

SUPREME COURT OF THE STATE OF MISSISSIPPI

Imogene Mix Clower

Appellant

v.

Case No. 2007-CA-01481

Joseph Lewis Clower

Appellee

CERTIFICATE OF INTERESTED PARTIES

THE UNDERSIGNED counsel of record certifies that the following list of persons and/or entities have an interest in the outcome of this case. The representations are made in order that Justices of the Supreme Court of the State of Mississippi may evaluate possible disqualification or recusal.

1. Imogene Mix Clower, Appellant, 20 Stanford Court, Jackson, MS 39211
2. Joseph Clower, Appellee, 129 Virginia Valley Drive, Brandon, MS 39047
3. Kyle B. Ainsworth, Counsel for Appellant, P.O. Box 2810, Jackson, MS 39207-2810
4. Monti C. Bishop, Counsel for Appellee, 419 S. State Street, Suite C100, Jackson, MS 39201
5. Honorable Patricia Wise, Chancellor, Hinds County Chancery Court, P.O. Box 686, Jackson, MS 39205

SO CERTIFIED this 25th day of January 2008.


MONTI C. BISHOP

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE	2
A. Nature of the Case.....	2
B. Course of Proceedings and Disposition of the Court Below.....	2
C. Statement of the Facts.....	3
STANDARD OF REVIEW.....	5
SUMMARY OF THE ARGUMENT.....	6
ARGUMENT.....	7
I. Mr. Clower is not in contempt for failure to make alimony and health insurance premiums and for failure to provide proof of life insurance because he paid the full amounts and was current at the time his Petition for Modification was filed on April 6, 2006.....	7
II. This Court should affirm the Chancery Court’s decision that found a material change in circumstances due to Mr. Clower’s medical problems, business failures, the property settlement agreement, the <i>Armstrong</i> factors, and the fact that Mrs. Clower is able to financially support herself.....	8
A. Based on Mr. Clower’s “current financial ability” stated in the Parties’ Settlement Agreement, he is unable to make alimony payments due to business failures and medical problems which prevent him from obtaining employment; also Mrs. Clower is financially able to support herself.....	9
B. This Court should look to the <i>Armstrong</i> factors when determining 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.....	13
III. This Court should affirm the Chancery Court’s decision that held	

Mrs. Clower responsible for payment of her attorney's fees because she is financially able to support herself.....	15
CONCLUSION.....	17
CERTIFICATE OF SERVICE.....	18

TABLE OF AUTHORITIES

State Supreme Court Cases

<i>Anderson v. Anderson</i> , 692 So. 2d 65 (Miss. 1997).....	13
<i>Brendel v. Brendel</i> , 566 So. 2d 1269 (Miss. 1990).....	10
<i>Davis v. Davis</i> , 268 So. 2d 913 (Miss. 1972).....	7
<i>De Marco v. De Marco</i> , 24 So. 2d 358 (Miss. 1947).....	10
<i>Ford Motor Co. v. Tennin</i> , 960 So. 2d 379, (Miss. 2007).....	5
<i>Hooker v. Hooker</i> , 205 So. 2d 276 (Miss. 1967).....	7
<i>Kincaid v. Kincaid</i> , 57 So. 2d 263 (Miss. 1952).....	11
<i>R.K. v. J.K.</i> , 946 So. 2d 764 (Miss. 2007).....	16
<i>Schlom v. Schlom</i> , 115 So. 197 (Miss. 1928).....	7
<i>Townsend v. Townsend</i> , 859 So. 2d 370 (Miss. 2003).....	5
<i>Upchurch Plumbing Inc. v. Greenwood Utilities</i> , 964 So. 2d 1100 (Miss. 2007).....	16

Court of Appeals Cases

<i>Austin v. Austin</i> , 2007 WL 3076870 (Miss. App. Oct. 23, 2007).....	9
<i>D'Avignon v. D'Avignon</i> , 945 So. 2d 401 (Miss. App. 2006).....	9
<i>Dix v. Dix</i> , 941 So. 2d 913 (Miss. App. 2006).....	5
<i>Grice v. Grice</i> , 726 So. 2d 1242 (Miss. App. 1998).....	11
<i>Stribling v. Stribling</i> , 960 So. 2d 556 (Miss. App. 2007)	7

STATEMENT OF THE ISSUES

Appellee Mr. Clower presents three main issues:

I. Should a person, who has paid the full amounts for alimony and health insurance premium at the time the Petition for Modification was filed, be in contempt for failure to pay alimony and health insurance premiums and for failure to provide proof of life insurance?

