IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2007-TS-01119

ROBERT STAFFORD JUSTUS, SR.
APPELLANT

VS.

BRENDA LOTT JUSTUS
APPELLEE

BRIEF OF THE APPELLANT

Appeal from the Chancery Court of Lauderdale County
State of Mississippi

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CERTIFICATE OF INTERESTED PARTIES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NO. 2007-TS-01119

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

1. Judge Jerry G. Mason
2. Honorable William B. Jacob
3. Honorable Joseph A. Kieronski, Jr.
4. Honorable Daniel P. Self, Jr.
5. Honorable Robert D. Jones
6. Honorable Henry Palmer
7. Robert Stafford Justus, Sr.
8. Brenda Lott Justus

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

Robert S. Justus, Sr. (hereinafter referred to as Bob), was married to Brenda Lott Justus (hereinafter referred to as Brenda). They were married on December 21, 1974 (E-3) (RE-78). They were divorced on April 30, 1991 (E-41-50) (RE-66-75). Prior to their separation, they had been married for sixteen (16) years.

Pursuant to the Judgment of Divorce (E-41-50) (RE-66-75), Bob was to pay Brenda, as alimony, the sum of $3,250.00 per month.

On March 24, 1998, an Order was entered by the Trial Court wherein the parties had agreed to reduce the alimony to the sum of $2,900.00 per month (E-51-56) (RE-116-121). The attorney for Brenda announced into the record the agreement of the parties and stated:

> "This reduction (in alimony and child support) is based upon the alleged decrease in the defendant's income (Bob) and the **contemplated employment** of the plaintiff (Brenda) at Lamar Elementary School as a full time school teacher, which will become effective, hopefully, in August 1998." (E-52) (RE-117).

In February 2005, Bob filed a Complaint for Modification of the prior decree for, among other things, a reduction and/or elimination of alimony. After extensive discovery and a lengthy pretrial order being entered (CP 250-259), trial was held in this cause.

II. DISPOSITION AT THE TRIAL

Trial was conducted on October 9, 10, 12, and 13, 2006, along with December 8, 2006 and February 23, 2007. At the conclusion of the trial, the Court rendered a Memorandum Opinion (CP 274-336) with a corresponding Order (CP 337-338). This Judgment was entered on May 30, 2007. The Trial Court concluded that the alimony to be paid by Bob to Brenda should remain at $2,900.00 per month. Feeling aggrieved, Bob does prosecute this appeal.

SUMMARY OF THE ARGUMENT

A. MATERIAL CHANGE OF CIRCUMSTANCES

Being able to articulate the law in a particular case is not, in and of itself, enough. The finder of fact and the finder of law must be able to apply properly the theory of law articulated. In this case, the Chancellor correctly determined that in order to modify or terminate an award of alimony a material change of circumstances subsequent to the decree awarding alimony must be established. However, the Trial Court did not go far enough in that this material change of circumstances would apply to one or more of the parties. In this case, both parties did experience a material change of circumstances.

Brenda Justus commenced her life after divorce in 1991 as a stay at home mom caring for three (3) minor children. Being unemployed outside of the home, the divorce Court awarded her alimony in the sum of $3,250.00 per month.

Seven (7) years later, in 1998, Brenda Justus became a part time teacher at Lamar Elementary School. Also, during that seven (7) year period, the two (2) older children, even though under the age of twenty-one (21), were declared to be emancipated. Thus, Brenda had only one (1) remaining minor child in her home.

In 1991, Brenda Justus had no retirement, no savings in the bank, and no real separate estate. Even though she had worked several years prior, she had very little Social Security earnings with only a minimal Social Security safety net. She had no IRA's or other funds from which she could rely for retirement purposes.

Through the divorce, she was not only awarded alimony, but also the former marital home. Her ex-husband was required to pay for this residence in which she lived. There were two (2)

certificates of deposit which were the beginnings of a college fund for the older two (2) children which the divorce Court froze for the use and benefit of the older boys.

By 1999, Brenda Justus voluntarily decided to move her residence from the State of Mississippi to the State of Tennessee. She did so in order to be closer to her parents. She left a full time teaching position in Meridian, Mississippi and commenced a full time teaching position in Memphis, Tennessee.

She sold the Meridian home and realized more than $85,000.00 in equity from that sale. This equity had been provided by her ex-husband since he is the sole person paying the notes on the residence. She also acquired a certificate of deposit of $25,000.00 and a second $12,000.00 certificate of deposit being the two (2) older children's college funds.

During the discovery process, information was sought as to her disposition of the house equity and the two (2) certificates of deposit. She could produce none. She could produce no deposit slips, bank statements, proof of disposition of these funds whatsoever. Yet, she could produce receipts for telephone bills in 2003, electrical breaker repair from 2005, credit card bill from 2002, and a hospital statement from 1997. Thus, she never provided any proof of any dissipation of the $123,000.00, plus interest, that she received.

