but reversed and remanded for further consideration based on the lower court's failure to provide Debby with periodic alimony, medical insurance and attorney's fees. *Id.* at 588 (¶ 21). (R.E.2).

On remand, the chancellor addressed the relief ordered by this Court and ruled also on other matters touching on issues of child support, college tuition, health insurance, life insurance which arose during the pendency of the appeal. (R.E.3). However, even favorable rulings ring hollow when followed by orders which fail to enforce the relief awarded. Therefore, Debby now seeks a review by this Court of the chancellor's June 22, 2006 Order, which addressed the parties' motion to clarify, modify and enforce the 2004 Judgment After Remand.

This Court further found in *Weeks* that Debby was "entitled to continue living in the same standard of living as she has grown accustomed to during the course of her twenty-two year marriage." *Weeks*, 832 So. 2d at 588 (¶ 20). (R.E.2). In the Judgment After Remand, the chancellor awarded her alimony in the amount of $3,000.00 per month. (R.E.3). Subsequent to the hearing on remand, however, there have been material changes in Debby's circumstances, including the diagnosis of additional health problems which resulted in higher medical expenses, unanticipated changes in her ability to draw from her share of Roland's Knight-Ridder, Inc. 401(k) plan, and the destruction of the former marital home, which she

was awarded, by Hurricane Katrina in August, 2005. Moreover, ambiguities and inconsistencies in the chancellor's orders resulted in Debby's assumption of greater responsibility for the support and college expenses of the parties' minor daughter, Alex, as well as in greater tax liability than anticipated. Contrary to the evidence presented in the record, however, the chancellor refused to grant Debby's April 19, 2005 petition for modification of alimony and child support. (R.E.5).

The chancellor's orders subsequent to remand not only have served to exacerbate the friction between the parties but also have left definition and enforcement of Roland's responsibilities to Debby and the parties' minor daughter, Alex, open to interpretation and ultimately, subject to review and resolution by the court. As a result, Debby has incurred substantial attorney's fees. The chancellor erroneously denied her requests for attorney's fees, having found, contrary to the evidence in the record, that Debby has "a pot of money," and thus is able to pay her own legal expenses. (R.E.5).

STATEMENT OF THE FACTS

Deborah Warren Weeks (hereinafter "Debby") was granted a divorce from Roland Weeks (hereinafter "Roland") on grounds of adultery, with the Final Judgment of the Chancery Court of the First Judicial District of Harrison County rendered on April 4, 2001. Aggrieved by the chancellor's division of the substantial but illiquid assets accumulated by the parties during the twenty-two year marriage, as well as by his failure to award lump sum or periodic alimony and the denial of attorney's fees, Debby appealed to this court.

In *Weeks v. Weeks,* 832 So. 2d 583 (Miss. Ct. App. 2002), the Court of Appeals upheld the chancellor's division of marital assets, which distributed almost one-third of the assets to Debby and more than two-thirds to Roland, as well as his denial of lump sum alimony.[1] *Weeks*, 832 So. 2d 586-87 (¶¶ 13, 15). (R.E.2). Because of the gross disparities in the estates of the parties, however, the court found that the chancellor's denial of periodic alimony, as well as his failure to make provisions for medical insurance without an on-the-record articulation of the factors set out in *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993), was manifest error. *Weeks*, 832 So. 2d at 587 (¶ 18). (R.E.2).

Reviewing those factors, the Court of Appeals found that Debby had not been adequately provided for by the division of marital assets, which consisted primarily of Roland's Knight-Ridder, Inc. 401(k) savings plan and retirement plan, and that she had no separate income or estate other than the share of marital assets which she was awarded. *Id.* at 587-88 (¶¶ 18-21). (R.E.2). She had not worked in twenty-two years and was in poor health. *Id.* Accordingly, the case was reversed and remanded with instructions to the chancellor to

[1] The court's ruling was based on its finding that the marital estate was valued at $5,219,567. Debby was awarded one-third of the marital assets, which included one-fourth of Roland's "401(k) valued at $282,750, one-third of his defined benefit pension and retirement plan, including annual payments which had a cash value of $2,000,000 and $50,000 in cash." *Weeks*, 832 So. 2d at 585 (¶ 6).

award periodic alimony and further, to require Roland to provide Debby with medical insurance coverage. *Id.* at 588 (¶¶ 21-22). (R.E.2).

The chancellor's denial of attorney's fees to Debby was reversed and the case remanded for a determination of whether attorney's fees should be awarded based upon the existing record and application of the factors set out in *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982). *Weeks*, 832 So. 2d at 588 (¶ 24). (R.E.2). Costs of the appeal itself were divided equally between the parties. *Id.* (¶ 25). (R.E.2).

The hearing on remand was held in October, 2003.[2] On April 23, 2004, the Judgment After Remand was entered. (R.3 at 302, R.E.3).[3] The chancellor, after making an on-the-record finding of the *Armstrong* factors, awarded Debby periodic alimony in the amount of $3,000.00 per month. (R.3 at 317-18, R.E.3). In addition, he ordered Roland to pay for Debby's health insurance premiums. (R.3 at 317, R.E.3). Roland further was required to maintain insurance policies on his life in the amount of $300,000.00 each for Debby and Alex as irrevocable beneficiaries. (R.3 at 318-19, R.E.3). As required by *Weeks*, the chancellor further made an on-the-record review of the *McKee* factors and found that Debby was entitled to attorney's fees for the divorce proceedings in the amount of $25,000.00, with credit given to Roland for $7,500.00 he previously had paid. (R.3 at 321-23, R.E.3).

The chancellor also addressed issues of custody, child support and college expenses for the parties' minor daughter, Alexandra Weeks (hereinafter "Alex"), which arose during the pendency of the appeal. (R.3 at 319-21, R.E.3). The parties had stipulated that Debby

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[2] The original action was decided by Special Chancellor Shannon Clark, who was appointed to hear the case by the Mississippi Supreme Court. Subsequent to the remand, the parties stipulated that the action could be heard by Chancellor Carter Bise in the First Judicial District of Harrison County. (R.1 at 123).

[3] Citations to the Record are designated as "R.____" and citations to the Transcript of trial testimony are designated as "Tr. ____." Citations to the Record Excerpts are designated as "R.E.____."

would have primary physical custody of Alex. (R.3 at 319, R.E.3). Although Roland's income was well in excess of $50,000.00, the chancellor used the statutory guidelines to determine that Roland's child support obligation should be $1890.00 per month. (R.3 at 319-20, R.E.3). Further finding that Roland had sufficient resources to fully support Alex's college education, he determined that "Roland shall be responsible for 100% of the college expenses of his child, based upon her attending an in-state institution, including sorority dues and fees, as well as her vehicle and insurance, health insurance, meal plan and books." (R.3 at 320-21, R.E.3). The difference, if any, between what Roland spent on these expenses and the $1890.00 designated as child support was payable directly to Alex to help defray other college expenses. (R.3 at 321, R.E.3). The order made no provision for the direct payment of child support to Debby.

On May 21, 2004, Debby filed her Motion to Reconsider. (R.3 at 325). Based on her ineligibility for Social Security benefits and the disparity in the parties' liquid assets which existed despite Roland's dissipation of his estate, Debby challenged the adequacy of the awards of both alimony and attorney's fees. (R.3 at 325-29). She subsequently filed a Supplemental Motion to Reconsider, seeking clarification of the child support provisions, requesting proof of insurance and addressing other matters which had been raised, but left unresolved by the chancellor's orders. (R.3 at 338-43). Because of Roland's failure to fully comply with provisions of the order, Debby filed a motion for contempt on September 9, 2004. (R.3 at 344). Roland, too, sought reconsideration of certain aspects of the Judgment After Remand.

A hearing was held on the parties' Motions to Reconsider on November 1, 2004. (Tr. 9 at 486). The chancellor limited testimony at that time to clarification of those facts already in evidence at the time the order was entered, and not those occurring subsequently, which

touched on matters of contempt or modification. (Tr. 9 at 493). In his February 2, 2005 Order on Motion to Reconsider, the chancellor denied Debby's request to reconsider the amount of alimony awarded, but made the award retroactive to June 1, 2001, ordering Roland to pay $58,770.00 to Debby immediately. (R.3 at 400). He further denied Debby's request to introduce additional evidence regarding medical problems which might serve to increase her medical and pharmacy bills on a monthly basis, expressly reserving them to a separate request for modification. (R.3 at 400-01). Her request for reconsideration of attorney's fees further was denied. (R.3 at 400).