II. Should a person who has a sole income of \$1384.20 per month and is required to pay alimony of \$2000 per month and health insurance premium payments of \$240 per month be entitled to modification of alimony and health insurance premiums?

III. Should a party who has sufficient assets with which to pay her own attorney's fees be entitled to attorney's fees and costs?

1. This Court finds that a material change in circumstances has occurred since the Judgment, which includes the following: Mr. Clower was earning over \$100,000 per year income in 1988, the date of the original Judgment; he has suffered medical problems; although his business was bought out by Acosta, his Pinehaven Golf Business was a failure; and the property settlement agreement was clear on its face that the alimony was based upon "Husband's current financial ability." R. 16.

2. Mrs. Clower shall be responsible for payment of her attorney's fees and Mr. Clower shall be responsible for his attorney's fees and the costs of court. R. 16.

C. Statement of the Facts

Mr. and Mrs. Clower were divorced on August 25, 1988. According to the parties' settlement agreement Mr. Clower was to pay Mrs. Clower \$2000 a month as alimony. The parties' settlement agreement provides for modification according to Mr. Clower's "current financial ability." R. 5. Although Mr. Clower earned over \$100,000 per year income in 1988, his current source of income is social security payments of \$1384.20 per month. Tr. 4. and Tr. 14. Mr. Clower is depleting his checking account of \$30,000 in order to pay for living expenses. Tr. 22. Mrs. Clower currently has total assets of \$334,651.75. Tr. 143.

Mr. Clower sold his business, Humphreys Clower Company, to the Acosta Company. Tr. 6. Mr. Clower received \$15,600 for his portion of the business for four and a half years. R. 7. His last check was received in February. Tr. 8. The income received from the interest in the Humphreys Clower Company was invested in the Pinehaven Golf Hole. R. 8. Mr. Clower lost in the hundred thousands due to this business failure. Tr. 11. Mr. Clower currently continues to volunteer for charity despite

having lost his income. Tr. 12. Mr. Clower informed Mrs. Clower of the specific date when he could not continue alimony payments due to his final Acosta payment. There was \$100,000 that Mr. Clower owed on the Florida real property that he transferred to his stepson. Tr. 19 and Tr. 20.

Mr. Clower suffers from medical problems such as high blood pressure, two severe strokes, diabetes, two heart stints, and grand mal seizures. Tr. 24. Mrs. Clower has a prosthetic foot, back and leg problems, high blood pressure, anxiety and has had surgery for a brain aneurysm. Tr. 125 and Tr. 126.

STANDARD OF REVIEW

A chancellor's decision in a divorce proceeding will not be disturbed unless the chancellor abused his discretion, was manifestly wrong, was clearly erroneous, or applied the wrong legal standard. *Townsend v. Townsend*, 859 So. 2d 370, 370 (Miss. 2003). A court may modify periodic alimony when there has been a material change in circumstances considering the present status of the parties. *Dix v. Dix*, 941 So. 2d 913, 913 (Miss. App. 2006).

The appellate court will not reverse the chancellor's decision regarding attorney's fees unless a manifest abuse of discretion is evident. *Ford Motor Co. v. Tennin*, 960 So. 2d 379, 379 (Miss. 2007).

