

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
NO. 2007-CA-00-00816

MONTE STUART MORRIS

APPELLANT

VERSUS

LOU ANN JAMES MORRIS

APPELLEE

APPEAL FROM THE CHANCERY COURT OF  
LAMAR COUNTY, MISSISSIPPI

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BRIEF OF APPELLANT  
MONTE STUART MORRIS

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HERMAN M. HOLLENSED, JR.  
MSBN [REDACTED]  
BRYAN NELSON, P.A.  
POST OFFICE DRAWER 18109  
HATTIESBURG, MS 39404-8109  
(601-261-4100)

ATTORNEYS FOR APPELLANT  
MONTE STUART MORRIS

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**CERTIFICATE OF INTERESTED PERSONS**

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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Monte Stuart Morris, Appellant
2. Herman M. Hollensed, Jr., Bryan Nelson, P.A., Attorneys for Appellant
3. Lou Ann James Morris, Appellee
4. Erik Lowrey, Attorney for Appellee

Respectfully submitted, this the 7<sup>th</sup> day of March, 2008.

  
HERMAN M. HOLLENSSED, JR.

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### **STATEMENT OF THE ISSUES**

Appellant, Monte Stuart Morris, asserts that the primary issue before the Court for decision is whether the chancellor erred in failing to modify the parties' divorce judgment to terminate the requirement that he pay monthly periodic alimony of \$1,500.00, or to substantially reduce those payments.

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE, COURSE OF THE PROCEEDINGS, AND DISPOSITION IN THE CHANCERY COURT**

This case involves an ex-husband's plea that the parties' judgment of divorce be modified to terminate or substantially reduce the monthly periodic alimony payments he has been paying to his ex-wife.

On November 6, 2001, the chancellor entered a final judgment of divorce granting the parties, Monte Stuart Morris and Lou Ann Morris, a divorce on the grounds of irreconcilable differences. (R 59, 60). The judgment incorporated the parties' child custody, child support and property settlement agreement. (R 61-70). Pursuant to the judgment, the parties' marital assets were divided. The judgment also required that Monte convey his interest in the parties' marital home to Lou Ann, and that Monte pay the mortgage, property taxes, and insurance on the marital home. (R 63, 64). Monte was also required to pay Lou Ann \$1,000.00 per month in child support (\$500.00 for each of the parties minor children), and to also pay Lou Ann periodic alimony of \$1,500.00 per month. (R 62, 66).

On June 27, 2006, Monte filed a (Complaint/Petition) Motion for Modification of Former Judgment of Divorce and Child Custody, Child Support and Property Settlement Agreement asserting as grounds that there had been a material change in circumstances, including but not limited to, a substantial reduction in Monte's income, and a substantial increase in Lou Ann's income, since the entry of the judgment. (R 75-91). Monte requested that the divorce judgment be clarified to reflect that one of the parties' children had reached 21 years of age, and therefore, he was no longer obligated to pay child support for that child. Monte further requested that the judgment be modified to reflect that his

obligation to pay Lou Ann \$1,500.00 per month in periodic alimony be immediately terminated or substantially reduced. Monte further requested that the judgment be clarified and/or modified to reflect that his obligation to pay the property taxes and insurance on the marital home be deemed terminated.

Lou Ann filed her answer to Monte's complaint for modification denying that Monte was entitled to any of the relief he requested, except she agreed Monte was no longer obligated to pay her child support for the child who had reached 21 years of age. (R 94-97). She also asserted a counterclaim alleging that there had been a material change in circumstances, specifically that Monte was no longer obligated to pay her \$500.00 per month in child support for their child who had reached 21 years of age, and therefore, Monte's child support obligation for the parties only remaining minor child should be adjusted to 14% of Monte's adjusted gross income. Monte filed a reply to the counterclaim denying that Lou Ann was entitled to the relief she requested. (R 100-102).