In the February 27, 2005, Order on Motion to Reconsider, the chancellor found that Roland's payment of Alex's college expenses could be offset against his $1890.00 monthly child support obligation. (R.3 at 399-400). The chancellor further granted Roland's request to pay child support to Debby in two semi-annual installments of $11,340.00, with Debby to make the payments for Alex's educational expenses directly to the university, and Debby and Alex to be responsible for "all other tuition, fees and expenses." (R.3 at 400).

Debby filed a Motion to Clarify Order and/or for Relief from Judgment and Order on February 16, 2005, seeking clarification of the chancellor's orders regarding Roland's obligations for payment of Alex's support and college expenses as well as for payment of Debby's health insurance premiums. (R.3 at 402). Pursuant to Rule 60(b)(3) of the Mississippi Rules of Civil Procedure, she further asked the court to consider additional facts ascertained subsequent to the hearing regarding the limitations on her ability to take disbursements from her share of Roland's 401(k) plan. (R.3 at 403) Roland's Response and Amended Response, filed on August 10 and 11, 2005, focused not on the substantive issues raised, but on the procedural issue that Debby's Motion to Clarify was, in reality, a Motion to Modify Judgment pursuant to Rule 60(b)(3), and thus, was not timely filed. (R.4 at 462).

Ultimately, Debby filed a Petition for Modification of both child support and alimony on April 19, 2005. (R.3 at 444).

In May, 2006, a five-day hearing was held on the pending motions filed by the parties subsequent to the Judgment After Remand. The chancellor issued his bench opinion on June 2, 2006, which was incorporated by reference into an order filed on June 22, 2006. (R.E.5). In the Order, the chancellor denied Debby's petition for modification of alimony and child support. (R.4 at 568-69, R.E.5). The chancellor also denied both parties' motions for attorney's fees. (R.4 at 570, R.E.5, Tr. 11 at 1157, R.E.4). The chancellor further refused to find Roland in contempt of previous court orders to pay Debby's medical insurance and provide insurance on his life for her behalf, or to provide child support, life insurance, health insurance and vehicle insurance for the parties' minor child. (R.4 at 567-70, R.E.5).

Debby filed a Motion to Reconsider, which was denied on August 9, 2006. (R.5 at 673, R.E.6). Aggrieved by the chancellor's decision, Debby now appeals to this court.

SUMMARY OF THE ARGUMENT

The chancellor's June, 22, 2006 Order addressed motions raised by the parties as they sought to clarify, modify and enforce provisions of the April 23, 2004 Judgment After Remand. (R.E.3, R.E.5). In this appeal, Debby seeks review by this Court of the chancellor's rulings on matters touching on Roland's obligation to provide support for her and the parties' minor daughter.

Debby first asserts that the chancellor erred in finding that Roland was in compliance with the court's orders requiring him to provide Debby with the monthly premiums for her medical insurance coverage. Roland's interpretation of the order, which was adopted by the chancellor, fixes the amount of his obligation at a monthly rate of $516.00, the premium in effect at the time the order was entered in 2004. Such interpretation, which does not reflect annual changes in the policy premium, is inconsistent with the chancellor's other orders requiring Roland to provide insurance for Debby and Alex, without regard to a specific premium.

Debby further contends that the chancellor erred in finding that Roland was not in contempt of the order requiring him to maintain an insurance policy on his life in an amount of at least $300,000.00, naming Debby as an irrevocable beneficiary. Roland's testimony was in conflict with the evidence introduced of coverage he maintained as of 2004. No evidence that Debby had ever been named as an *irrevocable* beneficiary was presented. Moreover, the chancellor failed to require Roland to provide Debby with the information necessary for the proper reporting of the premiums paid as alimony taxable to her.

In the Judgment After Remand, as well as in subsequent orders, the chancellor ordered Roland to pay child support as well as to provide for Alex's college expenses. To the extent that Roland's obligations can be discerned from these orders, Debbie asserts that the

chancellor erred in finding that Roland had complied with the orders and was not in contempt. There is insufficient evidence in the record to support the chancellor's finding that Roland exceeded his obligations to pay child support. Moreover, in light of the chancellor's allowance for Roland to set off college expenses against his child support obligations, clarification of the expenses which he is required to pay – and entitled to set off – is necessary.

More than a year before Alex turned twenty-one, Debby sought to modify the award of child support based on her daughter's increased expenses. The matter was not heard until the May, 2006 hearing, by which time Alex had reached the age of majority. Debby asserts that the chancellor abused his discretion in summarily rejecting evidence of changes occurring subsequent to the 2004 Judgment After Remand without consideration of a retroactive modification of child support.

Debby further contends that the chancellor abused his discretion in denying her request for a modification of alimony. To the extent any findings relative to the *Armstrong* factors were made, they were contrary to the evidence or based on a misunderstanding of the facts. The chancellor's finding that no material changes in circumstance had occurred subsequent to the initial award of alimony likewise was contrary to the evidence.

Finally, Debby asserts that the chancellor erred in finding that she had ample resources with which to pay her own attorney's fees and thus was not entitled to any relief for her legal expenses subsequent to remand. Given the nature of the assets available to Debby, the chancellor's findings were contrary to the evidence and the law.

ARGUMENTS AND DISCUSSION OF THE LAW

I. THE CHANCELLOR ERRED IN FINDING THAT ROLAND WEEKS WAS REQUIRED TO PAY HEALTH INSURANCE PREMIUMS FOR DEBBY WEEKS AT A FIXED RATE AND NOT COMMENSURATE WITH ANNUAL INCREASES SET BY THE INSURER

The Court of Appeals, in remanding the case, noted that the Special Chancellor had "placed great weight on the need to divide assets in such a way to prevent future friction between the couple." *Weeks*, 832 So. 2d at 583 (¶ 21). (R.E.2). The chancellor's rulings subsequent to remand, however, were fraught with ambiguities which have served to increase the friction between the parties and to undermine the relief afforded to Debby by the Court of Appeals' original opinion, as well as in the chancellor's initial Judgment After Remand. Debby first contends that the chancellor erred in finding that Roland owed a fixed amount of $516.00 per month for payment of her health insurance premiums and therefore was neither in contempt of that order nor required to pay the annual premium increases set by the insurer.

In *Weeks,* the Court of Appeals found that the chancellor erred in failing to require Roland to provide medical insurance for Debby. 832 So. 2d at 588 (¶22). (R.E.2). At the hearing on remand, Debby testified about the difficulties she had encountered in obtaining insurance coverage because of her many health problems. (Tr. 7 at 180-85). Ultimately, she was accepted for coverage by the Mississippi Health Insurance Risk Pool Association. (Tr. 7 at 186). Having stated that the monthly premium for her medical insurance was $502.00 for the remainder of 2003, but was subject to change on an annual basis, she further explained, "[a]nd after the first [of the year], it will increase to $516. If they don't increase the rates before the first of the year, that's what my monthly bill will be." (Tr. 7 at 186).

In the Judgment After Remand, Roland was ordered to provide medical insurance for Debby as follows:

> "The Court finds that the award of medical insurance shall be deemed alimony. Debby currently has enrolled in the Mississippi Insurance Risk Pool at a monthly premium of $516.00. Roland will pay this for Debby as a part of his alimony obligation in addition to those sums previously designated as periodic alimony.

(R.3 at 318, R.E.3). Debby was required to pay her deductible, co-payments and any non-covered medical expenses out of her alimony, which the chancellor found "would be the only way a cap on such expenses could be maintained." (R.3 at 318, R.E.3).

After Roland refused to pay the annual premium increase, Debby filed a Motion to Clarify on February 16, 2005, seeking a determination by the court that he was required to pay her monthly premium for the Mississippi Insurance Risk Pool, including the annual increases based on her age. (R.3 at 403). On August 10, 2005, Roland responded that the judge's order did not require any clarification. (R.4 at 460). In his Amended Response, filed the next day, Roland asserted that the order was very specific and that Debby's attempt to have him pay anything in addition to the amount of the premium at the time of the order was a motion to modify pursuant to Rule (60)(b)(3) of the Mississippi Rules of Civil Procedure, and thus, time-barred. (R.4 at 465).

In his June 2, 2006 Bench Opinion, apparently adopting Roland's construction of the order, the chancellor addressed the issue without analysis, stating:

> The judgment on remand ordered that Roland pay a set amount which was based on what the premium was at that time. He was never ordered to pay the insurance premium, per se.