SUMMARY OF THE ARGUMENT

Mr. Clower is entitled to modification because he has experienced a material change in circumstances. Mrs. Clower is financially able to support herself in the future, but Mr. Clower receives no income other than social security of \$1384.20. Based on Mr. Clower's "current financial ability," he is unable to pay the alimony payments due to unfortunate business failures. Mr. Clower's numerous medical problems such as severe strokes and grand mal seizures prevent him from securing employment. Despite Mr. Clower's medical problems, his generosity is evident by his continuous service to the Gleaners Organization. This Court should affirm the Chancery Court's decision to reduce Mr. Clower's alimony payments to Mrs. Clower and affirm the Chancery Court's decision to hold Mrs. Clower responsible for her attorney's fees.

ARGUMENT

- I. Mr. Clower is not in contempt for failure to make alimony and health insurance premiums and for failure to provide proof of life insurance because he paid the full amounts and was current at the time his Petition for Modification was filed on April 6, 2006.**

Mr. Clower's alimony payments were current at the time his Petition for Modification was filed. The Supreme Court of Mississippi has long held that unilateral reductions and/or modifications are allowed and subject to the approval of the Court after the proper filing of a petition. *Schlom v. Schlom*, 115 So. 197, 197 (Miss. 1928). Although Mr. Clower was allowed to modify his payments subject to approval of the Court and after the filing of his petition, he paid the full amounts of alimony for April 2006 and health insurance premiums on May 29, 2006.

Even if Mr. Clower had failed to pay the full amounts of alimony he would not have been in contempt because the payments would have left him with nothing on which to live. This Court held that a husband was not in contempt of court for failure to make alimony payments when the payments would leave him with nothing on which to live. *Davis v. Davis*, 268 So. 2d 913, 913 (Miss. 1972). In *Davis*, the husband had an income of \$550 per month, with \$465 to be paid monthly. *Id.* The husband was left with \$85 per month for living expenses. *Id.* The Court stated, "A man would have to be a financial genius or a magician to comply with this decree." *Id.* at 916.

The Court of Appeals of Mississippi held that a person may not be in contempt if he has an honest inability to pay alimony. *Stribling v. Stribling*, 960 So. 2d 556, 556 (Miss. App. 2007) Likewise, the Supreme Court of Mississippi determined that a husband was not in contempt of court for failure to make alimony payments where he has experienced financial setbacks making him unable to continue the payments. *Hooker v.*

Hooker, 205 So. 2d 276, 276 (Miss. 1967). In *Hooker*, the husband had lost businesses including gas and oil dealerships. *Id.* at 277. His only source of income was by day labor at a modest salary. *Id.*

In the case at bar, Mr. Clower has experienced financial reverses making him unable to continue the alimony payments. Although Mr. Clower earned over \$100,000 per year income in 1988, his current source of income is social security payments of \$1384.20 per month. Tr. 14. The alimony payment of \$2000 per month and health insurance premium payments of \$240 per month would leave Mr. Clower with nothing on which to live.

Moreover, Mr. Clower informed Mrs. Clower of the specific date when he could not continue alimony payments due to his final Acosta payment; Mrs. Clower was aware that she would no longer receive the alimony payments from Mr. Clower. This Court should affirm the decision that held Mr. Clower not in contempt of court because he has not had the ability to perform since he has no income other than his social security and he had paid the full amounts at the time the Petition for Modification was filed.

II. This Court should affirm the Chancery Court's decision that found a material change in circumstances due to Mr. Clower's medical problems, business failures, the property settlement agreement, the *Armstrong* factors, and the fact that Mrs. Clower is able to financially support herself.

The Chancery Court properly found that Mr. Clower is entitled to modification of his alimony and health insurance premiums because there has been a material change in circumstances. Although Mr. Clower once had a substantial income, he is currently unable to make alimony payments to Mrs. Clower because of unfortunate business decisions. In addition, his numerous medical problems prevent him from obtaining

employment. Furthermore, the parties' settlement agreement explicitly states Mr.

Clower's obligation to pay Mrs. Clower is based on his "current financial ability." R. 5.

A. Based on Mr. Clower's "current financial ability" stated in the Parties' Settlement Agreement, he is unable to make alimony payments due to business failures and medical problems which prevent him from obtaining employment; also Mrs. Clower is financially able to support herself.