On February 13, 2007, Monte's complaint for modification and Lou Ann's counterclaim for modification came on for hearing. (TT 2). After hearing the testimony and receiving the evidence, the chancellor announced his opinion from the bench denying the relief requested by Monte, and granting Lou Ann an increase in child support from \$500.00 to \$583.33 per month. (TT 100-104). The chancellor also found that Monte was required to pay the property taxes and insurance on the marital home for a period of five years after the mortgage was satisfied. On March 15, 2007, a judgment was entered in accordance with the opinion the chancellor announced from the bench and incorporating the chancellor's bench opinion. (R 138-141)

On March 22, 2007, Monte filed a Motion to Amend Findings of Fact, Conclusions of Law and Judgment, or Alternatively, Motion for New Trial or Motion for Reconsideration. (R 142-149). On

March 30, 2007, Lou Ann filed an objection to Monte's motion. (R 152-153). On April 16, 2007, the chancellor entered an order overruling Monte's motion in its entirety. (R 154).

On May 14, 2007, Monte filed a timely notice of appeal of the lower court's judgment entered on March 15, 2007, and the order entered on April 16, 2007, denying Monte's Motion to Amend Findings of Fact, Conclusions of Law and Judgment, or Alternatively, Motion for New Trial or Motion for Reconsideration. (R 155, 156).

## **B. STATEMENT OF THE FACTS**

On November 6, 2001, the trial court entered a final judgment of divorce granting the parties a divorce on the grounds of irreconcilable differences. (R 59,60). The judgment incorporated the parties' child custody, child support and property settlement agreement. (R 61-70). In accordance with the judgment, the parties' marital assets were divided. The judgment also required that Monte convey his interest in the parties' marital home to Lou Ann, and that he make the payments on the mortgage secured by the marital home of \$866.77 per month, and pay the property taxes and insurance on the marital home averaging \$306.49 per month. (R 63, 64; and TT. Ex. 1). The judgment further provided that if Monte, "prepays the mortgage within five (5) years from the date of judgment, then he will continue to be responsible for taxes and insurance on the home through this five (5) year period." The judgment further required that Monte pay Lou Ann child support in the amount of \$500.00 per child per month for the parties' two minor children, Kevin and Anna Claire. (R 62, 66). The judgment further required that Monte pay Lou Ann \$1,500.00 per month in periodic alimony. (R 62, 68).

In deciding the merits of Monte's complaint for modification and this appeal, the Court necessarily must examine the parties' circumstances at the time of the divorce, as compared to their circumstances at the time of the hearing on the complaint for modification, and particularly their financial situations at those times.



Monte was 44 years old at the time of the divorce and 50 years old at the time of the hearing on his complaint for modification. (TT 3). Monte and Lou Ann had two children, Kevin who was twenty-one (21) years old at the time of the hearing, and Anna Claire who was seventeen (17) years old at the time of the hearing. After Monte and Lou Ann divorced, Monte remarried and fathered another child who was born on August 29, 2003. (TT 2, 3). Monte's new wife, Christina, is employed as a revenue officer with the United States Internal Revenue Service. (TT 3, 4). Christina has two children from her prior marriage, namely Justin, age 13, and Hannah, age 8. (TT 2, 3). Justin and Hannah live with Monte and Christina six months a year. (TT 3).

Monte has been employed for over 25 years by Credit Bureau Central, a family owned collection agency, that primarily collects medical bills. (TT 3, 5). Monte owns a 45% interest in the company, his sister owns a 45% percent interest in the company, and their father, owns a 10% interest in the company. (TT 4). Monte is paid a salary from the business, and in addition he is paid a portion of the profits from the business, which are calculated at the end of each calendar year. (TT 12, 13). The profits from the business are divided among Monte, his sister, and their father according to their respective ownership interests. (TT 13). Monte's only source of income is from that business, with the exception of some investment income from his savings (approximately \$1,333.00 per month on average according to his sworn financial statement and tax returns), which are diminishing ever year because he does not earn enough money to pay his reasonable living expenses and the alimony payments he is required to pay to Lou Ann. (TT 17, 36, Exhibits 1 - 6).