(Tr. 13 at 1154, R.E.4). In his final order, he emphasized that Roland "was required only to pay $516.00." (R.4 at 568, R.E.5). Thus, the chancellor refused to find Roland in contempt for failing to pay the increased premiums (Tr. 13 at 1154, R.E.4) or to order him to pay the

increased costs of Debby's medical insurance. (Tr. 13 at 1160-61, R.E.4). Debby therefore seeks this Court's *de novo* review of the chancellor's ruling. *Rogers v. Rogers*, 919 So. 2d 184, 187 (¶ 10)(Miss. Ct. App. 2005); *Meek v. Warren*, 726 So. 2d 1292, 1293-94 (¶ 3)(Miss. Ct. App. 1998).

In construing court decrees or opinions which are ambiguous or unclear, the Mississippi Supreme Court has stated:

> A judgment decree or opinion of court is a legal text, and, when questions of meaning arise, answers are sought by "the same rules of construction which appertain to other legal documents." *Gillum v. Gillum,* 230 Miss. 246, 255 92 So. 2d 665, 668 (1957), quoting *Rayl v. Thurman,* 156 Miss. 8, 15, 125 So. 912, 914 (1930); *see also, Webster v. Webster,* 566 So. 2d 214, 215 (Miss. 1990); *Bowe v. Bowe,* 557 So. 2d 793, 795 (Miss. 1990). Courts must give the prior decree the most coherent and principled reading its words will bear. *See Simmons v. Bank of Mississippi,* 593 So. 2d 40, 43 (Miss. 1992). Of course, the record of proceedings before the court are the principal part of the objective accessible world the construing court may consult en route to construction. *Wray v. Wray,* 394 So. 2d 1341, 1343-44 (Miss. 1981); *Gillum v. Gillum,* 230 Miss. at 255, 92 So. 2d at 669.

Estate of Stamper v. Edwards, 607 So. 2d 1141, 1145 (Miss. 1992). "The determinative factor is the intent of the court . . . as gathered . . . from all parts of the judgment itself." *Balius v. Gaines*, 908 So. 2d 791, 798 (¶ 16)(Miss. Ct. App. 2005), *quoting* 46 Am. Jur. 2d Judgments § 94 (1994).

Looking at the record of the proceedings before the court, Debby's testimony at the hearing on remand established that the premium for the medical insurance policy was not fixed, but changed annually. (Tr. 7 at 186). At the May, 2006 hearing, she testified that the premium had increased from $516.00 to $639.00. (Tr. 10 at 748). Furthermore, looking at "all parts of the judgment itself," the chancellor's provision for life insurance made as part of the award of alimony, as well as the provisions made for the parties' daughter, Alex, which included life, health and automobile insurance, did not place specific dollar limits on

Roland's monthly obligation to pay. A finding that Roland is required to pay Debby's medical insurance in the specific amount of $516.00 per month, therefore, is inconsistent with the other parts of the judgment which set out Roland's obligations to provide insurance for Debby and Alex.

Giving the language of the order "the most coherent and principled reading its words will bear," therefore, requires an interpretation which finds that Roland was required to pay Debby's monthly health insurance premium and not a fixed dollar amount. *Stamper*, 607 So. 2d at 1145, *citing Simmons*, 593 So. 2d at 43. Indeed, if the tables were turned and Debby subsequently had qualified for a lower-premium policy with the Mississippi Insurance Risk Pool or another insurer, it would be Roland who now would argue that the chancellor did not intend to require him to pay a fixed premium and seek reimbursement from Debby of the difference between $516.00 and the actual premium paid. Ironically, those expenses Roland is entitled to subtract from his child support obligation to Debby, including life insurance, health insurance and car insurance for Alex, were ordered as obligations without reference to a specific dollar amount. Moreover, where the choice of provider and means of acquiring the coverage is a matter left to Roland's discretion, as with the requirement that he maintain life insurance policies naming Debby and Alex as irrevocable beneficiaries, no such limits were delineated, nor was Roland made accountable to Debby in any way. A "principled reading" of the order, therefore, would not distinguish Roland's obligation to pay Debby's medical insurance premiums, but interpret it consistently with his other obligations to provide insurance for Debby and Alex.

The chancellor's order should be construed as requiring Roland to pay the actual amount of Debby's monthly medical insurance premiums, without limiting his obligation to the $516.00 premium in effect at the time the order was entered. Roland should be ordered

to provide medical insurance for Debby based on the current rate charged by the insurer, subject to annual adjustments in the premium rate. On remand, a determination of the difference between what Debby has actually paid since the entry of the April, 2004 order and the $516.00 per month Roland has paid should be made, and Roland ordered to pay that difference to Debby.

II. THE CHANCELLOR ERRED IN FINDING THAT ROLAND WEEKS HAD COMPLIED WITH THE ORDER REQUIRING HIM TO MAINTAIN DEBBY WEEKS AS AN IRREVOCABLE BENEFICIARY OF AN INSURANCE POLICY ON HIS LIFE

Debby further contends that the chancellor erred in finding that Roland had complied with that part of the Judgment After Remand which required him to make her the irrevocable beneficiary of a life insurance policy in the amount of $300,000.00, and thus, was not in contempt of the court's order. The evidence presented at the May, 2006, hearing, however, was insufficient to establish that Roland maintained a policy naming Debby as an *irrevocable* beneficiary. Moreover, despite the fact that chancellor ordered maintenance of the policy as a form of alimony, he failed to require that Roland regularly provide Debby with the evidence of the premiums paid or with access to the information necessary for tax reporting purposes.

The chancellor's order provided Roland with two options: to make Debby a co-beneficiary on an existing Hartford Insurance Company policy with his present wife, Sharon Brune Weeks, or to obtain a separate policy, stating:

> Roland reports in his 8.05 that he has a $1,000,000.00 policy with Hartford naming Alex as beneficiary of $300,000.00 and Sharon as beneficiary of the remainder. The Court finds that Alex should be made the irrevocable beneficiary of that $300,000.00. Additionally, the Court finds that Debby should be made the irrevocable beneficiary of an equal amount. Accordingly, the Court finds that Roland should, and hereby is, directed, as an additional item of alimony, to either obtain a life insurance policy on his life naming Debby the irrevocable beneficiary thereof in the sum of not less than

> $300,000.00, or making Debby an irrevocable beneficiary of the Hartford policy.

(R.3 at 318, R.E.3). The record presents conflicting evidence as to which option Roland selected. Moreover, it establishes only that Roland had Debby named as a beneficiary of a $300,000.00 policy on Roland's life in July, 2004; it does not establish that she was made an *irrevocable* beneficiary of any policy at any time nor does it prove that Roland has continued to maintain a policy for her benefit subsequent to July, 2004. Nevertheless, the chancellor found Roland to be in compliance with the order requiring him to maintain a life insurance policy naming Debby as the irrevocable beneficiary. (R.E.5).

Roland's failure to provide Debby with proof of conformity with the chancellor's order was raised in Debby's Second Complaint for Citation of Contempt, filed on September 9, 2004. (R.3 at 346). In her Supplemental Motion to Reconsider, Debby further addressed the issue, requesting that the chancellor require Roland to provide her with proof of insurance. (R.3 at 340). Although a proposed order drafted by Debby's attorney required Roland to provide Debby with proof that he continued to maintain a policy on his life naming her as an irrevocable beneficiary, (R.3 at 365), that provision was not incorporated into the chancellor's Order on Motion to Reconsider, entered on February 7, 2005. (R.3 at 399). Under the terms of that order, which required Roland also to carry Alex as the irrevocable beneficiary of a $300,000.00 life insurance policy only until she reached the age of twenty-one, however, Roland was ordered to provide Debby with proof of such coverage on or before April 15 of each year until she turned twenty-one.[4] (R.3 at 400).

[4] In his Counter-Motion, Roland had argued that requiring him to make Alex an *irrevocable* beneficiary of his life insurance policy amounted to requiring him to pay child support beyond the age of twenty-one. (R.3 at 336).

At the May, 2006 hearing, Roland testified that he had made regular payments on policies naming Debby and Alex as beneficiaries since 2004. (Tr. 12 at 1024). He stated that Debby was named on the same policy as Sharon Weeks, and that Alex was the beneficiary of a separate policy. (Tr. 9 at 576). On cross-examination, Roland reiterated that he had one policy on which Debby and his present wife were named as co-beneficiaries as well as a separate policy on which Alex was named as the beneficiary. (Tr. 10 at 709). He further stated that he paid $1,750.00 a month for the policy on which Debby and Sharon Weeks were named, allocating $477.00 of that cost to Debby, and that Alex was carried on a separate, less expensive policy. (Tr. 9 at 709-10). The evidence introduced at trial, however, showed that, as of 2004, Alex was beneficiary of a $300,000.00 death benefit on a whole life policy Roland purchased in August, 2001, which also listed his present wife, Sharon Weeks, as beneficiary of an $800,000.00 death benefit. (Exh. 21). The monthly premium on that policy was stated at $1,750.00 per month. (Exh. 21). A level term life policy naming Debby as the beneficiary of a $300,000.00 death benefit was issued on July 26, 2004. (Exh. 21). The annual premium on the term life policy was guaranteed for ten years at $3,804.00 per year, or $317.00 per month. (Exh. 21).

