IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARK ANDREW WEST, SR., APPELLANT

V. DOCKET NO.: 20084-CA-00190

APRIL SAYLORS WEST APPELLEE

APPELLANT'S BRIEF

APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI

ORAL ARGUMENT IS NOT REQUESTED

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V. **DOCKET NO.: 20084-CA-00190**

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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 Saylors West
5771 Bedford Loop Cove
Southaven, MS 38672

The Lawyers:
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Attorney for Appellant

George S. Luter, Esq.
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Attorney for Appellee

The Trial Judge:

Chancellor Vicki B. Cobb
115A Eureka St.
P.O. Box 1104
Batesville, MS 38606-1104
Chancery Court Chancellor

H.R. Garner, [redacted]
Attorney of Record for Appellant,
Mark Andrew West, Sr.

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STATEMENT OF THE ISSUES

The issues presented by the Appellant in this appeal are:

ISSUE I: 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 AN ESCALATION CLAUSE 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.

ISSUE II: 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.

STATEMENT OF THE CASE

A. Nature Of The Case, Course Of The Proceedings And Disposition In The Court Below *

This case stems from the decision of the Chancery Court of DeSoto County, Mississippi denying a modification of child support, to Appellant, Mark Andrew West, Sr. The Opinion of the Chancellor being rendered by the Court on the 3rd day of December, 2007 denying the modification , and Order Denying Modification entered by the Court Nunc Pro Tunc on January 4, 2008 to the 3rd day of December, 2007 by the Court recorded in Chancery Court Minute Book 464, Page 145 of the Official Chancery Court Minutes of DeSoto County, Mississippi. (CP 121) A Motion for Reconsideration and/or in the Alternative a New Trial being filed by the Appellant, Mark Andrew West, Sr., on January 8, 2008. (CP 141) An Order Denying Motion for Reconsideration being entered by the Court on the 28th day of January, 2008 recorded in Chancery Court Minute Book 466, Page 96 of the Official Chancery Court Minutes of DeSoto County, Mississippi. (CP 146)

The background of the parties and their child is that the parties were divorced by a Judgment of Divorce entered in the Chancery Court of DeSoto County, Mississippi on the 5th day of October, 2005 recorded in Chancery Court Minute Book 399, Page 608 of the Official Chancery Court Minutes of DeSoto County, Mississippi. (CP 27) The Judgment of Divorce contained therein a "Property Settlement Agreement" which contained the following provision:

> "(3) ***CHILD SUPPORT: The Father shall be responsible for paying unto the mortgage company the monthly mortgage payment on the marital residence in lieu of child support. Child support payments in the amount of $1,150 shall commence and be payable unto the Mother on the 1st of the month following the sale of the marital residence and shall be due and payable unto the Mother on the first of each month thereafter, or payable as directed by an Order for Withholding, until such time as the minor child becomes emancipated by the laws of the State of Mississippi. Said child support shall be for the support and maintenance of the parties' minor child. The child support payments shall***

commence on the 1st of the month following the sale of the marital residence and due and payable bi-monthly.

. . .

The Parties agree that there will be a substantial change in the needs of the minor child every five (5) years and thus the Non-Custodial parent shall be responsible for providing to the Custodial parent, every five (5) years a copy of his/her current year's tax returns or W-2 form immediately upon filing his/her tax returns. Should the Non-Custodial parent have an increase in pay of $10,000 or more, child support shall automatically be raised to an amount equal to fourteen percent (14%) of his/her new adjusted gross income and an Order directing same shall be entered."