When the parties were divorced in 2001, Monte was paid a base salary of \$55,000.00, plus his 45% share of the profits of Credit Bureau Central that year of \$80,000.00, for a total of \$135,000.00. (TT 14). In 2002, Monte was paid a base salary of \$55,000.00, plus his share of the business' profits that year of \$92,000.00, for a total of \$147,000.00. (TT 15). In 2003, Monte was paid a base salary of

\$55,000.00, plus his share of the business' profits that year of \$62,000.00, for a total of \$117,000.00. (TT 15). In 2004, Monte was paid a base salary of \$55,000.00, plus his share of the business' profits that year of \$48,000.00, for a total of \$98,000.00. (TT 15). In 2005, Monte was paid a base salary of \$55,000.00, plus his share of the business' profits that year of \$15,000.00, for a total of \$70,000.00. (TT 16). In 2006, Monte's base salary was increased to \$75,000.00 in order to help pay his monthly living expenses, and at trial he estimated he would receive an additional \$15,000.00 for his percentage of the business' profits that year, for a total of \$90,000.00 of income from the business. (TT 12, 13). Monte's income has substantially decreased since the divorce even though he has continued to work just as hard if not harder. (TT 12). The reason for his reduction in income from the business is market conditions and competition. (TT 5, 12).

Monte's Uniform Chancery Court Rule 8.05 Financial Statement in relation to his complaint for modification is included in the record, and clearly sets forth the untenable financial situation he now finds himself in because of his substantial reduction in income, which he did not foresee when the parties divorced and has arisen since the parties' divorce. (TT. Ex. 2). At trial, Lou Ann offered no substantial credible evidence to challenge Monte's financial statement.

Monte's testimony and sworn financial statement show that he has an average total monthly gross family income of \$11,507.27, of which approximately \$3,200.00 per month is Christina's salary. The statement further shows average monthly deductions for taxes of \$2,391.11, mandatory insurance of \$271.18, mandatory retirement of \$28.98, union dues of \$26.22, for a total of \$2,717.49 in average monthly deductions, leaving Monte and Christina an average combined net monthly income of \$8,789.78. The statement further shows Monte's family's current average net monthly household expenses are \$11,618.72, of which \$3,256.00 is paid to Lou Ann for alimony, child support, mortgage

payment, property taxes, and insurance. Thus, Monte's net monthly expenses exceed his net monthly income by \$2,828.95.

Monte's net worth at the time of the divorce was approximately \$650,000.00 and his net worth at the time of trial was approximately \$550,000.00. (TT 53, Ex. 1). Those amounts are consistent with his net monthly income and expenses, and demonstrates that Monte is on the road to bankruptcy if he continues having to send a majority of his personal net income to Lou Ann every month. If Monte does not receive any relief from the excessive amounts he is required to pay to Lou Ann, he will eventually be broke and have to declare bankruptcy.

On the other hand, the evidence shows Lou Ann has had a substantial increase in her income since the time of the divorce, and she is no longer in need of alimony to meet her reasonable and actual living expenses. The evidence without any dispute shows that Lou Ann's income has practically doubled from what it was at the time of the divorce compared to what it was at the time of the modification hearing, and that Lou Ann's average net monthly income substantially exceeds her average net monthly living expenses.

Lou Ann was 43 years old at the time of the divorce and 49 years old at the time of the hearing on the parties' claims for modification. (TT, Ex. 7). Lou Ann is a dietician and performs consulting work for Deaconess Home Health and Hospice, successor of South Mississippi Home Health. (TT 54, 55, 56). The year of the parties' divorce Lou Ann taught school for the Petal Municipal School District, and she also worked part-time for South Mississippi Home Health as a dietician. (TT 54-58). After the school year ended in the spring of 2001, Lou Ann applied for disability, as a result of having Cushing's disease, with the Mississippi Public Employees' Retirement System and the U.S. Social Security Administration. (TT 58-62). The state retirement system granted her application for disability benefits in 2001, but her application for social security disability was denied that year. (TT 62). After two

denials, the Social Security Administration eventually granted Lou Ann's application for disability benefits in the year 2003. (TT 60, 61).