Brenda Justus, at the time of trial, had savings in the bank, retirement accounts and Tennessee Teacher Retirement benefits. Thus, a substantial and drastic material change of circumstances has been established as to Brenda Justus.

Bob Justus, on the other hand, has also experienced a material change of circumstance since the prior decree. At the time of the divorce, he was a periodontist in Meridian, Mississippi. A second periodontist had just arrived in town and had not established a practice. At the time of trial,

three (3) periodontist were in Meridian. At the time of the divorce, the dentists in Meridian were referring periodontal work to Bob Justus as a specialist. At the time of trial, many of the dentists were performing their own periodontal work and business had decreased. At the time of the divorce, Bob Justus was operating out of one office in Meridian. At the time of trial he, in order to increase business, was also operating a periodontal office in Tuscaloosa, Alabama as well as Meridian, Mississippi. In order to increase income levels, Bob Justus was also an active National Guard member.

At the time of the divorce, Brenda Justus produced expert CPA testimony projecting Bob's income for the future to range between $240,000.00 and $300,000.00 per year from the Meridian periodontal office. From 1998 through the time of trial, Bob Justus' periodontal practice produced an average of $137,000.00 per year. Thus, Dr. Justus experienced a fifty percent (50%) reduction of his income as compared to the projected income at the time of the divorce, through nor fault of his own.

At the time of trial, Brenda Justus had no minor children living in her home in that the remaining minor child was in college and was being supported in her college endeavors by her father. Bob Justus had remarried and his daughter by the current marriage was attending school in the same location as his other children. Further, he was supporting two (2) stepchildren in post-graduate endeavors. Therefore, a material change of circumstances has occurred regarding the situation of Bob Justus. This substantial and material change of circumstance was decreased income due to no fault of his own. On the other hand, Brenda Justus was making approximately $50,000.00 per year, had retirement income, had retirement benefits, Social Security availability, and security.

Yet, the Trial Court found that even though there had been a change of circumstances, it did

not justify a reduction and/or termination of alimony. This finding was notwithstanding the fact that Brenda had already received in excess of $750,000.00 in alimony. Also, this did not consider the fact that the parties were together for sixteen (16) years of marital support and an additional sixteen (16) years of alimony. As such, this Court should find that an abuse of discretion has occurred and that the Chancellor applied an erroneous standard of law to the facts presented in this case. As such, this cause should be reversed and if the alimony is not terminated, remanded to the Trial Court for a finding of termination and/or substantial reduction in amount.

B. MISAPPLICATION OF THE ARMSTRONG FACTORS

Again, the Chancellor correctly identified the principle of law that in order to modify and/or terminate alimony, the Armstrong factors were applicable. However, the application of that principle of law to the facts of this case were misapplied.

The Chancellor did conduct an Armstrong analysis. However, that analysis can be summerized directly from the Opinion into three (3) factors. These three (3) factors are:

(1) Bob has sufficient funds to pay alimony;

(2) The **net worth of Bob** does not **equal the net worth of Brenda Justus**;

(3) Bob is not deceased, Brenda is not deceased, and Brenda has not remarried.

The Chancellor completely ignored the material change of circumstances of the parties. The Chancellor further ignored the rulings from this Court that alimony is not a bounty for which Brenda Justus would be entitled simply by reason of the fact that at one time she and Bob Justus had been married.

The Chancellor further ignored the fact that as assets and separate estate increases the need for alimony decreases. The Chancellor also ignored that when minor children are no longer in the

household, expenses and needs decrease. The Chancellor further ignored that the receipt in excess of $750,000.00 in alimony has the ability to provide substantial financial security for the future. The Chancellor ignored that the needs of Brenda Justus can easily be met with over a four hundred percent (400%) increase in income. The Chancellor ignored that Brenda Justus is now eligible for Tennessee State retirement through the teacher's retirement system. The Chancellor ignored the fact that Brenda now has savings and retirement funds independently in the bank. The Chancellor ignored the fact that Brenda still has available to her, based upon the proof, in excess of $122,000.00 in cash assets. The Chancellor ignored the fact that Bob Justus' income has decreased by fifty percent (50%). The Chancellor ignored that Bob Justus is supporting a minor child in his household. The Chancellor ignored that Bob Justus is providing support for post-graduate work for two (2) stepchildren. The Chancellor ignored that Bob Justus is required to work three (3) jobs instead of one (1) just to try to maintain income.

Most importantly, the Chancellor ignored the law. In fact, the Trial Court, not the legislature, "created law" by requiring that the net worth of the parties, not being equal, justified and demanded a continuation of alimony. The Chancellor disregarded the dissipation of funds provided by Bob Justus to Brenda when she failed to properly invest and/or safeguard the $750,000.00 she has received in alimony. The Chancellor also disregarded and ignored the fact that the parties were together as a couple for sixteen (16) years and Brenda has been receiving alimony for sixteen (16) years.