That subsequent thereto an Agreed Order of Modification was entered by the Court whereby the Appellant, Mark Andrew West, Sr., would begin paying child support to the Appellee, April Sailors West (Hollis), with the Appellant, Mark Andrew West, Sr., to pay Appellee, April Sailors West (Hollis), for her interest in the parties' home. Said Order entered on the 27th 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 on the 19th day of March, 2007 a Petition for Modification of Child Support, Etc. 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)(2) of the Mississippi Rules of Civil Procedure was filed by the Appellant, Mark Andrew West, Sr. (CP 52) That an Answer to Petition for Modification and Counter-Petition to Cite for Contempt was filed on April 20, 2007 by the Appellee, April Sailors West (Hollis). (CP 67)

On April 20, 2007, an Answer and Affirmative Defenses to Counter-Petition to Cite for Contempt was filed by the Appellant, Mark Andrew West, Sr. (CP 77)

On May 2, 2007, Appellant, Mark Andrew West, Sr., filed a Motion to Set Aside a Portion of Judgment of Divorce. (CP 83)

This case was tried on August 7, 2007 with testimony from the Appellant, Mark Andrew West, Sr., (TR 6-36) and Appellee, April Sailors West (Hollis). (TR 36-55) The Court then entered an Order Taking the Matter Under Advisement and Instructing the Attorneys to Submit Proposed Findings of Facts and Conclusions of Law. (CP 117, MRE 29-32) Said Order entered on the 7th day of August, 2007 entered Nunc Pro Tunc the 8th day of August, 2007 recorded in Chancery Court Minute Book 451, Page 179 of the Official Chancery Court Minutes of DeSoto County, Mississippi. (CP 117, MRE 29-32)

The testimony and facts are not in great dispute. Appellee, April Sailors West (Hollis), had an attorney employed who drew up the divorce proceeding, Property Settlement Agreement, and presented same to the Chancellor. (TR 8-9) Appellant, Mark Andrew West, Sr., testified he did not have an attorney nor did he have independent legal advice, but relied upon the information provided by Appellee's attorney. (TR 8) He was not informed of what the child support payment of 14% of his adjusted gross income was, nor was he advised that the escalation clause contained in the agreement would not be automatic based upon increased earnings in the future alone. (TR 10-11)

That he filed the Petition, seeking to have the escalation clause voided or excluded from the original Judgment of Divorce, and asked the Court to make a finding into the record of exactly what his child support would be based upon the child support guidelines taking into consideration his current earnings. (TR 16-18) He asked for a modification of child support.

The Court in its decision held that the escalation clause was valid due to the fact that the parties had agreed to same citing Rogers v. Rogers, 919 So.2d 184 (Ms. Ct. App. 2005), holding that the Appellant, Mark Andrew West, Sr., was bound by his agreement regarding the escalation clause on child support. (CP 121, MRE 10-28) The Court further held that it was not required to

make a written finding into the record that the child support guidelines were applicable or inapplicable as provided under Mississippi Code Annotated Section 43-19-101 (1972, As Amended). (CP 121, MRE 10-28)

The Court denied the Appellant's Petition of Modification of Child Support. (CP 121, MRE 10-28) The Appellant, Mark Andrew West, Sr., being aggrieved of the Court's decision did perfect his appeal to the Mississippi Supreme Court.

*** The following abbreviations shall apply as used herein for reference: CP means Clerk's Papers. TR means transcript. MRE means mandatory record excerpts.**

B. STATEMENT OF THE FACTS AND CIRCUMSTANCES OF THE CASE

The parties in this proceeding are the Appellant, Mark Andrew West, Sr. , hereinafter referred to as "Mark" and the Appellee, April Sailors West (Hollis) , hereinafter referred to as "April". That both are adult residents and Citizens of DeSoto County, Mississippi . The parties are the parents of one child namely : Mark Andrew West, Jr., a male child, born July 25, 2000, presently 6 years of age.

The parties were divorced by a Judgment of Divorce entered in the Chancery Court of DeSoto County, Mississippi on the 5th day of October, 2005 by Chancellor Percy L. Lynchard, Jr., recorded in Chancery Court Minute Book 399, Page 608 of the Official Chancery Court Minutes of DeSoto County, Mississippi. (CP 27)

At the time of divorce, the parties entered into a Settlement Agreement, which was adopted by the Court and incorporated into the Final Judgment of Divorce.