Lou Ann's financial disclosure statement filed in relation to her complaint for divorce in 2001 does not disclose any disability income from the state retirement system. (TT Ex. 7). While Monte was aware that Lou Ann had applied for disability when the parties' were divorced, he was not aware that her application for state disability benefits had been granted, nor was he aware that Lou Ann had actually begun receiving disability benefits from the state retirement system at the time of the divorce. (TT 20, 21, 26).

For the year 2001, Lou Ann's adjusted gross income (AGI) was \$32,605.00, of which \$11,375.00 was from the Petal School District, \$3,533.00 from Deaconess Home Health, \$8,015.00 from state disability, and \$9,000.00 from alimony. (TT 57, 58, 59, Ex. 8). For the year 2002, Lou Ann's AGI was \$31,900.00, of which \$5,912.00 was from Deaconess Home Health, \$16,477.00 from state disability, and \$9,000.00 from alimony (according to her tax return, although she was actually paid \$18,000.00 in alimony that year). (TT 59, Ex. 9). For the year 2003, Lou Ann's AGI was \$68,399.00, of which \$4,295.00 was from Deaconess Home Health, \$17,130.00 from state disability, \$25,991.00 from Social Security disability (which included a catch up for 2001 and 2002), and \$18,000.00 from alimony. (TT 59, 60, Ex. 10). For the year 2004, Lou Ann's AGI was \$56,227.00, of which \$3,120.00 was from Deaconess Home Health, \$17,622.00 from state disability, \$13,256.00 from Social Security disability, and \$18,000.00 from alimony. (TT 60, Ex. 11). For the year 2005, Lou Ann's AGI was \$59,644.00, of which \$4,078.00 was from Deaconess Home Health, \$18,144.00 from state disability, \$13,619.00 from Social Security disability, and \$18,000.00 from alimony. (TT 62, Ex. 12). Lou Ann's 2006 tax returns were not available at trial, but her income, not including any child support for that year should

have been approximately \$60,000.00. Lou Ann's state disability and social security disability payments are adjusted upward for inflation on a yearly basis. (TT 62, 63).

Lou Ann's Uniform Chancery Court Rule 8.05 Financial Statement at the time of the hearing shows that her gross monthly income is \$4,548.00, not including any child support. (TT Ex.7). Her financial statement lists \$260.00 of monthly income (\$3,120.00 yearly) from salary and wages for her work at Deaconess Home Health, although her tax returns since the parties' divorce include W-2 forms showing yearly income from Deaconess Home Health in 2002 of \$5,912.00, 2003 of \$4,295.00, 2004 of \$3,120.00, and 2005 of \$4,078.00. (TT. Ex. 9, 10, 11, 12). Lou Ann is certainly able to do some work for Deaconess Home Health. Lou Ann testified she does not work more for Deaconess Home Health because she would begin losing her state retirement disability, or in other words, Lou Ann admits that she is capable of working more but she has chosen not to.

Based on her tax returns, Lou Ann is obviously capable of making \$4,200.00 per year at Deaconess Home Health without any penalty against her disability income. Thus, Lou Ann is capable of making \$350.00 (\$4,200 divided by 12) per month working at Deaconess Home Health instead of \$260.00 as she listed in her financial statement. Lou Ann also has additional nontaxable income of \$583.33 per month for child support not reflected on her financial statement. Furthermore, Lou Ann's financial statement does not list her investment interest and dividend income which was \$3,561.00 in 2002, \$3,397.00 in 2003, \$3,696.00 in 2004, and \$4,163.00 in 2005, for an average of \$3,704.00, a year or \$308.00 per month and increasing every year. When the income reflected in Lou Ann's Financial Disclosure Statement is adjusted to include the additional \$90.00 per month she is easily capable of earning at Deaconess Home Health, the \$583.33 per month she receives for child support, and her investment income of approximately \$308.00 per month (\$3,696.00 per year divided by 12), Lou Ann's actual gross monthly income should be approximately \$5,530.00. After deducting monthly taxes and

mandatory insurance in the amount of \$206.00, Lou Ann is capable of having net monthly income of \$5,326.00. Lou Ann's financial statement shows she has net monthly expenses for herself and her children totaling \$3,700.00. (TT Ex. 8). Thus, Lou Ann is capable of having net monthly income that exceeds her net monthly expenses by \$1,626.00. Said another way, she is capable of meeting her monthly living expenses without the \$1,500.00 of monthly periodic alimony from Monte, and having \$126.00 per month left over. In contrast, Monte goes in the hole at least \$2,800.00 per month.