As a matter of practice,

> A decree 'should be complete within itself-containing no extraneous references, leaving open no matter or description or designation out of which contention may arise as to the meaning. Nor should a final decree leave open any judicial question to be determined by others, whether those others be the parties or be the officers charged with execution of the decree***.'

E.E. Morgan v. USF&G Co., 191 So. 2d 851, 854 (Miss. 1966), *quoting Griffith*, Mississippi Chancery Practice § 625, at 676-77 (2d. ed. 1950). As written, the chancellor's order creates compliance options for Roland out of which contention might arise. Was Debby named on the same policy as Roland's current wife, or on a separate policy? Which premium was

taxable to her as alimony? It further leaves open questions of definition which cannot be fully resolved without reference to the language of the policy itself. Did Roland truly satisfy the requirement of making Debby the *irrevocable* beneficiary of a policy on his life by making her the beneficiary of a level term life policy? As to these matters, therefore, the chancellor's order is sufficiently ambiguous to warrant *de novo* review by this Court. *Rogers*, 919 So. 2d at 187 (¶ 10); *Meek*, 726 So. 2d at 1293-94 (¶ 3).

The chancellor's orders further are in conflict with the requirement of the Judgment After Remand that the policy premiums are taxable to Debby as alimony since there is no provision requiring Roland to provide her with documentation of actual premiums paid so that she might accurately report her alimony "income." Although Debby sought clarification of the chancellor's order in her Supplemental Motion for Reconsideration, the chancellor failed to take the simple remedial step of requiring Roland to provide Debby with basic information about the policy on a regular basis. As a result, Roland has had available to him the information needed to enjoy the benefit of deducting as alimony the premiums paid. Moreover, his "confusion" about the policies begs the question of which premiums he has reported as alimony. Debby, however, has no access to the information needed to fully report her alimony income.

The ambiguities of the chancellor's order leave open matters out of which contention may arise as to the meaning of the order and raise questions as to the extent of Roland's obligation to Debby. The provision, therefore, is difficult to enforce, allowing Roland to elude a finding of contempt, no matter how blatant his disregard of the court's intent. Not surprisingly, the chancellor found that Roland was not in contempt of the order, despite his conflicting testimony about the premiums paid, and the complete absence of any proof that

he still maintained a policy for Debby's benefit or that he had ever made her an *irrevocable* beneficiary of such policy.

Whether a judgment has been violated "necessarily includes questions of whether or not it was possible to carry out the judgment of the Court." *Wing v. Wing,* 549 So. 2d 944, 947 (Miss. 1989). Addressing the issue of contempt, the Mississippi Supreme Court drew an analogy to the standard required when crafting an order for an injunction or a restraining order: "the ordinary person reading the court's order should be able to ascertain readily from the document itself exactly what conduct is proscribed or mandated." *Wing*, 549 So. 2d at 947, *quoting* Comment, Rule 65(d) of the Mississippi Rules of Civil Procedure. Would the ordinary person have understood what was expected of him from the wording of the chancellor's order? To the extent that Roland was required to maintain a policy naming Debby as the *irrevocable* beneficiary of a life insurance policy in excess of $300,000.00, probably so. Despite any ambiguities as to how Roland might comply with the court's order, the chancellor arguably could and should have found Roland in contempt of the order for failing to maintain the policy for Debby as an *irrevocable* beneficiary. However, the root of his error lies in rendering a judgment which was sure to raise contention between the parties, was difficult to enforce, and which failed to specify Roland's obligation to provide Debby with proof of coverage and information about the premiums paid.

The issue should be remanded with instructions to the chancellor to make specific findings regarding the coverage Roland is currently maintaining for Debby's benefit and whether he has complied with the directive to make her an *irrevocable* beneficiary of said policy. Roland further should be required to provide Debby with proof of coverage and premiums paid on an annual basis, or in the alternative, with access to that information directly from the insurer.

III. THE CHANCELLOR ERRED IN FINDING THAT ROLAND WEEKS WAS IN COMPLIANCE WITH HIS COURT-ORDERED CHILD SUPPORT OBLIGATIONS

Debby next contends that the chancellor erred in refusing to find Roland in contempt for failing to meet his child support obligations, particularly with regard to support payments for the summer months. As with the orders addressing life insurance and health insurance, the chancellor's various orders fail to clearly set out Roland's obligations to Debby and the parties' minor child, Alex, effectively insulating Roland from a finding of contempt. Debby now seeks this Court's *de novo* review of the chancellor's orders providing for child support and college tuition to resolve the ambiguities therein. *Rogers*, 919 So. 2d at 187 (¶ 10); *Meek*, 726 So. 2d at 1293-94 (¶ 3). Moreover, to the extent that Roland's child support obligations can be established from the chancellor's orders, there is insufficient evidence in the record to support his finding that Roland exceeded his obligations and thus is not in contempt of any court orders providing for Alex's support or education.

Before Alex started college, Roland was ordered to pay temporary child support in the amount of $1,731.52 per month. (R.1 at 124). In the Judgment After Remand, the chancellor considered Roland's declared income of $13,500.00 per month and found that Roland should provide child support in the amount of $1,890.00 per month. (R.3 at 319-20, R.E.3). Because Roland's income exceeds $50,000.00 per year, the chancellor determined that "deviation from the statute is necessary in order to provide for child support and educational expenses of the child." (R.3 at 320, R.E.3).

Noting that Roland paid for all expenses of his step-daughter, Shelby Brune, at Ole Miss, including her sorority dues, the chancellor stated that Roland's first obligation was to his daughter, Alex, and found that "there is no question but that Roland has sufficient financial resources to *fully* support Alexandra's college education." (R.3 at 320, R.E.3). The

Judgment From Remand therefore provided that "Roland shall be responsible for 100% of the college expenses of his child, based upon her attending an in-state institution, including sorority dues and fees, as well as her vehicle and insurance, health insurance, meal plan and books." (R.3 at 320-21, R.E.3). However, instead of requiring Roland to pay Alex's college expenses *in addition to* the child support set by the court, the chancellor provided for Roland's payment of those expenses as follows:

> Alex shall be responsible for presenting her father with the necessary tuition and other college costs and expenses in a timely manner, and Roland shall have the option of paying the university directly or paying Alex directly. The difference, if any, between what Roland expends for Alex's education and this $1890.00, shall be paid to Alex to defray other college expenses. During the summer months, should Alex reside with Debby, then Roland will pay to Debby as child support *the pro rata share* of $1890.00 per month child support.

(R.3 at 321, R.E.3)(emphasis added).

In the February, 2005 Order on Motion to Reconsider, the chancellor found that for the remainder of the 2004-05 academic year, "Roland Weeks will pay directly to Louisiana State University for tuition, fees and books, an amount equal to that payable for substantially identical expenses payable to the University of Mississippi. Sorority dues, sorority or dorm housing, and meal plans will be paid directly to the sorority, dormitory or meal plan provider." (R.3 at 399). These expenses, as well as the costs of Alex's car insurance and health insurance were to be offset against the child support set out in the Judgment After Remand, with any balance left payable to Debby. (R.3 at 399). For the 2005-06 school year, Roland's Motion to Reconsider was granted, allowing him to make his child support payments in two equal semi-annual installments of $11,340.00 (less the cost of Alex's car insurance) to Debby instead of to the university, "and Debby (and Alex) will be responsible for all other tuition, fees and expenses." (R.3 at 400).

Whether Roland met his child support obligations to Debby and Alex is a two-prong question. First, the proper interpretation of the chancellor's order that Roland pay a "pro rata share" of child support during the summer months must be established. Second, the chancellor's orders, read together, are ambiguous with regard to the college expenses Roland is required to pay – and allowed to set off – against his child support obligations.