Appellant, Mark Andrew West, Sr., was not represented by an attorney, nor did he seek independent legal advice. (TR 8) Appellee, April Sailors West (Hollis), was represented by counsel, Ms. Shannon Williams, of the DeSoto County Bar. (TR 8) The Agreement was prepared by Appellee's attorney, Ms. Williams. (TR 8-9) Mark Andrew West, Sr. was not advised prior to signing the agreement of subsequent thereto as to what he would be paying child support pursuant to the child support guidelines. (TR 10-11) At the time of the execution of the agreement in 2005, Mark Andrew West, Sr. was earning adjusted gross income of $57,027.00, which was in excess of $50,000.00. (TR 10) He was never informed or advised that under the guidelines the child support would be 14 % of his adjusted gross income. (TR 10-11) He was advised that the clause contained in the agreement provided that if he made more money, then he would automatically have to pay more child support. (TR 11) That both parties executed the

Agreement and the Judgement of Divorce was presented to the Court by Appellee's attorney, Shannon Williams, for entry by the Court on 5th day of October, 2005.

On the 27th day of April, 2006 and filed on May 3, 2006 was an Agreed Order of Modification entered by Chancellor Mitchell Lundy, Jr. recorded in Chancery Court Minute Book 414, page 504 of the Office Chancery Court Minutes of DeSoto County, Mississippi. (CP 50, TR 3) Said Agreed Order was marked as Exhibit "2" introduced into evidence at the trial. (CP 50, TR 3)

On March 19, 2007, a Petition for Modification of Child Support was filed by Mark Andrew West, Sr. (CP 52) Service was had upon April Sailors West (Hollis) by Summons on the 22nd day of March, 2007 at 9:15 a.m. On April 20, 2007, an Answer to Petition for Modification and Counter-Petition was filed by April Sailors West (Hollis) (CP 67); on April 20, 2007 an Answer and Affirmative Defenses to Counter-Petition to Cite for Contempt was filed by Mark Andrew West, Sr. (CP 77)

This case was tried before Chancellor Vicki B. Cobb in the Chancery Court of DeSoto County, Mississippi on August 7, 2007. That both parties testified as witnesses. In addition thereto introduced into evidence were six documents consisting of the following: Exhibit 1 the Judgment of Divorce; Exhibit 2 the Agreed Order of Modification; Exhibit 3 the Financial Disclosure Statement of Mark Andrew West, Sr.; Exhibit 4 the Responses to Discovery of April Sailors West (Hollis); Exhibit 5 the Quit Claim Deed from Mark Andrew West, Sr. and April Sailors West (Hollis) to Mark Andrew West, Sr. dated May 15, 2007; and Exhibit 6 April Sailors West (Hollis) Financial Disclosure Statement; and the Affidavit of Kimberly S. Jones introduced during the trial marked Exhibit 7. (TR 3)

The primary issues presented for the Court to Determine were should the escalation clause contained in the Agreement and Judgment be set aside, and that child support be modified so as to comply with the statutory guidelines.

The Judgment of Divorce had incorporated therein and approved by the Court the Agreement of the parties regarding child support which was as follows:

(3) ***CHILD SUPPORT:***

. . .

"The Parties agree that there will be a substantial change in the needs of the minor child every five (5) years and thus the Non-Custodial parent shall be responsible for providing to the Custodial parent, every five (5) years a copy of his/her current year's tax returns or W-2 form immediately upon filing his/her tax returns. Should the Non-Custodial parent have an increase in pay of $10,000 or more, **child support shall automatically be raised** ***to an amount equal to fourteen percent (14%) of his/her new adjusted gross income and an Order directing same shall be entered."***

The lower Court Chancellor held that the controlling authority in this case was the case of Rogers v Rogers, 919 So2d 184 (Miss. App. 2005), a case which essentially overruled a long line of authority from the Mississippi Supreme Court regarding the criteria that must be included for an escalation clause regarding child support to be upheld or valid. (TR 66) The Court's reasoning under Rogers was that the parties were bound by their agreement regarding child support, and although it contained an escalation clause that did not meet the criteria required, the parties may in fact 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. *East v. East*, 493 So.2d 927, 931-32 (Miss.1986). The Chancellor, treated the agreement between the parties regarding child support as a valid contract on child support between the parties and enforceable under its terms. Holding that the agreement of the parties regarding child support and the escalation clause overturned or distinguished that the basic right of the minor child to be

supported by its parents is not affected by an agreement between the parties with respect to such obligations. . . . Varner v. Varner, 588 So.2d 428, 433 (Miss.1991) (quoting Calton v. Calton, 485 So.2d 309, 310 (Miss.1986) . In order 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). 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 further held that the Court was not required to make a written finding into the record as to whether or not the child support guidelines were applicable. (TR 66) Contrary to the Court that the Court is not required to make 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. Turner v. Turner, 744 So.2d 332 (Miss. 1999). See also, Mississippi Code Annotated Section 43-19-101 (1972 As amended).