## SUMMARY OF THE ARGUMENT

Where due to a clear and material change of circumstances it would be unfair and inequitable for periodic alimony to continue after a divorce, or for periodic alimony to continue in the amount awarded at the time of the divorce, the award of periodic alimony should be terminated or reduced considering the relevant circumstances. *Beacham v. Beacham*, 383 So.2d 146 (Miss. 1980).

The relevant circumstances and factors to be applied in determining whether to modify an award of periodic alimony are set forth in *Armstrong v. Armstrong*, 618 So.2d 1278 (Miss. 1993). Those factors are as follows: 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 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 “just and equitable” in connection with the setting of spousal support. In making periodic alimony determinations, the chancellor should first consider the wife’s financial resources and the amount she needs to maintain her standard of living, considering the husband’s ability to pay. *Brooks v. Brooks*, 652 So.2d 1113, 1122 (Miss. 1995). The chancellor should then consider the husband’s right to lead as normal a life as possible with a decent standard of living.

*Id.*

If a chancellor’s award of periodic alimony was manifestly wrong, clearly erroneous, or a clearly erroneous standard was applied, the chancellor’s decision should be reversed. *Armstrong v. Armstrong*, 618 So.2d 1278 (Miss. 1993). If a chancellor’s decision with respect to periodic alimony was not fair or equitable, the chancellor’s decision should be reversed. *Yelverton v. Yelverton*, 961 So.2d 19 (Miss.

2007). The chancellor's decision in this case not to terminate or substantially reduce the \$1,500.00 per month in periodic alimony payments that Monte has been paying to Lou Ann since the parties' divorce was patently unfair, inequitable, manifestly wrong and clearly erroneous, and therefore, should be reversed.

The chancellor erred in failing to find that there has been a clear and material change of circumstances since the parties' divorce, and that it would be unfair and inequitable for periodic alimony to continue in this case. The chancellor clearly failed to properly weigh and consider the *Armstrong* factors in making his decision in this case. The uncontradicted and overwhelming evidence demonstrates that Monte has had a substantial decrease in his income through no fault of his own, and that Lou Ann has had a substantial increase in her income since the time of the parties' divorce, and that Lou Ann is now able to satisfy her actual living expenses and maintain her standard of living without any periodic alimony. The uncontradicted and overwhelming evidence also demonstrates that Monte is not able to lead as normal a life as possible with a decent standard of living with his current income.

When the uncontradicted facts are considered as a whole, the chancellor's judgment should be reversed, and judgment entered in favor of Monte modifying the parties' judgment so as to terminate the requirement of periodic alimony, or the amount of monthly periodic alimony should be substantially reduced to a reasonable amount by way of a remittitur. Alternatively, the chancellor's judgment should be reversed and the case remanded with instructions that the chancellor properly consider and weigh all of the relevant facts and evidence, and apply the proper legal standards for determining periodic alimony.



## ARGUMENT

### A. STANDARD OF REVIEW

An Appellate court reviews a chancellor's decision in a case involving modification of alimony for abuse of discretion. *Austin v. Austin*, \_\_ So.2d \_\_, No. 2006-CA-00766-COA, 2007 WL 3076870 (Miss. App. 2007), (rehearing denied Feb. 19, 2008). An appellate court will, "not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or a clearly erroneous standard was applied." *Yelverton v. Yelverton*, 961 So.2d 19 ¶6 (Miss. 2007). If a chancellor's award of periodic alimony was not fair and equitable, the chancellor's decision should be reversed. *Id.* ¶ 8. If a chancellor's decision as to alimony is manifestly wrong, or the chancellor applied an erroneous legal standard, the Supreme Court will not hesitate to reverse the chancellor's decision. *Armstrong v. Armstrong*, 618 So.2d 1278 (Miss. 1993).