As such, the Chancellor abused his discretion and applied an erroneous standard of law to the facts of this case and it should be reversed. This Court should terminate the requirement for alimony to be paid or at the very least, remand this cause for further hearing consistent with the

Opinion of this Court.

ARGUMENT

A. THE FACTS

As can be seen by the Opinion of the Court at the time of the divorce (E-1-40) (RE-76-115), the divorce was a very contentious one. At that time, Brenda was a stay at home mom, caring for three (3) children. Bob was a periodontist. Since Bob was a self-employed periodontist, Brenda hired an economic expert to determine the projected income of Bob as a periodontist in Meridian, Mississippi. After much testimony, the Trial Court found:

> "The multiple exhibits and testimony from the defendant's (Bob's) individual income do allow this Court to find that the defendant's (Bob's) **gross annual income from his periodontal practice** could reasonably vary from **$240,000.00 to $300,000.00**." (E-20) (RE-95).

Thus, based on this anticipated income level of $240,000 to $300,000 annually from **his periodontal practice in Meridian**, the Court found it reasonable to conclude that Bob should pay unto Brenda alimony in the sum of $3,250.00 per month commencing on May 3, 1991. (E-44) (RE-69). The Trial Court recognized that there were limits to this alimony requirement and included the language that this sum should be paid until, among other things, "Further order of this Court" (E-44) (RE-69).

Brenda remained a stay at home mom until 1998 when she commenced work, part time, at Lamar Elementary School in Meridian, Mississippi. At that time, additional litigation had commenced regarding the amount of alimony to be paid, among other problems. That matter concluded by a settlement announcement and judgment being made on March 24, 1998 (E-51-56) (RE-116-121). At that time, the parties recognized that material changes in the financial condition of both parties was occurring. Brenda anticipated in August of 1998 to be employed full time as a

teacher at Lamar Elementary School in Meridian, Mississippi. The parties further agreed that the two (2) oldest children were now emancipated. As such, the parties agreed to a reduction in alimony (E-52) (RE-117).

Brenda voluntarily decided to move to Collierville, Tennessee in August 1999 and she purchased a home in that town. She stated that she wanted to make this move "Because her parents were older, she was older, she could resume her career as a teacher and accumulate retirement and of harassment by the Petitioner (Bob)" (E-290) (RE-19). (By that time Brenda **had already "resumed her career"** as a teacher **since she was working full time at Lamar Elementary School.** Yet another inaccuracy by the Chancellor.) Brenda voluntarily sold the former marital home, which had been awarded to her in the divorce (E-44) (RE-69), and she realized an equity from that sale of $85,980.19. (E-290) (RE-19). Since Brenda was a stay at home at the time of the divorce, Bob had paid all of the notes on that residence up to the time of the divorce. He was further ordered to continue to pay the house notes after the divorce. Thus, through Bob's efforts financially, Brenda received the aforesaid equity.

At the time of the divorce, there were two (2) certificates of deposit, one for the minor child, Stafford Justus, in the approximate sum of $25,000.00 and a second for the minor child Jarrod Justus in the approximate sum of $12,000.00. Those accounts were for the boys' education and were required to be frozen by the divorce decree. In March 1998, since both of the minor children were declared emancipated and not attending college, Brenda Justus acquired those funds individually that had been set aside by Bob for the childrens' education (E-52) (RE-117). Thus, there was approximately $125,000.00 (house equity and the two certificates of deposit) that was provided by Bob that Brenda was the recipient thereof.

Through discovery, the disposition of the $125,000.00 was sought. However, no verification of disposition was provided. (T-262, 859, 860 and 867). Even the Trial Court recognized that Brenda had not produced the requested documents when he stated:

> "The witness (Brenda) was requested to produce documents which **have not been produced**" (T-860).

However, the Trial Court allowed Brenda to give unverified explanations for what she allegedly did with those monies. No deposit slips, checks or any other records of deposit or disbursement were produced concerning any of those funds contrary to the discovery requests. Yet, the Trial Court not only allowed the testimony but also cited it a "finding of the Court."

The Court found that Brenda has spent the $85,000.00 equity from the marital home in Meridian, Mississippi, on her Collierville home. (CP 291); that she spent the $25,000.00 on payment of various notes for Stafford (CP 316); and that she no longer had the $12,000.00 from Jarrod's certificate of deposit (CP 317). All of those findings were made over the objection of Bob, in violation of discovery, and without verification of those findings. Thus, those findings are not supported by the record.