The Court holding that a modification of the child support was not required and denied the Appellant, Mark Andrew West, Sr., Petition for a modification of child support. (TR 67)

SUMMARY OF THE ARGUMENT

The argument of the Appellant, Mark Andrew West, Sr., is summarized as follows:

ISSUE I: 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.

The Chancellor misconstrued or erroneously applied the decision in Rogers v Rogers, 919 So2d 184 (Ms. Ct. Appeal 2005), which basically says that the parties can agree to anything they want to in reference to anything, including an escalation clause on child support which overruled or overturned a long line of authority from the Mississippi Supreme Court. Bruce v. Bruce, 687 So.2d 1199, 1202 (Miss.1996), Brocato v. Brocato ,731 So.2d 1138.(Miss. 1999) Knutson v. Knutson 704 So.2d 1331 (Miss. 1997) and Thompson v. Thompson, 894 So.2d 603, rehearing denied, certiorari denied 893 So.2d 1061 (Miss. 2004). In essence, permitting the parents to contract away the rights to support of the parties child by agreement. Varner v. Varner, 588 So.2d 428, 433 (Miss.1991) (quoting Calton v. Calton, 485 So.2d 309, 310 (Miss.1986). It should be noted that the only basis contained in the clause for an increase in child support is that the Appellant, Mark Andrew West, Sr., would be earning more money and nothing more. (CP 27, MRE 23, TR 3, 11, 68) Tedford v. Dempsey, 437 So.2d 410, 419

(Miss.1983), Bruce v. Bruce, 687 So.2d 1199, 1202 (Miss.1996) and Wing v. Wing, 549 So.2d 944, 947 (Miss.1989)

If the Chancellor's ruling is held correct then escalation clauses and criteria set forth by the Mississippi Supreme Court regarding child support would no longer be applicable, as the parties could agree to anything "including more than legally required", or what about less than required to be paid for child support under the child support guidelines ? Mississippi Code Annotated Section 43-19-101(1972 as Amended). Bruce v. Bruce, 687 So.2d 1199, 1202 (Miss.1996).

The Court is requested to find the escalation provision on child support contained in the Judgment of divorce void.

ISSUE II: 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.

Appellant, Mark Andrew West, Sr., testified that he was making more than fifty thousand dollars ($50,000) adjusted gross income at the time of the Divorce. (TR 10-11) At the time of the modification hearing he was earning in excess of fifty thousand dollars ($50,000) adjusted gross income. (CP 16) Appellant urges the Court upon finding that the "Escalation Clause" in the Judgment of Divorce to be declared void, to require the Chancellor to adjust the child support he is to pay and to make a finding into the record as to the applicability of child support guidelines to him. Therefore, setting the correct amount of child support based upon the application or non- application of the child support guidelines. Mississippi Code Annotated

Section 49-19-101 (1972 as Amended). Appellant, Mark Andrew West, Sr., urging the Court to find that the Chancellor committed reversible error in failing to hold that 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. Turner v. Turner, 744 So.2d 332 (Miss. 1999).

ARGUMENT

A. STANDARD OF REVIEW

The standard of review is well settled in that the Chancellor's findings will not be disturbed when supported by substantial evidence, unless the Chancellor abused his discretion, was manifestly wrong or clearly erroneous or applied an erroneous legal standard. Williams v. Williams, 656 So2d 325, 330 (Miss. 1995).