### B. THE CHANCELLOR ERRED BY FAILING TO MODIFY THE PARTIES' DIVORCE JUDGMENT TO TERMINATE THE PAYMENT OF PERIODIC ALIMONY OR TO SUBSTANTIALLY REDUCE THE AMOUNT OF PERIODIC ALIMONY

Awards of periodic alimony, whether by agreement or otherwise, are subject to review and modification on a showing of a clear and substantial change in circumstances. *Taylor v. Taylor*, 392 So. 2d 1145, 1149 (Miss. 1981); *Austin v. Austin*, *supra*. Where there has been a clear and substantial change in circumstances, and it would be unfair and inequitable for periodic alimony to continue at all, or to continue in the amount awarded at the time of the divorce, the award of periodic alimony should be terminated or reduced to a reasonable amount considering the relevant circumstances. *Beacham v. Beacham*, 383 So.2d 146 (Miss. 1980).

In *Armstrong v. Armstrong*, 618 So. 2d 1278 (Miss. 1993), the Mississippi Supreme Court set forth the factors to be considered in initially determining whether to award alimony and the amount of

such an award. Those factors are also to be considered in deciding whether to modify periodic alimony, comparing the relative positions of the parties at the time of the request for modification in relation to their position at the time of the divorce decree. *Anderson v. Anderson*, 692 So. 2d 65, 72 (Miss. 1997), *Jones v. Jones*, 917 So. 2d 95 ¶ 11 (Miss. App. 2005). *Striebeck v. Striebeck*, 911 So.2d 628 (Miss. App. 2005).

The *Armstrong* factors to be considered in arriving at findings and judgments pertaining to alimony are as follows:

- 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.

## APPLICATION OF ARMSTRONG FACTORS TO THIS CASE

### 1. INCOME AND EXPENSES OF THE PARTIES

Monte's income has substantially declined from approximately \$140,000.00 per year at the time of the divorce to between \$75,000.00 and \$90,000.00 per year at the time of the hearing on the petition for modification. Monte's reasonable living expenses are somewhat more now than they were when the parties were divorced, considering that he is primarily responsible for providing for another young child. Monte's reasonable living expenses now substantially exceed his income.

In contrast, Lou Ann's income has practically doubled since the time of the divorce from approximately \$30,000.00 per year, including alimony, to approximately \$60,000.00 per year at the time of the hearing. Lou Ann's reasonable living expenses are now significantly less than her current income.

### 2. HEALTH AND EARNING CAPACITIES OF THE PARTIES

There is no evidence that Monte has any health problems. Monte works as hard as he did when the parties were divorced, and his earnings are limited to what he, his sister, their father, and their employees are able to generate through Credit Bureau Central.

Although Lou Ann's Cushing's disease has qualified her for state retirement and social security disability benefits, she is still healthy enough to perform some work. Lou Ann admits that she does not work anymore than she does as a dietician for Deaconess Home Health, because of her concern it would disqualify her from state retirement disability payments. Lou Ann's tax returns show that she worked enough to make in excess of \$4,000.00 every year except for one at Deaconess Home Health since the parties' divorce, and she has not been disqualified from receiving disability benefits for any of those years. Lou Ann receives cost of living increases with her disability income payments, and her investment income has increased every year since the divorce.

3. THE NEEDS OF EACH PARTY

Monte's reasonable needs and living expenses can no longer nearly be met with his current income. Lou Ann's actual needs and living expenses are now satisfied with her current net income, without \$1,500.00 per month periodic alimony, and in fact she is capable of having a net surplus of income every month in excess of Monte's \$1,500.00 monthly periodic alimony payments. Lou Ann is capable of having a monthly net income of \$5,326.00 and her reasonable monthly living expenses are only \$3,700.00. Thus, Lou Ann should be taking in a net monthly income with Monte's alimony payments that exceeds her net monthly expenses by forty-four percent (44%) (\$1,626.00 surplus of net monthly income divided by \$3,700.00 of monthly expenses). Such an outcome is patently unfair and inequitable when Monte has a net monthly deficit of \$2,800.00.