A. Provision for "pro rata share" of child support during the summer months

The chancellor's requirement that Roland should pay "the pro rata share of $1890 per month child support" for the summer months, should Alex reside with Debby, clearly presents a description "out of which contention may arise as to the meaning" as well as a potential "judicial question to be determined by others." *Morgan*, 191 So. 2d at 854. The record indicates that even Roland and his attorneys entertained more than one construction of Roland's obligation to provide support for Alex during the summer months. In a May 5, 2004 letter to Judge Bise regarding the language about child support, Tom Crockett stated, in relevant part:

> During the summer months when Alex is not in college, when she resides with Debby, then this $1890 per month shall be paid to Debbie [sic] for each month that Alex stays with Debbie [sic]. If Alex stays with Debby for a portion of the month, then this sum shall be prorated based on the faction[sic] of the month in which Alex stays with Debby.

(Exh. 5) At the May, 2006, hearing, however, Roland testified that during the months of May, June, July and August, 2003, he paid $303.00 for three of those months and the full $1890.00 for the fourth month. (Tr. 9 at 563). No evidence regarding the portion of each month Alex spent with Debby was presented; rather Roland's testimony focused on the other expenses for Alex which he claimed to have paid, but for which no supporting documentation was introduced. (Tr. 9 at 566-70). This was consistent with Roland's position in his Motion to Modify, wherein he sought to be relieved of paying any additional sums to

Debby and to require her to fully provide for Alex's support during the summer, asserting that:

> The court also ordered that Roland pay the difference between the said college expenses and $1890 per month the amount of child support ordered to be paid during the summer months should Alex reside with Debby 'then Roland will pay to Debby as child support the pro rata share of $1,890 per month child support.'

(R.3 at 371-72). In the affidavit which accompanied his Response to Debby's Supplemental Motion to Reconsider, Roland described how he arrived at the pro rata amount he would pay Debby if Alex resided with her during any of the summer months, stating, "I *estimated* the total amount I would pay over the next twelve months for Alex's education and subtracted that amount from $22,680.00 to determine how much I should give her monthly for other college expenses and give to Debby when Alex lived with her this summer." (R.3 at 359)(emphasis added).

Black's Law Dictionary defines "pro rata share" as "[p]roportionately; according to an exact rate, measure or interest." Black's Law Dictionary, p. 1236, 7th ed. West Group (1999). Mr. Crockett's May 5, 2004 letter correctly construes a "pro rata" apportionment of summer child support as the pro-ration of monthly support in proportion to that fraction of the month Alex spent with her mother. It is a fraction or proportion of the total amount, according to an exact measure; the exact measure, in this case, being the number of days each month Alex lived at Debby's house. Roland's interpretation, contrary to the definition, merely involves subtracting the monthly child support owed from an *estimated* amount of money he expected to spend, without any reference to the time Alex actually stayed with her mother, giving him *carte blanche* to claim whatever expenditures he desired against the support payable to Debby during the summer months as college expenses, just as he could during the months Alex was in school.

B. What expenses was Roland entitled to claim as college expenses?

Assuming *arguendo* that this Court were to find Roland's interpretation of a "pro rata" share of his child support obligation to be correct, there are no exact figures on which to base the pro-ration amount. By his own admission, Roland "estimated" what he expected to spend on Alex's expenses over the coming year. Moreover, despite the chancellor's finding in the Judgment After Remand that Roland was able to provide for 100% of Alex's college expenses, each successive order entered by the court served to shift more of financial responsibility for her educational expenses, as well as for her other needs, to Debby. As the custodial parent, the record shows that Debby bore the majority of Alex's medical, dental and optical expenses not covered by insurance; her needs when she was at home on weekends and vacations; her clothes, apartment furnishings, gasoline and credit card bills, and ultimately, her car insurance and new car note.

It is well-established that "college expenses are not technically 'child support.'" *Fancher v. Pell*, 831 So. 2d 1137, 1142 (¶ 23)(Miss. 2002); *Lawrence v. Lawrence*, 574 So. 2d 1376, 1382 (Miss. 1991). Moreover, "'payments such as college tuition will seldom qualify [as an offset for child support], as they do not diminish the child's need for food, clothing and shelter.'" *Fancher*, 831 So. 2d at 1142 (¶ 23), *quoting Varner v. Varner,* 588 So. 2d 428, 435 (Miss. 1991). The chancellor, nevertheless, fashioned an order, which on one hand, ordered Roland to pay child support and further found that he was financially able to *fully* pay 100% of his daughter's college expenses, and on the other, allowed him to offset college expenses, car insurance, health insurance and the like from his child support obligation. The chancellor's orders effectively blurred the line of demarcation between child support and provision for Alex's college expenses, leaving open the question of what

expenses Roland actually was required to pay – and, ultimately, to deduct – from his child support obligation.

The chancellor initially required Roland to pay "100% of the college expenses of his child, based upon her attending an in-state institution, including sorority dues and fees, as well as her vehicle and insurance, health insurance, meal plan and books." (R.3 at 320-21, R.E.3). For the 2005-06 school year, in addition to Alex's health insurance and car insurance, he subsequently ordered Roland to "pay directly to Louisiana State University for tuition, fees and books, an amount equal to that payable for substantially identical expenses payable to the University of Mississippi. Sorority dues, sorority or dorm housing, and meal plans will be paid directly to the sorority, dormitory or meal plan provider." (R.3 at 399).

Employing the *Wing* analysis, an ordinary person reading the court's orders would not "be able to ascertain readily from the document itself exactly what conduct is prescribed or mandated." 549 So. 2d at 947. There is a genuine question as to the expenses Roland was required to pay, the expenses he could credit against his child support obligation, and the effect of Debby's assumption of some of the obligations originally assigned by the chancellor's orders to Roland. Indeed, Debby had sought, but never received, clarification of the chancellor's order as to what portion of the child support payments were to be considered college education expenses and what portion would be considered child support for non-educational expenses. (R.3 at 402).

The Mississippi courts have not expressly delineated what costs fall within the general term "college expenses," preferring instead to look at the specific facts and circumstances of each case. *Saliba v. Saliba*, 753 So. 2d 1095, 1102 (¶ 24)(Miss. 2000). In *Saliba*, where the parents were wealthy and the minor child had been raised in a privileged environment, the court found that the father was responsible for contributing to his

daughter's educational expenses, including out-of-state tuition, car insurance and sorority expenses, as such were commensurate with the family's station in life. *Id.* at 1102-03 (¶ 27). As the court explained,

> The child of a multimillionaire would be entitled to share in that standard of living-for example to attend a private school or to participate in expensive extracurricular activities – *and would accordingly be entitled to a greater award of child support to provide for these items*, even though such items would not be ordered in a different case.

Id. at 1104 (¶ 34), *quoting Miller v. Schou,* 616 So. 2d 436, 438 (Fla.1993)(emphasis added).

A child in Alex Weeks' position is entitled, by virtue of her father's circumstances, to have him provide greater support for her college expenses than a child from a less-fortunate family. Keeping in mind Roland's ability to pay and Alex's position as the daughter of the retired publisher of the Sun Herald, a prominent community leader, the chancellor should make specific findings of Alex's actual expenses, which expenses Roland was required to pay, and how much each parent actually has paid toward those expenses so that a determination can be made of whether Roland has met his court-ordered support obligations to his daughter.

C. Whether Roland was in contempt of the chancellor's orders

Finding that Roland was not in contempt for failure to pay the full amount of child support he owed during the summer months, the chancellor stated:

> As to Mrs. Weeks' petition to hold Mr. Weeks in contempt for failure to pay child support, the proof was clear that Mr. Weeks had paid more than required and up to $29,000.00 per year in child support at all times since he was required to pay child support by prior order of the Court. What Mr. Weeks has paid exceeds what he was required to pay when Alexandra Weeks was not attending college in the summer months; therefore he cannot be in contempt of any prior Court order for failure to pay child support.

(R.4 at 568, R.E.5). The evidence in the record simply does not support the chancellor's finding that "the proof was clear" that Roland had paid more than what was required of him

in child support. Although Roland testified at trial regarding various expenses he has paid on Alex's behalf or that he has directly given her the money to pay, he presented absolutely no documentation or corroborating evidence of those expenditures. The threshold showing of clear and convincing evidence has not been met. 897 So. 2d at 205 (¶ 11). See also, *Wiles v. Williams*, 845 So. 2d 709, 712 (¶ 16)(Miss. Ct. App. 2003)(chancellor did not abuse his discretion in refusing to give father credit for expenses any normal father should make for his children, when calculating past-due child support). The credit Roland seeks for all expenses paid is not an automatic entitlement. This Court has stated that where the mother otherwise would be unjustly enriched, a non-custodial father *may* be entitled to receive credit against his child support for expenses paid directly to or for the benefit of the minor child. *Baier v. Baier*, 897 So. 2d 202, 204 (Miss. Ct. App. 2005)(¶ 11)(emphasis added). That is not the case here. Given the extensive evidence presented by Debby of the expenses she has shouldered, it cannot be said that she would be unjustly enriched for disallowing Roland credit for money he directly gave to Alex to cover her expenses or expenses he paid on her behalf. The chancellor's finding, therefore, is clearly erroneous.