B. ISSUE I: 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.

The Judgment of Divorce entered in the Chancery Court of DeSoto County, Mississippi on the 5th day of October, 2005 by Chancellor Percy L. Lynchard, Jr., recorded in Chancery Court Minute Book 399, Page 608 of the Official Chancery Court Minutes of DeSoto County, Mississippi contained the following "Escalation Clause" regarding future child support :

"The Parties agree that there will be a substantial change in the needs of the minor child every five (5) years and thus the Non-Custodial parent shall be responsible for providing to the Custodial parent, every five (5) years a copy of his/her current year's tax returns or W-2 form immediately upon filing his/her tax returns. Should the Non-Custodial parent have an increase in pay of $10,000 or more, child support shall automatically be raised to an amount equal to fourteen percent (14%) of his/her new adjusted gross income and an Order directing same shall be entered."

The Chancellor was requested to set aside the portion of the Judgment of divorce which contained an escalation clause as to child support in the Judgment of divorce as void ab anitio . (CP 52)

The Chancellor held in her opinion on December 30, 2008, denied the Appellant's request to set aside the portion of the Judgment of Divorce as it related to the child support escalation clause. (TR 68) Relying as authority on the cases of 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)

There is no question that the clause in question is an escalation clause, but fails to follow the criteria required to be included in an escalation clause involving child support.

The Supreme Court has addressed "Escalation Clauses" in a number of decisions. While not expressly condemning escalation clauses did set forth certain criteria that they must be based upon.

The case of Morris v. Stacy, 641 So.2d 944 (Miss. 1994) involved a case where the lower court ordered in a modification proceeding for the father to pay 10% of his income over $50,000.00 as child support. The Supreme Court in reversing the lower Court discussed an anticipated modification, which does not in anyway apply to every case, and an escalation clause which does apply to this case.

The Court in Morris pointed out what is necessary wherein it held:

"Regarding escalation clauses in child support awards, this Court in Tedford said, "the parties generally ought to be required to include escalation clauses tied to the parents' earnings or to the annual

inflation rate or to some factored combination of the two." Tedford, 437 So.2d at 419. This Court further elaborated on this idea in Wing stating:

"Tedford dictates that an escalation clause should 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. See also, Adams v. Adams, 467 So.2d 211, 215 (Miss.1985). These factors channel the escalation clause to relate to the non-custodial parent's ability to pay and the needs of the child. Id. An automatic adjustment clause without regard to all of the above factors runs the risk of overemphasizing one side of the support equation. On the other hand, an increase in the [non-custodial] parent's income does not necessarily entitle the child to more support; nor does an income decrease necessarily signal inability to pay, as when the obligated parent has assets. H. Krause, Child Support in America-the Legal Prospective 24 (1981). (Emphasis added).

Wing, 549 So.2d at 947. Thus, should this provision be deemed an escalation clause, it would still be improper. The provision in the instant case relates only to the father's income. It in no way relates to the other important factors discussed in Wing such as the mother's separate income or the inflation rate. Also of vital importance, this provision seems to increase child support with no regard to the needs and expenses of the children. Thus, the Chancellor overemphasized Morris' possible future income to the exclusion of the other factors which should also be considered in child support determinations."

The Mississippi Supreme Court in the more recent case of Bruce v. Bruce, 687 So.2d 1199 (Miss. 1997) once again condemned an escalation clause that ordered the father to pay 20% of his net pay for child support which did not take into consideration they mother net pay and other factors.

Holding as follows:

"***To be enforceable, an escalation clause must be associated with (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).***"

Wing v. Wing, 594 So.2d 944 (Miss. 1989) wherein the Court held in overturning a lower court's contempt citation as follows;

" Our inquiry here is limited to whether or not the judgment is violated and this necessarily includes questions of whether or not it was possible to carry out the judgment of the Court. Ladner v. Ladner, 206 So.2d 620, 623 (Miss. 1968).

[5] On reviewing the record, we disagree with the Chancellor. The Property Settlement Agreement at issue is uncertain. Through his testimony, Russell Wing demonstrated that an "ordinary person reading the court's order" would not "be able to ascertain readily from the document itself exactly what conduct is prescribed or mandated." See Comment, Miss.R.Civ.P. 65(d). A genuine dispute existed over the amount owed, over the commencement year of the escalation clause, and over which Consumer Price Index was to be utilized. The uncertainty in the agreement may have resulted from the novelty, at that time, of using escalation clauses in divorce decrees. Furthermore, at the time this decree was prepared, this Court had not addressed the computation of these clauses. Notwithstanding that the chancellor had little direction, our positive law requires that we reverse the finding of contempt."

