

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**MARK ANDREW WEST, SR.,**

**APPELLANT**

**V.**

**DOCKET NO.: 2008-CA-00190**

**APRIL SAYLORS WEST**

**APPELLEE**

**APPELLANT'S REPLY BRIEF**

**APPEAL FROM THE DECISION OF THE  
CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI**

**ORAL ARGUMENT NOT REQUESTED**

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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 this Court may evaluate possible disqualification or recusal.

The Appellant:

Mr. Mark Andrew West, Sr.  
8888 Cameron Street  
Olive Branch, MS 38654

The Appellee:

April Saylor West  
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Southaven, MS 38672

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The Trial Judge:

Chancellor Vicki B. Cobb  
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P.O. Box 1104  
Batesville, MS 38606-1104  
Chancery Court Chancellor

*H. R. Garner*

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## ARGUMENT

A: THE CHANCELLOR ERRED IN FAILING TO SET ASIDE THE COURT'S PRIOR ORDER CONTAINING AN ESCALATION CLAUSE REGARDING CHILD SUPPORT GUIDELINES AND ERRONEOUSLY RELYING ON THE CASE OF ROGERS V ROGERS, 919 SO2D 184 (MS CT APP. 2005), WHEREIN THE CHANCELLOR ERRONEOUSLY HELD THAT THE APPELLANT WAS BOUND BY HIS AGREEMENT REGARDING CHILD SUPPORT , AND THERE WAS NO NEED FOR THE COURT TO MAKE A WRITTEN FINDING INTO THE RECORD AS TO THE APPLICATION OF CHILD SUPPORT GUIDELINES IN AN IRRECONCILABLE DIFFERENCES DIVORCE WITH AN AGREED PROPERTY SETTLEMENT AGREEMENT.

April Sailors West (Hollis), Appellee argues in her brief that the Mark Andrew West, Sr. , Appellant, should have filed a Motion to Alter or Amend Judgement pursuant to Rules 59 and 60 of the Mississippi Rules of Civil Procedure and that the time had long since expired for him to avail himself of the relief that could have been obtained under Rules 59 and 60 of the Mississippi Rules of Civil Procedure. However, it should be pointed out to this Court that Mark Andrew West, Sr., Appellant, was not made aware of this error at the time the judgment of divorce being entered by the Court on the 5<sup>th</sup> day of October, 2006 recorded in Chancery Court Minute Book 399, Page 608 of the official Chancery Court minutes of DeSoto County, Mississippi.( CP 27). Nor was he made aware of same when an Order of Modification was entered by the Court on the 27<sup>th</sup> day of April, 2006 recorded in Chancery Court Minute Book 414 Page 504 of the Official Chancery Court Minutes of DeSoto County, Mississippi.( CP 50) That he only learned of the void or voidable provisions regarding the escalation clause regarding the child support on March 19<sup>th</sup> , 2007, at which time he filed a Petition for Modification of child support pursuant to Mississippi Code Annotated Section 93-5-23, 93-5-24, 93-11-65 , 43-19-101, 43-19-103 and Rule 81 (d) of the Mississippi Rules of Civil Procedure .(CP 52)

At the time of the filing his petition, Mark Andrew West, Sr. asked the Court to Modify the Court's former decree of divorce, so as to exclude the escalation clause and to re-assess child

support based upon his current earnings pursuant to Mississippi Code Annotated Section 43- 19-101 and 43-19-103 ( 1972 ) and making a finding of same into the record as to the reasonableness of same by the Court citing 43-19-101 (1972). Modification being defined as (1) A change to something ; an Alteration ; (2) A qualification of limitation of something. Black's Law Dictionary Seventh Edition , Bryan A Garner, Editor in Chief . Therefore, taking him outside of the limitations of Rules 59 and 60 of the Mississippi Rules of Civil Procedure . Simply put to be enforceable, an escalation clause must be tied to (1) the inflation rate, (2) the non-custodial parent's increase or decrease in income, (3) the child's expenses, and (4) the custodial parent's separate income. Tedford v. Dempsey, 437 So.2d 410, 419 (Miss.1983). Also, an escalation clause that is uncertain and indefinite with regard to escalation each year and based solely on net pay is void. Bruce v. Bruce, 687 So.2d 1199, 1202 (Miss.1996). The Mississippi Supreme Court has stated that to be enforceable an escalation clause "*must be associated with*" these four factors. Bruce v. Bruce, 687 So.2d 1199, 1202 (Miss.1996). Furthermore, the Mississippi Supreme Court has held that "these factors channel the escalation clause to relate to the non-custodial parent's ability to pay and the needs of the child. *An automatic adjustment clause without regard to all of the above factors runs the risk of overemphasizing one side of the support equation.*" Wing v. Wing, 549 So.2d 944, 947 (Miss.1989); Gillespie v. Gillespie, 594 So.2d 620, 623 (Miss.1992); Morris v. Stacy, 641 So.2d 1194, 1201 (Miss.1994).