From the Judgment of Divorce, Bob's projected range of income from his periodontal practice in Meridian was ~~from~~ $240,000.00 to $300,000.00 per year (E-20) (RE-95). Based upon the corporate tax returns admitted into evidence, the Trial Court fashioned "Attachment A" to its Opinion (CP 333) which shows that the income from the periodontal office ranged from a low of $66,081.00 to a high of $207,094.00 with an average of $136,094 per year. Thus, there was more than a fifty percent (50%) reduction in income from the average projected income to the actual income for the years 1998 through 2005.

At the time of the divorce, Brenda was a stay at home mom and had a salary of zero (0)

dollars per month. In 1998, Brenda's income was $10,361.00 (CP 336). By 2005, her income had increased to $43,609.00 per year (CP 336). Thus, she had a four hundred twenty-three percent (423%) increase in her salary.

Prior to the divorce, the parties had remained together for approximately sixteen (16) years. Since the divorce, there has been approximately sixteen (16) years at the time of trial for which Bob has been paying alimony. In those sixteen (16) years, Bob has paid alimony and cash in the form of alimony to Brenda in just over three quarters (3/4) of a million dollars. None of the three quarters (3/4) of a million dollars did Brenda account for. As stated previously, Brenda never provided discovery verification of what she has done with $125,000.00, nor did she establish what she did with the remaining $650,000.00. Based on Exhibit 98 (E-722) (RE-126), Brenda has received $299,142.00 in alimony from 1998 through 2005. Brenda was amazed at the total for that brief period of time and had to recheck her figures "a couple of times". (T-247). Shortly thereafter, in her testimony, she realized that she had cash assets of her separate estate in the sum of $478,977.00. (Exhibit 99-E-723) (RE-127). Thus, coming from the time of divorce, wherein Brenda had no separate estate, her assets have increased drastically to over $750,000.00 This separate estate is, of course, excluding the equity she has in her current residence, child support, increases in pay since 2005, extra income from tutoring and the like.

Notwithstanding the above and foregoing, the Trial Court left the amount of alimony the same.

B. POINTS OF ERROR

PROPOSITION 1: THE COURT ERRED IN FAILING TO FIND A MATERIAL CHANGE OF CIRCUMSTANCES HAS OCCURRED JUSTIFYING A SUBSTANTIALLY REDUCTION OR ELIMINATION OF THE REQUIREMENT FOR BOB TO PAY ALIMONY TO BRENDA

The scope of review of an alimony award is a well settled matter. Alimony awards are within the discretion of the Chancellor and his discretion will not be reversed on appeal unless the Chancellor was **manifestly in error in his findings of fact and abused his discretion**. Further, this Court will only interfere where the decision of the Chancellor is seen as so oppressive, unjust or grossly inadequate as to evidence and abuse of discretion. Also, if this Court finds that the Chancellor's decision was manifestly wrong or that the Court applied an **erroneous legal standard**, a reversal is warranted (Armstrong v. Armstrong, 618 So.2d, 1278; 1280 (Miss. 1993)).

The Trial Court first relied upon the case of McDonald v. McDonald, 683 So.2d, 929 (Miss. 1996). The Court quoted a portion of that case from page 931. The Trial Court did correctly quote from the case. However, McDonald (supra) dealt with the question of whether or not a particular payment designated by the divorcing couple was in reality "lump sum alimony" or not. Thus, this case was dealing with an entirely different issue, namely lump sum alimony, whereas the case at bar is dealing with periodic alimony and the modification thereof. Thus, McDonald (supra) is no authority that would support the Trial Court's rulings

The Trial Court recognized that in Armstrong (supra), periodic alimony may be modified by increasing, decreasing or **terminating the award** in the event of **a material change of circumstances subsequent to the decree awarding alimony** (CP 280). Yet, the Chancellor did NOT follow this principle it quoted.

In order to determine what would constitute a material change of circumstances a review of several cases is needed. In the case of Varner v. Varner, 666 So.2d, 493 (Miss. 1995), this Court stated:

> "Support agreements for divorces granted on the grounds of irreconcilable differences are subject to modification . . . The modification (of alimony) can occur

only if there has been **a material change in circumstances** with **one or more of the parties . . .** " (Page 497).

The Court of Appeals addressed a similar issue in James v. James, 724 So.2d, 1098 (Miss. App. 1998) wherein the Court stated:

> "Not only must the Chancellor consider the Armstrong Factors in initially determining whether to award alimony and the amount of the award, **but the Chancellor should also consider the Armstrong Factors 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 positions at the time of the divorce decree.**" (Page 1102 ¶14)

Thus, in sum Bob was required to prove a material change of circumstances occurring since the rendition of the divorce decree as it relates to either himself or Brenda.