Wing v Wing., 594 So2d 944 (Miss. 1989) contained the following "escalation clause":

"The Husband hereby agrees and obligates himself to pay to the Wife the sum of $400.00 per month for the support of said minor child beginning October 1, 1979, and on the first of each month thereafter until the said minor child shall marry, become self-supporting, became otherwise emancipated, or until order of this Court to the contrary. The Husband further agrees to increase said support each year according to the rate of inflation as set forth in the consumer price index. (emphasis added)."

In Wing v. Wing, 549 So.2d 944, 947 (Miss.1989), "Strong public policy calls for provision for increased financial needs of children without additional litigation, incurring attorney's fees, court congestion and delay, and emotional trauma." If this is an escalation clause and not a modification clause, this Court is called upon to review what the Chancellor considered in creating an escalation clause.

In Wing we stated:

Tedford v. Dempsey, 437 So.2d 410 (Miss.1983) dictates that **an escalation clause should be tied to: (1) the inflation rate, (2) the non-custodial parent's increase or decrease in income, (3) the child's expense, and (4) the custodial parent's separate income**. See also, Adams v. Adams, 467 So.2d 211, 215 (Miss.1985). These factors channel the escalation clause to relate to the non-custodial parent's ability to pay and the needs of the child. Id. An automatic adjustment clause without regard to all of the above factors runs the risk of overemphasizing one side of the support equation ... H. Krause, Child Support in America--The Legal Perspective 24 (1981).
Wing v. Wing, 549 So.2d at 947.

After noting problems associated with escalation clauses Wing urged the bench and bar, when using escalation clauses for child support, to:

(a) specify with certainty the particular cost of living or consumer price index which is to be utilized (there are many); (b) show the applicable ratio (present CPI is to ascertainable CPI as present award is to future award); (c) calculate the base figure as of the date of judgment; (d) establish frequency of adjustments (we suggest nothing less than yearly); and (e) establish an effective date for each adjustment (e.g., anniversary of date of judgment).

Id. at 948.

The provision inserted by the chancellor in this case is tied to only one event, the child starting kindergarten, and it lacks the specificity required for an escalation clause. The Chancellor was perfectly within his authority to include an escalation clause, but the basis for the calculation of the increase must be more specific. Furthermore, explanation is required for the increase if it is to be included in the original award..

[5] On reviewing the record, we disagree with the chancellor. The Property Settlement Agreement at issue is uncertain. Through his testimony, Russell Wing demonstrated that an "ordinary person reading the court's order" would not "be able to ascertain readily from the document itself exactly what conduct is prescribed or mandated." See Comment, Miss.R.Civ.P. 65(d). A genuine dispute existed over the amount owed, over the commencement year of the escalation clause, and over which Consumer Price Index was to be utilized. The uncertainty in the agreement may have resulted from the novelty, at that time, of using escalation clauses in divorce decrees. Furthermore, at the time this decree was prepared, this Court had not addressed the computation of these clauses. Notwithstanding that the chancellor had little direction, our positive law requires that we reverse the finding of contempt."

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In Wing v. Wing, 549 So.2d 944, 947 (Miss.1989), "Strong public policy calls for provision for increased financial needs of children without additional litigation, incurring attorney's fees, court congestion and delay, and emotional trauma." If this is an escalation clause and not a modification clause, this Court is called upon to review what the chancellor considered in creating an escalation clause.

In Wing we stated:

Tedford v. Dempsey, 437 So.2d 410 (Miss.1983), dictates that **an escalation clause should be tied to: (1) the inflation rate, (2) the non-custodial parent's increase or decrease in income, (3) the child's expense, and (4) the custodial parent's separate income.** See also, Adams v. Adams, 467 So.2d 211, 215 (Miss.1985). These factors channel the escalation clause to relate to the non-custodial parent's ability to pay and the needs of the child. Id. An automatic adjustment clause without regard to

all of the above factors runs the risk of overemphasizing one side of the support equation ... H. Krause, Child Support in America--The Legal Perspective 24 (1981).