4. OBLIGATIONS AND ASSETS OF THE PARTIES

Monte's assets and net worth are substantially diminishing while Lou Ann's are increasing.

5. LENGTH OF MARRIAGE

The length of the parties' marriage is not a significant factor for purposes of this case.

6. MINOR CHILDREN IN THE HOME REQUIRING CHILD CARE

Monte has a minor child in his home and is required to pay for that child's care. Lou Ann has no minor children in the home who require child care. Lou Ann now has only one minor child in the home, whereas she had two minor children in her home at the time of the divorce, and the minor child who is still in her home is expected to begin attending Mississippi State University in the fall of 2008. (TT 73, 74).

7. AGE OF THE PARTIES

Monte is 51 years old and Lou Ann is 49 years old.

8. STANDARD OF LIVING

There is no evidence that either of the parties' standard of living has changed since the divorce.

9. TAX CONSEQUENCES OF SPOUSAL ORDER

The tax consequences of the spousal support order do not appear to be a factor, other than the fact that Monte chose to pay Lou Ann a lump sum payment of \$100,000.00 in cash at the time of the divorce instead of transferring \$100,000.00 in taxable assets to her. As a result, Lou Ann received \$100,000.00 tax free as part of the division of marital assets, and Monte retained assets which could have been transferred to Lou Ann that would have been taxable to her, and instead Monte was required to pay capital gains taxes on those assets when they were sold. (TT 17, 18, 19).

10. FAULT OR MISCONDUCT

Fault or misconduct are not applicable factors, since the parties divorce was granted on the grounds of irreconcilable differences.

11. WASTEFUL DISSIPATION OF ASSETS

There is no evidence of wasteful dissipation of assets by either party.

While the chancellor acknowledged that Monte's income had fallen and that Lou Ann's income had increased since the time of the divorce, the chancellor could not have considered and properly weighed all of the relevant facts and evidence, since his decision was patently unfair, inequitable, and manifestly wrong. The chancellor was obviously strongly influenced by conjecture that was not supported by any evidence. For instance, the chancellor was overly influenced by his view that Monte was capable of increasing his income by simply firing Credit Bureau Central employees. (TT 88, 89). There simply is no evidence to support such a notion by the chancellor.

The chancellor further failed to recognize the undisputed evidence that Lou Ann's income had practically doubled since the time of the divorce, and that she was no longer in need of any periodic alimony from Monte in order to pay her actual living expenses and to support her lifestyle.

The chancellor also erred in making his specific finding that Lou Ann was entitled to a "cushion" in the form of alimony from Monte. (R. 102). Under Mississippi law, periodic alimony is not appropriate where the spouses' assets adequately provide for their respective households. *Striebeck v. Striebeck*, 911 So.2d 628 ¶26 (Miss. App. 2005). Mississippi law does not provide that an ex-husband should provide his ex-wife with a cushion in the form of periodic alimony. Instead, the "touchstone rule" for determining alimony in Mississippi, as set forth in *Brooks v. Brooks*, 652 So.2d 1113, 1122 (Miss. 1995), is as follows:

Alimony, if allowed, should be reasonable in amount, first deducting the resources of the wife and then finding an amount commensurate with the wife's accustomed standard of living, and considering the ability of the husband to pay. As long as the chancellor follows this general standard, the amount is largely within his discretion. *Wood v. Wood*, 495 So. 2d 503, 506 (Miss. 1986); Miss Code Ann. § 93-5-23 (Supp. 1989). The chancellor should consider the reasonable needs of the wife and the right of the husband to lead as normal a life as possible with a decent standard of living. *Massey v. Massey*, 475 So. 2d 802, 803 (Miss. 1985).

*Brendel v. Brendel*, 566 So. 2d 1269, 1272 (Miss. 1990).