The Chancellor herself in her opinion agreed that Mr. West agreed to do something more than he was required to do . (Tr 66).

However, the Chancellor felt bound to follow and rely upon Rogers v Rogers, 919 So2d 184 (Miss. Ct App 2005) and Williams v Williams , 810 So2d 613 (Miss. Ct App 2001). (TR 64-67).

The Chancellor so holding citing Rogers as authority which held that parties may agree of their own volition to do more than the law requires of them. Where such a valid agreement is made it may be enforced just as any other contract. (TR 66) (That ) Mark Andrew West, Sr. is bound by his agreement and there is no need for the Court to make written findings as to the applications of child support guidelines in the irreconcilable differences divorce with an agreed Property Settlement Agreement. (TR 66)

Either Rogers v Rogers, 919 So2d 184 (Miss. Ct App 2005) completely overruled prior decisions from the Mississippi Supreme Court on escalation clauses or it did not.

If Rogers, supra , is the law of the land then so be it, however if it is not it should be clarified or overruled by the Court.

**B: THE CHANCELLOR ERRED IN FAILING TO MAKE A WRITTEN FINDING INTO THE RECORD AS THE APPLICABILITY OF CHILD SUPPORT GUIDELINES AS REQUIRED BY MISSISSIPPI CODE ANNOTATED SECTION 43-19-101 (1972 AS AMENDED), WHERE THE APPELLANT EARNED IN EXCESS OF FIFTY THOUSAND DOLLARS (\$50,000.00) PER YEAR ADJUSTED GROSS INCOME.**

Miss. Code Ann. Section 43-19-101(4) provides as follows:

**"(4) In cases in which the adjusted gross income as defined in this section is more than Fifty Thousand Dollars (\$50,000.00) . . . the court shall make a written finding in the record as to whether or not the application of the guidelines established in this section is reasonable."**

The mandatory provisions of Mississippi Code Annotated Section 43-19-101 (4) (1972 ) is crystal clear. Nowhere in the Judgment of Divorce, or subsequent orders entered by the Court was it ever held or found on the record as to whether or not the application of the guidelines established in this section is reasonable. Turner v. Turner, 744 So.2d 332 ( Miss. 1999).

*Again -  
Rule 59/60 miss*

which stated under Miss.Code Ann. 43-19-101(2) (Rev.1993), an on-the-record finding as to the applicability of the child support guidelines is required on both the initial award of child support and any subsequent modification of child support.

The Appellee, April Sailors West (Hollis) , arguing in her brief that the Chancellor was correct in her opinion that the agreement of the parties on child support was controlling under Rogers v Rogers, 919 So2d 184 (Miss. Ct App 2005) and Williams v Williams, 510 So2d 613 (Miss. App. 2001) and that it was not necessary to make an on the record finding apparently of any kind as to whether or not the application of the guidelines established in this section is reasonable.

#### CONCLUSION

The Appellant's position that the Chancellor was in error in setting aside or modifying the escalation clause in the original judgment of divorce, and subsequent order of modification , and erroneously relied upon the decision of Rogers v Rogers, 919 So2d 184 (Miss. Ct App 2005) and the agreement of the parties regarding child support modification , taking it out of the authority of the Court, and placing it under the control of the parties .

The Chancellor's decision should be reversed , and the "escalation clause" be modified from the prior orders so as to provide that the Appellant, Mark Andrew West, Sr. , be required to pay child support pursuant to the guidelines on his actual adjusted gross income pursuant to Mississippi Code Annotated Section 43-19-101 (1972) and a finding made into the records as to whether or not the application of the guidelines established in this section is reasonable.

Respectfully submitted,



H.R. Garner, MSB [REDACTED]  
Attorney for Appellant

CERTIFICATE OF SERVICE

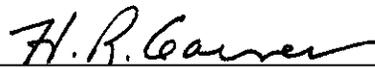
I, H.R. Garner, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing APPELLANTS REPLY BRIEF to:

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Dated this the 30th day of September, 2008.

  
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