Wing v. Wing, 549 So.2d at 947.

After noting problems associated with escalation clauses Wing urged the bench and bar, when using escalation clauses for child support, to:

(a) specify with certainty the particular cost of living or consumer price index which is to be utilized (there are many); (b) show the applicable ratio (present CPI is to ascertainable CPI as present award is to future award); (c) calculate the base figure as of the date of judgment; (d) establish frequency of adjustments (we suggest nothing less than yearly): and (e) establish an effective date for each adjustment (e.g., anniversary of date of judgment).

Id. at 948.

The provision inserted by the chancellor in this case is tied to only one event, the child starting kindergarten, and it lacks the specificity required for an escalation clause. The chancellor was perfectly within his authority to include an escalation clause, but the basis for the calculation of the increase must be more specific. Furthermore, explanation is required for the increase if it is to be included in the original award..

[4] It is axiomatic that before a person may be held in contempt of a court judgment, the judgment must "be complete within itself--containing no extraneous references, leaving open no matter or description or designation out of which contention may arise as to the meaning. Nor should a final decree leave open any judicial question to be determined by others, whether those others be the parties or be the officers charged with execution of the decree...." Morgan v. U.S. Fidelity & Guaranty Co., 191 So.2d 851, 854 (Miss. 1966), quoting Griffith, supra, §. 625; see also, Miss. R. Civ. P. 65(d)(2); Hall v. Wood, 443 So.2d 834, 841-42 (Miss.1983); Aldridge v. Parr, 396 So.2d 1027 (Miss.1981); Webb v. Webb, 391 So.2d 981 (Miss. 1980).

Speed v Speed, 757 So2d 221 (Miss. 2000) while upholding the escalation clause between the parties on the contract theory involving property and alimony, distinguished the difference involving escalation clauses involving child support.

The Court went on distinguish between escalation clauses in child support cases as opposed to escalation clauses in property and financial matters. Wherein the Court held as follows:

Regarding escalation clauses in child support awards, we said in Tedford v. Dempsey, 437 So.2d 410, 419 (Miss.1983), that "the parties generally ought to be required to include escalation clauses tied to the parent's earnings or to the annual inflation rate or to some factored combination of the two." We further elaborated on this idea in Wing v. Wing, 549 So.2d 944 (Miss.1989), holding that:

Tedford dictates that an escalation clause should 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. See also> Adams v. Adams, 467 So.2d 211, 215 (Miss.1985). These factors channel the escalation clause to relate to the non-custodial parent's ability to pay and the needs of the child. Id. An automatic adjustment clause without regard to all of the above factors runs the risk of over emphasizing one side of the support equation. On the other hand, an increase in the non-custodial parent's income does not necessarily entitle the child to more support; nor does an income decrease necessarily signal inability to pay, as when the obligated parent has assets. H. Krause, Child Support in America--the Legal Perspective 24 (1981).

Wing, 549 So.2d at 947.

In the case of Ligon v Ligon , 743 So.2d 404 (Miss. 1999) was a DeSoto County Chancery that held that the escalation clause on child support was unenforceable, which was affirmed by the Miss. Supreme Court. The Chancery Court determined that the provision in the child support order calling for "25 percent of his adjusted gross income, whichever is greater," is an unenforceable escalation clause.

The Supreme Court held: **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 chancellor held the escalation clause to be unenforceable because it was based on only one of the factors set out in Tedford. Recently, 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 Supreme Court went on to hold : "**It is apparent that the chancellor considered the Tedford factors and determined that the escalation clause is related only to Robert's adjusted gross income. The clause is not tied to Sherri's income or the children's needs. There is substantial evidence to support the chancellor's decision. Sherri has failed to prove that the chancellor was manifestly wrong or clearly erroneous. This issue is without merit.**

The recent case of D' Avignon v D'Avignon, 945 So.2d 401 (Miss.App.,2006.) dealt with an escalation clause in an alimony case, which was upheld on the theory of contract , being an agreement between the husband and wife concerning property and financial matters.