In order to determine whether Roland was in compliance with the chancellor's orders regarding child support, this Court first should establish that the requirement that Roland pay a "pro rata share" of child support during the summer months is based on the time Alex lived with Debby. The case then should be remanded for a determination of the specific college expenses Roland was required to pay, the amounts actually paid, and how they were to be credited against his child support obligation, with arrearages and interest thereon payable to Debby.

IV. THE CHANCELLOR ABUSED HIS DISCRETION IN REFUSING TO CONSIDER RETROACTIVE MODIFICATION OF CHILD SUPPORT

Debby filed her Petition for Modification, seeking an increase in child support, on April 19, 2005. (R.4 at 444). Alex Weeks turned twenty-one on May 5, 2006. The chancellor addressed Debby's petition at the May, 2006 hearing and denied her request, finding generally that there was no showing of a material and substantial change in circumstances and further, that "Alexandra is now over 21 years of age, and any further Court ordered child support has terminated. What Mr. Weeks chooses to do regarding child support in the future is a matter for his sole discretion." (R.4 at 569, R.E.5). Debby now asserts that chancellor abused his discretion in failing to consider modification of child support retroactive to the time she filed the petition in 2005.

When considering whether a material change has occurred which warrants a modification of child support, courts examine the following factors:

> (1) increased needs of older children, (2) an increase in expenses, (3) inflation, (4) a child's health and special medical or psychological needs; (5) the parties' relative financial condition and earning capacity; (6) the health and special needs of the parents; (7) the payor's necessary living expenses; (8) each party's tax liability; (9) one party's free use of a residence, furnishings, or automobile; and (10) any other relevant facts and circumstances.

Tedford v. Dempsey, 437 So. 2d 410, 422 (Miss. 1983). Debby presented evidence of Alex's increased school expenses, especially after she moved from a sorority to an apartment, which was not contemplated in the chancellor's orders, the relative ability of the parties to pay, and the additional financial responsibilities that had fallen upon her because of the ambiguities of the chancellor's orders providing for the minor child's support and education. Although the chancellor is not required to itemize the factors that he considered in making his decision as to whether an increase in child support is warranted, *Crayton v. Burley*, No. 2005-CA-01126-COA (¶ 9) (Sept. 19, 2006); *Wright v. Stanley*, 700 So. 2d 274, 283 (Miss. 1997), he clearly

disregarded the evidence presented and focused solely on the fact that Alex had turned twenty-one prior to the hearing, thus ending Roland's legal obligation to contribute to her support.

It is within the discretion of the chancellor to order an increase in child support payments retroactive to the date the petition for modification was filed. *Kirkland v. McGraw*, 806 So. 2d 1180, 1184 (¶ 10)(Miss. Ct. App. 2002); *Lawrence v. Lawrence*, 574 So. 2d 1376, 1383 (Miss. 1991). The chancellor, therefore, was not precluded from considering the modification of child support merely because Alex had turned twenty-one by the time the petition finally was heard. Indeed, it was an abuse of discretion to simply deny the relief sought because of Alex's age at the time of the hearing, especially in light of the evidence presented of the changes that had occurred since the amount of support was determined.

"All too often what parents would have done willingly had their relationship not deteriorated must, after the fact, be coerced for the benefit of their children." *Saliba*, 753 So. 2d at 1095 (¶ 95), *quoting Chesonis v. Chesonis*, 538 A.2d 1376, 1379 (Pa. Super. 1988)(Cirillo, P.J. concurring). This is one of those cases. It is undisputed that Roland has generously provided Alex with many luxuries. However, because of the increased expenses of Alex's education, shouldered largely by Debby, as well as the ambiguity of the chancellor's orders which allowed Roland to play fast and loose with the rules, the issue should be remanded for consideration of increased child support retroactive to Debby's filing of the petition in April, 2005.

V. THE CHANCELLOR'S REFUSAL TO MODIFY THE AWARD OF ALIMONY WAS AN ABUSE OF DISCRETION AND MANIFEST ERROR

The Court of Appeals reversed and remanded the original Judgment of Divorce with instructions to award periodic alimony to Debby. *Weeks*, 832 So. 2d at 588 (¶ 21). (R.E.2).

After making an on-the-record review of the *Armstrong* factors, the chancellor found that monthly periodic alimony in the amount of $3,000.00 was "reasonable." (R.3 at 317, R.E.3). The award, however, was made with the caveat that "[u]pon Debby reaching 59½ years of age, when she will be able to draw against her remaining funds from the Knight-Ridder Retirement Plan, the Court will re-examine periodic alimony." (R.3 at 317, R.E.3).

The Chancellor acknowledged that the Court of Appeals found that Debby "is entitled to continue living in the same standard of living as she has grown accustomed to during the course of her twenty-two year marriage." *Weeks,* 832 So. 2d at 587-88 (¶ 20). (R.E.2). (R.3 at 317). However, changes arising subsequent to the Judgment After Remand have made it apparent that the chancellor's award was inadequate and that modification is necessary. The chancellor refused to consider changes in circumstances arising subsequent to the hearing on remand as well as to re-examine the *Armstrong* factors in making his determination that Debby was not entitled to a modification of alimony. Further, reiterating his implication in the Judgment After Remand that the award of alimony was only temporary, he noted in the Bench Opinion that "I was quite tempted at trial – and I said this to counsel confidentially – whether or not alimony should even continue at all." (Tr. 13 at 1161, R.E.4). Moreover, the chancellor's limited findings with regard to Debby's health and her ability to work, as well as his disregard of the evidence regarding her inability to derive significant present income from her share of Roland's State Record and Knight-Ridder, Inc. retirement plans and 401(k) savings plan received in the distribution of marital assets, are contrary to the evidence in the record and as such, are clearly erroneous. His denial of Debby's Petition for Modification, as well as his inference that alimony should be terminated, were an abuse of discretion.

In the Judgment After Remand, the chancellor awarded Debby alimony in the amount of $3000.00, considerably less than the $6,500.00 per month she originally received as

temporary alimony prior to the hearing on remand. (R.1 at 132). That amount had been reduced to $4,000.00 by order dated July 16, 2003, which the chancellor stated was based in part upon a July 2, 2003 agreed order regarding the Final QDRO. (R.3 at 305, R.E.3). In his analysis of the *Armstrong* factors, the chancellor found as follows:

> Debby earns no income from employment, and given her years outside the workforce, her age and health, it is unlikely that she will earn income from employment in the future, other than from clerical [sic] positions such as those at Belk's or Dillard's. Debby is currently capable of drawing $6,360.00 per month from the marital distribution, if she draws against the 401(k) of $382,000.00 at $76,000.00 per year.

(R.3 at 308, R.E.3). The chancellor further noted that Debby had quit her job working at the cosmetic counter at Belk's Department Store "allegedly for health reasons," and that "she ha[d] not applied for Social Security benefits or SSI benefits, nor was the Court presented any testimony regarding other disability insurance which might be available to her." (R.3 at 312, R.E.3).

Debby sought reconsideration of the chancellor's award of alimony in motions filed in May and August, 2004. (R.3 at 325, 342). Ultimately, she filed her Petition for Modification on April 19, 2005, asserting that substantial and material circumstances had arisen since the prior orders, noting in particular her inability, contrary to the chancellor's findings, to make "equal and substantial" withdrawals from the Knight-Ridder, Inc. 401(k) savings plan as contemplated by the Judgment After Remand, and her ineligibility for Social Security benefits. (R.3 at 445). In his June 22, 2006 order, the chancellor denied Debby's petition. (R. 4 at 569, R.E.5).

A. Debby's Health and Ability to Work

The chancellor, in denying Debby's Petition for Modification, simply stated that there was no showing of a substantial and material change in circumstances so as to warrant an

increase in alimony. (R.4 at 569, R.E.5). To the extent that the chancellor made any findings regarding her health and ability to work, he stated only:

> Mrs. Weeks claimed that her medical condition kept her from working, yet she introduced no medical proof of her inability to work. Mrs. Weeks introduced documentary evidence from the Social Security Administration showing she had been denied disability for two reasons: she was not medically disabled; and she did not have enough years of employment.