The parties' settlement agreement provision pertaining to alimony expressly states that "This payment is based on husband's current financial ability." R. 5. The Mississippi Court of Appeals determined that the "four corners" of an agreement should be determined when interpreting a contract. *D'Avignon v. D'Avignon*, 945 So. 2d 401, 409 (Miss. App. 2006). The actual language of the parties' agreement should be considered. *Id.* Accordingly, the parties entered into an express agreement to consider Mr. Clower's "current financial ability" only. R. 5.

Mrs. Clower can offer no evidence that "retirement and the sale of Mr. Clower's business were both foreseeable and anticipated at the time of divorce." The parties' settlement agreement provides for modification according to Mr. Clower's "current financial ability" and not for modification in the event of his retirement. R. 5. Mr. Clower may have been aware that the Acosta payments would eventually end after ten years, but it was not foreseeable that the monthly payments he received from Acosta would be lost due to unfortunate business dealings. Tr. 7.

Furthermore, the Mississippi Court of Appeals held that a material change in circumstances exists where a husband had a reduced income of one-third of what he earned at the time of the divorce. *Austin v. Austin*, 2007 WL 3076870, at *4 (Miss. App. Oct. 23, 2007). The Supreme Court of Mississippi determined that "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.” *Brendel v. Brendel*, 566 So. 2d 1269, 1272 (Miss. 1990). Likewise, the Court of Appeals of Mississippi determined that a chancellor did not abuse his discretion by reducing alimony payments because the wife had a material change in circumstances which reduced her monthly expenses. *Wilson v. Wilson*, 810 So. 2d 615, 615 (Miss. 2002).

Mr. Clower’s income has reduced from \$100,000 per year to an income of Social Security of \$1384.20 per month. Tr. 14. Due to Mr. Clower’s numerous medical problems, he is unable to obtain employment. Mr. Clower should no longer pay Mrs. Clower the alimony payments because it would interrupt his ability to live a normal life with a decent standard of living. Mrs. Clower does not have a reasonable need for this alimony because she is able to support herself in the future; Mrs. Clower has had a material change in circumstances because her long term care is provided for and she has total assets of \$334,651.75 to support herself. Tr. 143.

Mr. Clower is different from husbands in other cases seeking unwarranted reductions in alimony cases. The Supreme Court of Mississippi denied a request to reduce a husband’s alimony. *De Marco v. De Marco*, 24 So. 2d 358, 359 (Miss. 1947). In *De Marco*, the husband had requested a reduction of alimony because his expenses had increased, but he had no decrease in income. *Id.* at 358. Unlike the defendant in *De Marco*, Mr. Clower has had a decrease in income that prevents him from continuing prior alimony payments.

The Court of Appeals of Mississippi held that a husband was not entitled to a reduction in alimony because he had continually transferred assets and business to his

current wife. *Grice v. Grice*, 726 So. 2d 1242, 1243 (Miss. App. 1998). The husband and his current wife had an extravagant lifestyle and had purchased several vehicles recently. *Id.* The Court determined that the husband continued to obtain significant assets and income. *Id.* at 1250.

Mr. Clower differs from the defendant in *Grice*. First, Mr. Clower does not live an extravagant lifestyle with his current wife; he cannot pay his bills and continue to pay the prior alimony payment to Mrs. Clower. He does not continue to maintain the same income he once had in the past. Second, Mr. Clower has not continually transferred any assets in order to maintain an extravagant lifestyle. Mr. Clower legitimately transferred real property in Florida to his stepson because Mr. Clower was not in a financial position to take on such an obligation. Based on Mr. Clower's "current financial ability," he decided to allow his stepson to take over his interest in the property when it was supposed to be refinanced again.

Mr. Clower considered this real property to be a liability because he owed about \$100,000 on the property. Tr. 20. Mr. Clower acknowledged that the insurance on the property seemed to have doubled this past year which would have also made payments difficult and the insurance cost increased substantially after Hurricane Katrina. Tr. 20.