The chancellor clearly failed to apply the "touchstone rule" in Mississippi for determining alimony to the facts of this case. At the time of the hearing on Monte's petition for modification, the undisputed evidence showed that Lou Ann's current resources, without any periodic alimony from Monte, are now commensurate with her reasonable standard of living. When the parties were divorced, Lou Ann did not have disability income sufficient to satisfy her standard of living. Moreover, Monte had the ability to pay Lou Ann periodic alimony from his income when the parties divorced, but due to a substantial reduction in his income since the divorce, he is not able to pay his reasonable living

expenses with his current income, and he is only able to pay alimony to Lou Ann with his savings which were his part of the division of marital assets. The chancellor also clearly erred in failing to consider the amount of income Lou Ann needs to satisfy her actual living expenses and her standard of living, and in failing to consider Monte's ability to pay and his right to lead as normal a life as possible with a decent standard of living in reaching his decision.

When all of the undisputed evidence in this case is considered and analyzed in its entirety, it is clear that there has been a substantial change of circumstances with respect to the *Armstrong* factors, that Lou Ann is no longer in need of any periodic alimony to pay her actual living expenses and to support her lifestyle, and that, in fairness and equity, Monte should be relieved of paying any periodic alimony or the amount he is paying should be substantially reduced.



In sum, the chancellor was manifestly wrong, and failed to properly consider and weigh the evidence, failed to properly apply the *Armstrong* factors, failed to properly apply the law, and specifically did not follow the "touchstone rule" regarding periodic alimony to the facts of this case. Had he done so, the award of periodic alimony should have been terminated in its entirety or substantially reduced.

## CONCLUSION

The chancellor failed to properly consider the evidence and to apply the *Armstrong* factors in making his finding of facts and conclusions of law. The chancellor also erred in failing to properly apply the "touchstone rule" for determining periodic alimony. The substantial and overwhelming evidence clearly demonstrates that Lou Ann is now capable of satisfying her actual living expenses and standard of living without periodic alimony, and that Monte is no longer able to maintain as normal a life as possible with his substantially reduced income since the divorce. The chancellor's decision was manifestly wrong, unfair, and inequitable. The judgment appealed from should be reversed and judgement entered in favor of Monte terminating the requirement that he pay Lou Ann \$1,500.00 per month in periodic alimony, or the amount of monthly periodic alimony should be substantially reduced by remittitur. Alternatively, the judgment appealed from would be reversed and remanded with instructions that the lower court properly weigh and consider the evidence and apply the proper legal standards to the issue of periodic alimony.

Respectfully submitted,

MONTE STUART MORRIS, Appellant

By:   
Herman M. Hollensed, Jr., MSB   
Of Counsel

BRYAN NELSON, P.A.  
P. O. Box 18109  
Hattiesburg, MS 39404-8109  
Telephone: (601) 261-4100  
Facsimile: (601) 261-4106  
*Attorneys for Appellant*



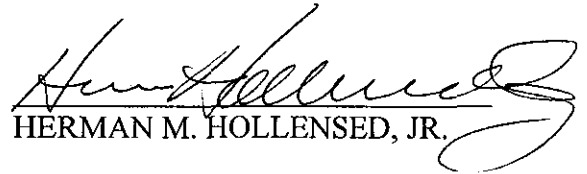
**CERTIFICATE OF SERVICE**

I do hereby certify that I have this date forwarded via First-Class Mail, postage prepaid, the original and three copies of the Brief of the Appellant to the Clerk of the Supreme Court of Mississippi for filing and a true and correct copy of the brief to:

Erik Lowrey, Esq.  
525 Corinne Street  
Hattiesburg, MS 39401

Attorney for Appellee

THIS, the 7<sup>th</sup> day of March, 2008.

  
HERMAN M. HOLLENSSED, JR.

**CERTIFICATE OF SERVICE**

I do hereby certify that I have this date forwarded via First-Class Mail, postage prepaid, a copy of the Brief of the Appellant to the Trial Court Judge, Honorable Johnny L. Williams, at P. O. Box 1664, Hattiesburg, MS 39403-1664.

This, the 12<sup>th</sup> day of March, 2008.

  
HERMAN M. HOLLENSSED, JR.