(R.4 at 569, R.E.5). In so finding, the chancellor disregarded Debby's undisputed testimony about the changes in her health and medical expenses arising subsequent to the original award of periodic alimony and misconstrued the evidence regarding Debby's ineligibility for Social Security disability benefits.

The Court of Appeals noted that Debby's testimony about her poor health and large medical bills was undisputed. *Weeks*, 832 So. 2d at 587 (¶ 18). In his Judgment After Remand, however, despite extensive testimony about the state of her health problems at the November, 2004 hearing and express findings regarding her insurance and prescription medicine costs (R. 3 at 310), the chancellor further found that "Debby has put on no proof of a need for future medical treatment that this Court finds convincing." (R.3 at 318, R.E.3). Debby sought to put on additional proof, but the chancellor denied her motion, finding that any evidence of medical problems which would serve to increase her monthly medical and pharmaceutical bills, as well as evidence of medications no longer covered by insurance, was "reserved to a separate request for modification." (R.3 at 407-08).

Debby therefore had no choice but to seek relief through her Petition for Modification. At the May, 2006, hearing, despite the chancellor's previous finding that she had no need for ongoing medical treatment, Debby testified about the worsening of pre-existing health problems as well as new health concerns, including asthma and chronic Epstein-Barr virus, which arose subsequent to the 2004 hearing. (Tr. 11 at 753-766). She

introduced evidence of her increased medical expenses; the chancellor allowed no evidence of any diagnoses made. (Tr. 11 at 779-81).

The chancellor abused his discretion in disregarding the evidence of Debby's increased health problems and medical bills. Where problems with the wife's health were known at the time of the divorce, this Court has found that the deterioration of her health as well as the increase in her insurance and medical costs were changes in circumstances that could not have been anticipated. *Makamson v. Makamson*, 928 So. 2d 218, 221 (¶¶ 11-12)(Miss. Ct. App. 2006); *Profilet v. Profilet,* 826 So. 2d 91, 96 (¶ 16)(Miss. Ct. App. 2002). Although both *Makamson* and *Profilet* addressed provisions for alimony made in agreed divorce settlements rather than those made by judicial determination, the underlying premise is the same. Unless the judgment contained some express provision for support made in anticipation of that spouses' ongoing health problems, the consequences of her deteriorating health could be found to be a change in circumstances warranting a modification of alimony. In *Makamson*, where the wife's pre-existing health problems became markedly more serious after the divorce, the Court of Appeals determined that the chancellor properly found a change in circumstances. 928 So. 2d at 221(¶¶ 11-12). In *Profilet*, where the ramifications of the deterioration of the wife's mental health problems were more subtle, this Court remanded the case for a determination of the foreseeability of the effects of the wife's medical condition. 826 So. 2d at 96 (¶ 16).

Contrary to the chancellor's finding that Debby was denied disability for two reasons - that she was not medically disabled and she did not have enough years of employment - no determination was ever made by the Social Security Administration as to whether Debby was medically disabled at the time of these proceedings. Rather, the Notice of Disproved Claim entered into evidence stated that "the date you last met the met the insured status requirement

for consideration of disability was 12/31/84." (Exh. 24). Explaining the denial of benefits, the Explanation of Determination further provided, "Since your ability to work was not significantly affected *on or before the date you last met eligibility requirements*, your claim is denied." (Exh. 24)(emphasis added). Clearly, the denial of Debby's application for benefits was not based on her ability or inability to work in 2004, but in 1984. Moreover, the evidence was not introduced for the purpose of showing whether or not Debby is presently able to work, but to establish that disability benefits were not a source of income on which Debby could hope to rely. For the chancellor to use this as a basis for finding that Debby has no present inability to work was a misunderstanding of the facts and therefore, clearly erroneous. *LeBlanc v. Andrews*, 931 So. 2d 683, 685 (¶ 9)(Miss. Ct. App. 2006).

B. Ability to Draw from the Knight-Ridder, Inc. Retirement Investments

Debby's ability to access the Knight-Ridder, Inc. retirement investments received as part of the distribution of marital assets was originally viewed by the chancellor as a major factor distinguishing her financial position at the time the case was remanded from the time of the divorce in 2001. (R.3 at 306, R.E.3). In the Judgment After Remand, the chancellor found that Debby's share of the retirement assets pursuant to the Final QDRO amounted to $681,140.75 from the Knight-Ridder, Inc. Retirement Plan, from which she could withdraw funds without penalty after she reached the age of 59½, and $382,564.01 from the Knight-Ridder Savings Plan or 401(k). (R.3 at 306, R.E.3). Based on the testimony at the hearing on remand that Debby could take five equal distributions from the 401(k) savings plan without penalty before she turned 59½, the chancellor further found that she was capable of drawing $76,400.00 per year for five years or $6,360.00 per month.[5] (R.3 at 308, R.E.3). Although the chancellor noted Debby's objection to invading her retirement assets, he found that

[5] Debby was fifty-five years old at the time of the hearing after remand.

because of the distribution she had received from the retirement account and her potential to draw from the 401(k) savings plan, monthly periodic alimony in the amount of $3,000.00 was reasonable. (R.3 at 308, 317, R.E.3).

At the time of the hearing after remand, Debby was receiving an annuity from the 401(k) savings plan in the amount of $442.95 per month. (Tr. 6 at 145). Debby made further inquiry and subsequently learned that the option to make substantial withdrawals as contemplated by the chancellor was not available to her since she was not an active Knight-Ridder employee. (Exh. 50). Instead, she was limited to the annuity option provided through the Metropolitan Life Insurance Company. (R.3 at 403, Tr. 11 at 866-67, Exh. 51). In her February 16, 2005 Motion to Clarify Order and/or Relief from Judgment and Order, Debby sought relief pursuant to Rule 60(b)(3) of the Mississippi Rules of Civil Procedure. (R.3 at 403).

Despite the emphasis placed on Debby's access to retirement assets in the Judgment After Remand when making the determination periodic of alimony, the chancellor failed to address the limits on her ability to draw on those funds in the June, 2006 Order, which came to light after the hearing on remand. The chancellor further disregarded Debby's testimony that she took a $100,000.00 withdrawal from the 401(k) in December, 2005, to cover post-hurricane expenses, including the maintenance of two residences.[6] (Tr. 11 at 857). Viewed in light of his pronouncement in the Judgment After Remand that the issue of alimony would be revisited when Debby turned 59½ and could draw from the retirement plan assets without penalty, a circumstance clearly foreseeable at the time the award of alimony was made, the chancellor's refusal to consider Debby's inability to make the withdrawals from the 401(k)

[6] Debby testified that because of Hurricane Katrina, she was able to make a one-time withdrawal from the 401(k) without penalty and to spread her tax liability evenly over five calendar years. (Tr. 11 at 856).

savings plan which he contemplated when making the award, a circumstance *not* foreseeable at that time, was contrary to the law and clearly erroneous.

C. Other Factors Relevant to Modification

When considering the modification of periodic alimony, the chancellor must consider both those changes occurring subsequent to the prior award which were not foreseeable at that time, and the *Armstrong* factors. *Austin v. Austin*, 766 So. 2d 86 (Miss. Ct. App. 2000); *James v. James,* 724 So. 2d 1098 (Miss. Ct. App. 1998); *Anderson v. Anderson,* 692 So. 2d 65 (Miss. 1997). Neither the Bench Ruling nor the June 22, 2006 Order reflect any consideration of the *Armstrong* factors.[7] Moreover, he failed to consider the various unforeseeable changes in circumstances which have occurred since the award of alimony, above and beyond the issues of Debby's health and ability to work, as well as the unforeseen limits on her ability to draw from the retirement assets received in the distribution of marital assets.

The evidence presented at the May, 2006, hearing clearly established that several other substantial and material changes occurred subsequent to the award of alimony. In addition to Debby's inability to make the substantial withdrawals from the Knight-Ridder 401(k) savings plan, as contemplated at the time of the divorce, she was faced with the unanticipated expenses associated with her newly-diagnosed medical problems; increased health insurance premium costs, tax liability and responsibility for Alex's support and

[7] The *Armstrong* factors include: the income and expenses of the parties; the health and earning capacities of the parties; the needs of each party; the obligations and assets of each party; the length of the marriage; 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; the age of the parties; the standard of living of the parties, both during the marriage and at the time of the support determination; the tax consequences of the spousal support order; fault or misconduct; wasteful dissipation of assets by either party; or any other factor deemed by the court to be "just and equitable" in connection with the setting of spousal support. *Armstrong,* 618 So. 2d at 1280.

college expenses resulting from the ambiguity of the chancellor's orders, as well as the legal expenses incurred in seeking to clarify and enforce those orders; and finally, serious damage to her home and loss of her car, furnishings and personal property as the result of Hurricane Katrina in August, 2005.