A) A Material Change of Circumstances as it Relates to Brenda:

At the time of the divorce Brenda was a stay at home mom. She was caring for three (3) children. In 1998, Brenda was a part time teacher at Lamar Elementary School in Meridian, Mississippi and was caring for one (1) child in her home. In 2007, Brenda was a full time teacher in the Memphis, Tennessee school system with no minor children living in her home and with Bob fully supporting the college education of the one (1) remaining minor child. Brenda's income went from zero (0) dollars at the time of the divorce to $10,361.75 in 1998 (CP 336). By 2005, her income had increased to $43,609.71 per year. (CP 336). The Trial Court recognized that her pay in 2007 had increased from 2005 and **did not include extra income from her tutoring sessions**.

At the time of the divorce, Brenda had no retirement or any savings. At the time of trial, she had savings as of December 2005, in the sum of $3,326.00; and IRA as of December 2005 at $9,688.00; a TSA savings account as of March 2006 of $2,977.00; a Valic Account of $500.00; a Tennessee Teachers Retirement Account as of June 2004 of $10,358.00; and a teacher savings

account balance ending September 2006 of $5,096.00. Thus, she had just under $32,000.00 of provable retirement and/or savings. (E-723) (RE-127).

At the time of trial, she had received $85,890.00 in equity from the sale of the Meridian, Mississippi former marital residence, $25,000.00 from a certificate of deposit for Stafford Justus and an additional $12,000.00 from a certificate of deposit held for Jarrod Justus. The aforesaid certificates of deposit were excluding the interest earned thereon. (E-723) (RE-127).

It should be noted that discovery was sought regarding the disposition of the equity from the house, the certificate of deposit from Stafford and the certificate of deposit from Jarrod. No such documentary verification was obtained. No bank account was produced showing that any of those funds were deposited into any account whatsoever. The Trial Court **assumed** that the monies had been spent.

However, if we assume that the monies had in fact been spent as Brenda claimed by her testimony, then why could and/or would she not produce the documentation to support this contention.

It is undisputed and even recognized by the Trial Court that Brenda wholly, totally, and completely failed to account for these funds.(T 860). She failed to produce any bank statements where any of the checks were deposited, any bank statements as to where these funds were withdrawn, if they were, any deposit slips and/or withdrawal slips, or any other type documentation regarding these funds. This Court has decided the case of Morgan v. United States Fidelity and Guaranty Company, 222 So.2d, 820 (Miss. 1969). That case dealt with the invoking of the privilege against self-incrimination in a civil case. In this case, Brenda "invoked her right to disregard discovery" in a civil case. In Morgan (supra), it holds that:

> **"An adverse inference can be drawn from a defendant's refusal to testify in a civil case whereas no comment or inference might be drawn from the failure of a defendant in a criminal case so to do."** (Page 828).

Therefore, a similar presumption and conclusion is reasonable and rational that Brenda still has the $122,000.00 secreted away and kept from the light of the Trial Court and this Court. Thus the Chancellor again abused his discretion in making the above referenced "finding".

When a party refuses to produce the verification and/or fails to give any plausible reason for not being able to do so, one can only conclude that she has not spent these funds, but has placed them elsewhere and still has them available. This belief is further enhanced when Brenda produced **envelopes** containing alimony and child support checks covering a three (3) year span, **alleged receipts for electrical service in March 2005 (E-436) (RE-129) automobile insurance for Jarrod from November 2003 (E-512) (RE-130), Capital One statement from November 2002 (E-524) (RE-131), telephone bill from January 2003 (E-526) (RE-132), department store bill from November 2003 (E-531) (RE-133), and a medical bill from April 1997 (E-552) (RE-134), and the like**. Yet she did NOT produce deposit slips or bank records for $122,000.00 Thus, the reasonable conclusion from the proof produced at trial is that Brenda still has in excess of $122,000.00 available somewhere, contrary to the "finding of the Chancellor."

Brenda has been **receiving alimony** for the **same amount of years that she and Bob were living together**. The equity from the house was awarded to her at the time of the divorce. Since she was a stay at home mom at the time of the divorce, the equity from the home came from Bob's efforts. The two (2) certificates of deposit were also from Bob's efforts. This was so since she was not working when the parties divorced. Thus, from the time of the divorce to the time of trial, Brenda has received from Bob, in the form of cash alimony, the sum of $763,742.36 as illustrated

by the chart below.

	MONTHLY	ANNUALLY	ALIMONY
Div (CP44 & 278)	$3,250.00	$39,000.00	
May '91 - Mar '98 7 years			$273,000.00
1998-2005 -(E 722)			$299,142.36
2005-2007 (2 yrs)	$2,900.00		$69,600.00
Equity from house			$85,000.00
Stafford CD			$25,000.00
Jarrod CD			$12,000.00
TOTAL			**$763,742.36**

Brenda was not employed outside of the home at the divorce. As such, her prospects of being able to receive Social Security retirement was minimal at best. At the time of trial Brenda has been gainfully employed, is paying Social Security taxes, is eligible for Social Security benefits upon reaching the Social Security age, has contributed to the Tennessee Consolidated Retirement System to which she has fully vested, and has known savings in the bank along with other retirement plans.