Unlike the defendants in other cases, Mr. Clower has disclosed his living expenses and earnings. The Supreme Court of Mississippi determined that a husband was not entitled to a modification because he did not show his living expenses and earnings. *Kincaid v. Kincaid*, 57 So. 2d 263, 263 (Miss. 1952). In *Kincaid*, the defendant made no disclosure as to the amount in his bank account and kept no record of his earnings. *Id.* at 264. He admitted that he had three new automobiles in the past two

years. *Id.* The defendant had cashed bonds, but could give no statement as to what happened to the bonds. *Id.*

Unlike the defendant in *Kincaid*, Mr. Clower has disclosed where he lost his income. He has explained that some of his income was lost due to a bad investment at the Pinehaven Golf Hole. R. 8. Mr. Clower has shown that he no longer receives income from Acosta and currently only receives a net monthly pay of \$1,384.20. Tr. 14. He stated that he receives around \$28 dollars a year from his few shares of stock. Tr. 15. Mr. Clower's checking account of \$30,000 has decreased because his living expenses are greater than what he can afford. Tr. 22. He spends \$1,107 per month on health, supplemental, long-term care, and cancer insurance. Tr. 23. Additionally, he spends \$350 for medical and prescription expenses. Tr. 24. Mr. Clower has shown that his living expenses are greater than his earnings.

Additionally, Mr. Clower continues to make charitable commitments despite having lost his substantial income. Mr. Clower is currently continuing his charity work by volunteering a couple of days per week for the Gleaners Organization by driving a truck. Tr. 13. The Chancery Court properly determined that Mr. Clower's continued service to charity was evidence that his donations to church were generous. Mr. Clower's current financial situation is due to business failures and his charitable contributions were made in good faith.

This Court should affirm the decision of the Chancery Court because Mr. Clower's "current financial ability" prevents him from continuing prior alimony payments and Mrs. Clower has had a material change in circumstances so that she is financially able to support herself.

B. This Court should look to the *Armstrong* factors when determining 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.

Based on the *Armstrong* factors, Mr. Clower's alimony payments should be modified because he is currently unable to continue previous alimony payments. The *Armstrong* factors should be considered in determining 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. *Anderson v. Anderson*, 692 So. 2d 65, 70 (Miss. 1997).

1. This Court should consider the income and expenses of the parties.

Mr. Clower's financial situation has substantially changed since the time of the divorce decree. Currently, Mr. Clower receives Social Security of \$1384.20 per month and has no mortgage. Mrs. Clower receives Social Security of \$546 per month and her mortgage is \$548 per month. However, Mrs. Clower has total assets of \$334,651.75; she has sufficient funds to pay her bills. Tr. 143.

2. The health and earning capacities of the parties should be considered.

Mr. Clower has had two severe strokes, two heart stints, has diabetes, suffers from grand mal seizures, and takes blood pressure medication. Tr. 24. Mr. Clower has a strong work ethic and feels lost when he is unable to work due to medical problems. Because he is not well enough to secure employment, he volunteers a couple of days per week for approximately three hours in the morning for the Gleaners Organization. Tr. 12. He drives a truck to pick up and delivers donations. Tr. 12. He recuperates the remainder of the day after he spends the morning volunteering. Tr. 15.

Mrs. Clower has a prosthetic foot, back and leg problems, high blood pressure, anxiety and had surgery for a brain aneurysm. Tr. 125 and 126. She has not worked since the parties' divorce.

3. The needs of each party should be considered.

Mr. Clower's largest expense is for supplemental insurance, long-term health care, cancer insurance, and his current wife's health insurance. Tr. 23. He has large monthly prescription bills and monthly utility bills. Tr. 24.

Mrs. Clower has shown no needs other than medical needs, mortgage, and monthly utilities. Her medical needs should be covered by Medicare and her \$292 supplemental insurance. Tr. 130 and Tr. 131.

4. The obligations and assets of each party should be considered.

Mrs. Clower has accounts totaling \$263,652. Tr. 132. Her only substantial debt is her mortgage of \$37,000, which has a payment of \$548 per month. Tr. 125.