This Court has found that "the husband is required to support his wife in the manner to which she has become accustomed, to the extent of his ability to pay." *Wells v. Wells*, 800 So. 2d 1239, 1245 (¶ 10)(Miss. Ct. App. 2001). The chancellor's finding that Debby had failed to prove that Roland was hiding assets is not equivalent to a determination that Roland was unable to pay. (R.4 at 569, R.E.5) Indeed, the evidence in the record indicated that Roland continued to enjoy a comfortable lifestyle. Nevertheless, the chancellor found in his Bench Ruling that:

> I couldn't help but think of the story of I believe it's the story of Prometheus which was bound on a rock. It was either Prometheus or Loki and Dali, a vulture comes and eats at his entrails, and every night, he is healed, and every day the vulture comes back. Roland Weeks is a diminishing asset, and the best thing Mrs. Weeks can do at this point is accept the fact that she has substantial assets and move on with her life.

(Tr. 13 at 1161, R.E.4). That comment followed the chancellor's remark that he "was concerned as to whether or not alimony should even continue at all." (Tr. 13 at 1161, R.E.4). Although the chancellor acknowledged that the issue was not presently before him, his references to terminating alimony, especially when coupled with his finding in the Judgment After Remand that alimony would be revisited when Debby was 59½ and could draw from the Knight-Ridder retirement plan assets, were over-reaching and an abuse of discretion.

The chancellor failed to properly consider the evidence of change in circumstances presented at the May, 2006 hearing. To the extent the *Armstrong* factors were considered, the chancellor's limited findings were clearly erroneous. The denial of Debby's Petition for

Modification of Alimony should be reversed and remanded.

VI. THE CHANCELLOR ABUSED HIS DISCRETION IN FAILING TO AWARD DEBBY WEEKS' ATTORNEY'S FEES FOR THE APPEAL AND PROCEEDINGS SUBSEQUENT TO REMAND

Debby asserts that the chancellor erred in refusing to award her attorney's fees for the legal expenses incurred on appeal and subsequent to the remand of the case by the Court of Appeals, based on his finding that she had sufficient assets available to her with which to pay them. The chancellor's finding that Debby had a "potful of money" with which she could pay her attorney's fees is contrary to the evidence and his assertion that she should delve into her retirement money to pay them, contrary to the law. Her inability to pay notwithstanding, Debby's legal bills were incurred not because of any wrongdoing on her part, but on the basis of a successful appeal and the ambiguity of the chancellor's subsequent orders which invited and enabled Roland's only minimal efforts to comply.

In *Weeks,* the Court of Appeals found the chancellor in error for denying an award of attorney's fees to Debby for the divorce proceedings without application of the factors set out in *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982), and remanded for a determination of whether an award of attorney's fees was appropriate. *Weeks*, 832 So. 2d at 588 (¶ 24). (R.E.2). In the Judgment After Remand, the chancellor made an on-the-record finding of the *McKee* factors based on the parties' positions at the time of the divorce. (R.3 at 321-24, R.E.3). Debby was awarded $25,000.00 toward her total attorney's fees for the divorce proceedings, with Roland given credit for $7,500.00 he had already paid. (R.3 at 321-24, R.E.3).

Both Debby and Roland included requests for attorney's fees in the flurry of motions which followed the Judgment After Remand. The chancellor, however, granted neither parties' requests for attorney's fees in the June 22, 2006 order. (R.4 at 569, R.E.5). Without

referencing the *McKee* factors, the chancellor simply found that Debby had sufficient assets of her own with which to pay her attorney fees, stating in his bench opinion, "She has a pot full of money. She has chosen not to touch her funds, but she has the funds available." (Tr. 13 at 1157, R.E.4). In response to Debby's attorney's question as to whether the judge also was denying legal fees for the May, 2006, motion hearing, the chancellor reiterated, "She has sufficient assets to pay her attorney fees." (Tr. 13 at 1161-62, R.E.4).

At the time of these proceedings, Debby's monthly income was limited to $3,000.00 in alimony and the $442.95 annuity she received as a distribution from the Knight-Ridder, Inc. 401(k) plan. Her testimony, as well as her Rule 8.05 Financial Disclosure Form, clearly establish that her expenses significantly exceed her monthly income. As this Court found, she has no separate estate beyond those assets received in the distribution of marital assets. *Weeks*, 832 So. 2d at 587-88 (¶¶ 18-21). (R.E.2). The chancellor established that Debby initially received $382,564.01 from Roland's 401(k) plan and $681,140.75 from his retirement plan in the distribution of marital assets. (R.3 at 306, R.E.3). She received between $450,000.00 and $500,000.00 in insurance proceeds for damage suffered to her home and property by Hurricane Katrina in August, 2005, which was set aside for rebuilding. (Tr. 10 at 734). Moreover, she had been forced to take a second mortgage prior to the hurricane on the former marital home in the amount of $200,000.00 to pay her outstanding attorney's fees from the divorce and appeal. (Tr. 7 at 194-96).

Where, as in the present case, the wife has "no immediately liquid assets" except the alimony she receives, an award of attorney's fees has been found to be appropriate. *East v. East*, 775 So. 2d 741 (Miss. Ct. App. 2000). As the Court explained in *East,* "where the only liquid asset is the alimony award and the party seeking fees has otherwise demonstrated an inability to pay the fees, a reasonable award is appropriate, providing the *McKee* factors,

regarding inability to pay, the skill of her attorney, the nature and novelty of the case, usual fees for similar cases of a similar character are satisfied." *Id.* at 745 (¶ 16). See also *Wells*, 800 So. 2d at 1246 (¶ 16-18)(Miss. Ct. App. 2001)(award of 1/3 of wife's attorney's fees not an abuse of discretion where alimony was her only liquid asset and to liquidate her portion of former husband's retirement plan would incur tax consequences and penalties for early withdrawal).

It is well-established that when determining whether an award of attorney's fees is appropriate, the court may consider the sources of funds the spouse would be forced to use to pay the attorneys fees. *Klauser v. Klauser,* 865 So. 2d 363, 368 (¶ 19)(Miss. Ct. App. 2003). That the wife may have savings or a retirement account, whether her own separate property or received as part of a distribution of marital assets, does not preclude an award of attorney fees. To the contrary, the Mississippi Supreme Court has held that she should not be required to use those assets to pay her attorney's fees. *Hemsley v. Hemsley*, 639 So. 2d 909 (Miss. 1994)(wife should not have to liquidate her savings or IRA to pay attorney's fees); *Adams v. Adams*, 591 So. 2d 431, 435 (Miss. 1991)(wife not required to invade corpus of her investments to pay attorney's fees).

The record clearly shows that Debby has "no immediately liquid assets" beyond her alimony and a monthly annuity; her only substantial assets are retirement funds received as part of the equitable distribution of marital assets, the withdrawal of which would have substantial tax consequences, and insurance proceeds designated for post-Katrina repairs to the former marital home; and she has significant health issues which preclude meaningful employment. The chancellor's finding that Debby has "a pot of money" is unsupported by the evidence and thus, clearly erroneous. Furthermore, he applied the wrong legal standard when making the implication that Debby should further delve into the retirement assets

received in the distribution of marital assets. The chancellor, therefore, abused his discretion in finding that Debby was able to pay her own attorney's fees.

CONCLUSION

The chancellor's June 22, 2006 Order served to undermine the relief originally awarded to Debby by this Court as well as in the Judgment After Remand. The findings on which the chancellor's decisions are based are largely unsupported by the facts. The chancellor abused his discretion in finding that Roland had complied fully with his obligation to Debby for the provision of medical insurance and life insurance, as well as for the payment of child support. The chancellor further abused his discretion and committed manifest error in denying Debby's motion for the modification of both child support and alimony. Finally, the chancellor erred in refusing to award Debby any attorney's fees for the proceedings subsequent to the remand of this case to the chancellor by the Court of Appeals.

WHEREFORE, Deborah Weeks prays that upon consideration of this appeal, the court will reverse and remand the chancellor's decision for reconsideration of the issues raised herein. Deborah Weeks also prays for an award of attorney's fees and any other relief to which she is entitled in the premises.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, John Robert White, Attorney for the Appellant, Deborah Weeks, hereby certify that I have this day caused to be served by first class mail, postage prepaid, a true and correct copy of the above Brief of Appellant on the following persons:

Chancellor Carter O. Bise
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Hon. Henry Laird
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SO CERTIFIED, this the 5th day of March, 2007.

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