The one remaining minor child would reach the age of twenty-one (21) years on July 30, 2007. This youngest minor child, at the time of trial, was not living in the home of Brenda and was being supported through college by Bob. Thus, her need for support of minor children had also dissipated.

Therefore, a material and substantial change of circumstances has occurred with Brenda since the rendition of the divorce decree and even the 1998 decree.

B) Material Change of Circumstances Regarding Bob:

Bob was a periodontist in Meridian, Mississippi when the divorce occurred. A new

periodontist had just arrived, but had not really established a practice. Pursuant to the findings of the divorce decree, after extensive financial analysis of Bob's income and expenses, the Court determined that **his income would range from $240,000.00 per year to $300,000.00 per year from his Meridian periodontal practice**. At the time of trial, his income ranged from $66,000.00 a year to $207,000.00 per year. This decrease in income was uncontradictedly explained by three (3) periodontist in Meridian now instead of one (1). It was further explained by the fact that the majority of dentists in Meridian were now doing periodontal work themselves and therefore not referring those cases out to Bob. Recognizing this decrease in patients, Bob tried to open satellite businesses in other towns which were unsuccessful. This necessitated other business plans.

The uncontradicted testimony revealed that Bob was working not only in Meridian, but also in Tuscaloosa, Alabama as a periodontist to attempt to supplement his income. Further, in addition to the two (2) periodontal jobs, Bob was employed in the military as a National Guard Commander.

The determination of the amount of alimony Bob should pay at the time of the divorce, was based upon the projections of the various CPAs' that testified. From this testimony the Chancellor found that Bob's projected income, as stated above, would support a large alimony award especially since Brenda was unemployed. A chart showing the relative incomes at the time of the divorce compared to the time of trial is as follows:

	LOW	**HIGH**	**AVERAGE**	**PERCENTAGE REDUCTION**
Div Decree (CP20)	$240,000.00	$300,000.00	$270,000.00	
1998-2005 (CP333)	$ 66,081.00	$207,094.00	$136,587.50	50.59%

Bob has remarried since the time of the divorce and he and his current wife have a child that he is supporting. This child is attending Lamar Schools in Meridian, Mississippi as did ~~his~~ Bob's other children. Also, his current wife has two (2) sons who are in post-graduate school and he is providing their support.

Thus, with a fifty percent (50%) reduction in income from his periodontal practice, increased expenses as a result of the necessity of travel to obtain additional patients, a material and substantial change of circumstances since the prior decree was established.

has occurred

C) Ruling by the Court:

The Trial Court ruled:

> "Although **circumstances have changed** since March, 1998, this Court finds that the Petitioner (Bob) has failed to prove by a preponderance of the evidence a material change in circumstances which requires or justifies a termination of periodic alimony paid by the Petitioner (Bob) to the Respondent (Brenda)." (CP 325-326).

Thus, the Trial Court limited the proof to 1998 and precluded any reference to the position the parties were in or the ruling of the Trial Court at the time of the divorce. Attempts were made to commence the analysis of the material change of circumstances through the testimony of Diane Singley, CPA, at T-108-109. The Trial Court prevented any such questions of a baseline determination of income as was found by the Trial Court in its divorce decree. (E-20) (RE-95).

As was stated in James (supra), the relevant time period for any modification would be at the time of the divorce decree. Accurate

For any type of estoppel to apply and thus preventing a return to the divorce decree, any intervening decrees would have been required to be actually litigated. (Hollis v. Hollis, 650 So.2d, 1371 (Miss. 1995). In this case, the 1998 judgment was a settlement announcement and not an adjudication and final litigation of the issues. It was even recognized at that time by the attorney for

Brenda, that the income of Bob was a basis for the voluntary slight reduction in alimony and that ". . . The **alleged decrease in the defendant's (Bob's) income . . .**" (E-52) (RE-117) would justify a reduction in alimony. There was no judicial finding of what the income of Bob was in 1998 as compared to the time of divorce and there was no judicial determination of whether or not a decrease had occurred. Thus, the Chancellor committed error by such a limiting of time.

Yet even considering the time of 1998 through 2006, Bob's income drastically decreased. In order to meet his obligations, Bob was required to sell capital assets including stocks and a withdrawal from his retirement account (CP 333) in 2000, 2003 and 2005.