5. The length of the marriage should be considered.

The parties were married for twenty-nine years. They have been divorced for eighteen years.

6. The presence or absence of minor children should be considered.

There were no children born of the marriage.

7. The age of the parties should be considered.

The parties were approximately fifty-five at the time of divorce. Mrs. Clower is now seventy-three and Mr. Clower is seventy-four.

8. The standard of living should be considered.

Mr. Clower has lost substantial amounts in a failed business venture. He has no extravagant expenses. Mrs. Clower has lived within her means and has saved substantial sums despite not having gainful employment. Tr. 143.

9. The tax consequences should be considered.

Mr. Clower paid alimony of \$2000 per month for approximately eighteen years. Tr. 127. He also paid lump sum alimony of \$25,000 over a period of the first ten years. Mrs. Clower paid the tax liabilities as a result of her receipt of alimony.

10. Fault or misconduct should be considered.

The divorce was granted on the ground of irreconcilable differences.

11. Wasteful dissipation of assets should be considered.

Although Mr. Clower received substantial buyouts from the sale of his business over a ten year period of time, he made unsuccessful business dealings, including the failed Pinhaven Golf Hole and a Florida rental home. Tr. 6. Mr. Clower's 1/3 interest in the Florida property became too expensive to maintain due to increased homeowner's insurance and taxes. Tr. 18. Therefore, he quitclaimed his interest therein to his stepson. R. 19. His stepson refinanced the property to relieve Mr. Clower from any liability. R. 19.

12. This Court should consider any other "just and equitable" factor.

Mr. Clower simply does not have the financial ability to continue making \$2000 per month alimony payments. This Court should reject any request to force Mr. Clower to deplete his bank accounts and take a mortgage on his home in order to pay Mrs. Clower alimony.

III. This Court should affirm the Chancery Court's decision that held Mrs. Clower responsible for payment of her attorney's fees because she is

financially able to support herself.

Mrs. Clower is not entitled to her attorney's fees and costs because she has the ability to pay for her attorney's fees. This Court held that this Court reviews an award of attorney's fees under an abuse of discretion standard. *Upchurch Plumbing Inc. v. Greenwood Utilities*, 964 So. 2d 1100, 1108 (Miss. 2007). Absent an evidence of abuse of discretion, the appellate court will give deference to the chancellor's decision in awarding attorney's fees. *R.K. v. J.K.*, 946 So. 2d 764, 764 (Miss. 2007). This Court should give deference to the chancellor's decision in determining that Mrs. Clower has the ability to pay for her own attorney's fees and she is financially able to support herself in the future; thus, this Court should affirm the decision that ordered Mrs. Clower responsible for payment of her attorney's fees.

CONCLUSION

Based on Mr. Clower's "current financial ability," he is unable to continue previous alimony payments because of unfortunate business failures and medical problems. Mr. Clower lost in the hundred thousands due to his investment in the Pinehaven Golf Hole. His health problems, such as severe strokes, grand mal seizures, diabetes, heart stints, and high blood pressure prevent him from seeking employment. This Court should affirm the Chancery Court's decision to reduce Mr. Clower's alimony payments to Mrs. Clower and affirm the Chancery Court's decision to hold Mrs. Clower responsible for her attorney's fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, attorney for the Appellee, certify that I have served a copy of this brief on Imogene Mix Clower by U.S. mail, postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellee to Kyle B. Ainsworth, Esquire, 704 N. President Street, Post Office Box 2810, Jackson, Mississippi 39207-2810.

This the 25 of January, 2008.




MONTI C. BISHOP

AMENDED CERTIFICATE OF SERVICE

I, the undersigned, attorney for the Appellee, certify that I have served a copy of this brief by HAND-DELIVERING a true and correct copy of the above and foregoing Brief of Appellee to Kyle B. Ainsworth, Esq., 704 N. President Street, Jackson, MS; and to the Honorable Patricia Wise, Chancellor, Hinds County Chancery Court, Jackson, MS.

This the 25 of January, 2008.


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