Therefore, the ruling of the Trial Court as to a material change of circumstances was wholly, totally and completely non-supported by the evidence presented. The Chancellor erred in failing to consider one or both of the parties' current situation as compared to the time of the divorce. The Chancellor erred in limiting the time period under consideration. The Chancellor erred, even considering the limited time period, that a material change in circumstances had occurred. The proof was uncontradicted that a material change of circumstances had occurred with BOTH of the parties. **Brenda's change** was for the **better** and **Bob's change** was for the **worse.** The Trial Court's ruling was an obvious abuse of discretion and followed an erroneous legal standard. As a result, the ruling of the Chancellor should be reversed.

PROPOSITION 2: THE TRIAL COURT ERRED BY APPLYING AN ERRONEOUS LEGAL STANDARD TO THE ARMSTRONG FACTORS

As stated previously, the scope of review for an alimony award is that alimony is within the discretion of the Chancellor. This Court will not interfere with that discretion unless the Chancellor was manifestly in error in his finding of fact and abused his discretion. If this Court finds that the Chancellor's decision was manifestly wrong or **that the Trial Court applied an erroneous legal**

standard, this Court will not hesitate to reverse. (Armstrong [supra]). (Page 1280)

The Trial Court acknowledged the Armstrong (supra) factors and listed them on CP-279-280. Later, in the Trial Court's Opinion, the Chancellor went through an Armstrong (supra) analysis. (CP-321-326).

In order to fully understand the Chancellor's rationale, three (3) specific portions of the Armstrong (supra) analysis are critical. **The first is**:

> "Although the petitioner's (Bob's) income has varied from year to year, he has had sufficient income to pay monthly periodic alimony." (CP-323).

The second is:

> "This Court finds that the **net worth** of the petitioner (**Bob**) significantly exceeds the **net worth** of the respondent (**Brenda**)" (CP-325).

The third is:

> "Periodic alimony automatically terminates upon the **death of the obligor or the death or the remarriage of the obligee**, Armstrong (supra)." (CP-326).

Thus, based upon the Trial Court's analysis of the Armstrong factors, the Court applied "the legal standard" that as **long as the paying party has the funds available to do so, and the net worth of the parties are NOT equal, then the paying party will continue to pay periodic alimony until death of either of them or remarriage of the obligee.**

In Armstrong (supra), this Court stated:

> "We reversed the Chancellor's award of alimony to Nina for the limited period of 2 years and render an award of periodic alimony to Nina in the sum of $175.00 per month until she dies, remarries, **or the award is modified or terminated pursuant to proper order of the Trial Court.**" (Page 1282).

Thus, the Trial Court abused its discretion by applying an erroneous legal standard. The Chancellor expressly stated that Bob had money, their net worth's were NOT equal and Brenda was

not dead nor had she remarried, thus Bob continues to pay alimony. It does NOT matter that she had received over $750,000, it does NOT matter that Brenda now has a full time job, it does NOT matter that Brenda now has retirement, Bob STILL PAYS. The ONLY other factor that the Chancellor found justifying a reduction or termination of alimony would be when their respective net worth's were equal. The Chancellor could cite to no such case supporting "that standard of law." Thus the Chancellor utilized an erroneous standard of law which justifies a reversal in this case.

This Court has held in Beacham v. Beacham, 383 So.2d, 146 (Miss. 1980), that alimony is not to be received indefinitely. This Court stated:

> "Alimony is not a bounty to which Mrs. Beacham became entitled to receive indefinitely **simply by reason of the fact that at one time she had been married to Beacham**."

Bob and Brenda **remained together for sixteen (16) years** and during that period of time he supported Brenda. **Since their divorce, sixteen (16) years later**, Bob has continued to support Brenda. Bob has provided to Brenda, in the form of alimony, cash in excess of $763,000.00. Brenda is no longer destitute. She continues to have savings. She continues to have retirement. She continues to have Social Security retirement available to her. She has substantial sums in the bank that were proven. She has substantial sums for which their location was not disclosed.

The Court of Appeals reaffirmed the principle announced in Beacham (supra) in the case of Brooks v. Brooks, 725 So.2d, 301 (Miss. App. 1999). Bob has certainly provided Brenda with sufficient assets to be self supporting and self sustaining and to live a life of security.

In the case of Graham v. Graham, 767 So.2d, 277 (Miss. App. 2000), the Court recognized that an income of $33,000.00 per year was certainly a living wage and one in which a party could sustain their needs. This is especially true since no minor children were involved. With that level

of income, no alimony was awarded. The Court acknowledged that Mrs. Graham could manage without financial support from her ex-husband. Brenda is making substantially more than Mrs. Graham and she has substantially more assets and security than Mrs. Graham.

Likewise, in the case of Jones v. Jones, 917 So.2d, 95 (Miss. App. 2005), the Court recognized that an ex-wife who was in good health, made a substantial salary, was absent any dependents, had the prospects of a solid financial future in the form of retirement pay and Social Security, and earned an income of approximately $51,000.00 per year, was not entitled to, nor should she receive, alimony. The Court recognized that alimony was not a bounty to which the ex-spouse became entitled to receive **indefinitely simply by the fact that at one time she had been married**. Brenda is in a much more financially secure position than Mrs. Jones.

Additionally, in determining an initial amount of alimony, this Court set out in Armstrong (supra) the factors to be considered. This Court in Ferguson v. Ferguson 639 So.2d 921 (Miss 1994) and Hensley v Hensley 639 So.2d 909 (Miss 1994), set forth the concept that when considering equitable distribution and alimony, when one increases the other decreases. However, practical considerations must also be utilized by the Chancellor.

At the time of the divorce, Brenda was awarded the house, vehicles, land, child custody, child support, alimony in the form of house payments as well as alimony in the form of cash to her. Bob was awarded his periodontal practice primarily. Thus, Bob was required to basically start over. Brenda received the lion's share of the assets. Until 1998, Brenda was solely a stay at home mom. At that time, she started working part time. Her independent assets started to increase. As such, her need for alimony started decreasing. She even acknowledged this decreased need by her agreement to lower the alimony in 1998.

Brenda and the Trial Court recognized her need for financial security was large at the beginning. When she started working part time she admitted that her needs were less. She, voluntarily and at her election, sold the former marital home in Lauderdale County, Mississippi. She recognized the consequences of that sale in that Bob would no longer be required to pay the house note. Further, she acknowledged that this loss would be substantially covered by her full time employment in Tennessee, being a member of the Tennessee retirement system and being closer to her parents. She acquired not only retirement security through the teacher's retirement system, but has also acquired independent retirement funds. She is no longer required to care for minor children and thus, she was able to take the bulk of the assets from the divorce and has drastically increased them over time. She has received in excess of **three-quarters of a million dollars in alimony** and thus, her separate estate has drastically increased from the time of the divorce. As a result of all of the above and foregoing, since Brenda's assets have increased, the need for, and Bob's requirement to pay, alimony has decreased.

Because the Chancellor applied an incorrect standard of law in analyzing the Armstrong factors, this case should be reversed. Additionally, this Court should declare that since a material change of circumstances has occurred, that all future requirements to pay alimony on the part of Bob should be terminated.

CONCLUSION

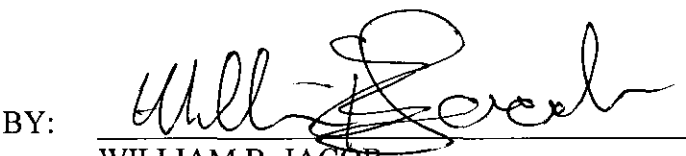
It is obvious from even a casual review of this record that a material change of circumstances has occurred with regard to Brenda's situation financially and otherwise. She is now full time employed, has retirement, a home, assets, and the like. On the other hand, Bob is now being required to work three (3) different jobs in order to maintain any semblance of income and his standard of

living. His projected income at the time of the divorce has never been met and yet, his alimony has remained virtually the same since the divorce. As such, this material change of circumstances with an appropriate and proper Armstrong (supra) analysis should result in a drastic decrease in alimony and/or a termination thereof.

Thus, this Court should reverse this matter and terminate the requirement of Bob to continue to pay periodic alimony. Alternatively, this Court should remand this cause for a substantial reduction and/or termination of periodic alimony in accordance with the proper legal analysis thereof.

Respectfully submitted, this the 19th day of February, 2008.

ROBERT STAFFORD JUSTUS, SR., APPELLANT

BY: 

WILLIAM B. JACOB,
OF COUNSEL FOR APPELLANT

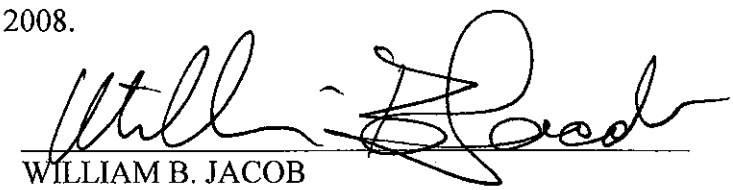
CERTIFICATE OF SERVICE

I, the undersigned, William B. Jacob, of counsel for the Appellant, Robert Stafford Justus, Sr., do hereby certify that I have this day, caused by postage prepaid, or hand delivery, a copy of the above and foregoing Brief of Appellant to:

Honorable Jerry G. Mason
Chancellor Twelfth District
Chancery Court
Lauderdale County Courthouse
Meridian, Mississippi 39301

Honorable Robert D. Jones, Esquire
Honorable Henry Palmer, Esquire
Lawyers, PLLC
Post Office Box 1205
Meridian, Mississippi 39302-1205.

THIS the 19th day of February, 2008.



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