The Court holding that : It is a well-established principle in Mississippi that "[a] true and genuine property settlement agreement is no different from any other contract, and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character." *West v. West*, 891 So.2d 203, 210(¶ 13) (Miss.2004).

The Supreme Court has held **"The basic right of the minor child to be supported by its parents is not affected by an agreement between the parties with respect to such obligations...."**

Varner v. Varner, 588 So.2d 428, 433 (Miss.1991) (quoting Calton v. Calton, 485 So.2d 309, 310 (Miss.1986)

The cases regarding an escalation cause distinguishes between alimony (property and financial issues)as follows: (a) an escalation clause in a property settlement agreement concerning financial and property issues is considered as a contract. It must pass the four corners test on contracts. See D' Avignon v D'Avignon, 945 So.2d 401 (Miss.App.,2006.). (b) An Escalation clause in a decree or agreement is unenforceable under the theory of contract . **The basic right of the minor child to be supported by its parents is not affected by an agreement between the parties with respect to such obligations....** Varner v. Varner, 588 So.2d 428, 433 (Miss.1991) (quoting Calton v. Calton, 485 So.2d 309, 310 (Miss.1986) . In order **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). 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).**

In the decision of Rogers v Rogers, 919 So2d 184 (Miss. App. 2005) relied upon by the Chancellor to support her position that the parties " may agree in fact 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."

The case dealt primarily with inter alia an escalation clause, which was agreed upon by the parties and approved by the Court which stated:

" (3) **Robert Earl Rogers, Jr. shall pay unto Donna Leigh Rogers the sum of 14% of his adjusted gross income or no less than $600.00 per month as child support. Additionally Robert Earl Rogers shall pay to Donna Leigh Rogers 14 percent of any and all future bonuses and salary increases.** Robert Earl Rogers shall be responsible for all medical, dental, doctor, drug, hospital and optical expenses incurred by the minor child. Robert Earl Rogers, Jr. shall be responsible for providing the child with all clothing, school and college expenses, trips, an automobile and automobile expenses."

6. The Court held :" **likewise, in looking at the child support provisions in the support and custody agreement and the final decree of divorce, the chancellor determined that the clear and unambiguous intent of the parties was that Mr. Rogers would pay a minimum of $600 per month as child support and an additional fourteen percent of all bonuses and wage increases. The relevant portion of the agreement states: "The Husband shall pay to the Wife, for the support and maintenance of the minor child of the parties, the sum of 14 percent of his adjusted gross income or $600.00 per month. Additionally, the Husband shall pay 14 percent of any and all future bonuses and salary increase."**

[7] ¶ 19. **Mr. Rogers now argues that the chancellor's determination creates an unlawful and unenforceable child support escalation clause**. This argument lacks merit. **The parties may in fact 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.** *East v. East*, 493 So.2d 927, 931-32 (Miss.1986).

"Bell on Family Law, 2006 Supplement states:

"In 2005, the court of appeals altered the approach to escalation clauses in that child support agreements, enforcing a father's agreement to pay fourteen percent of his adjusted gross income or $600.00 a month. The Court rejected the father's argument that the provision was an unenforceable child support escalation clause, stating that parties may agree of their own volition to do more than the law requires of them." Rogers v Rogers , 919 So2d 184, 189 (Ct. App. 2005).

The decision of the Court of Appeals in Rogers if construed as written overturns numerous Supreme Court decisions contrary regarding escalation clauses on child support. Which clearly conflicts with prior Supreme Court decisions regarding same.

An escalation clause in a decree or agreement for child support is unenforceable under the theory of contract . **The basic right of the minor child to be supported by its parents is not affected by an agreement between the parties with respect to such obligations. . . .** Varner v. Varner, 588 So.2d 428, 433 (Miss.1991) (quoting Calton v. Calton, 485 So.2d 309, 310 (Miss.1986). In order **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). 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).**

Now with the aforementioned authority regarding escalation clauses in child support cases being applicable, the question is, does it pass the criteria required in the Wing decision , supra.

The Escalation clause in question states as follows:

"***The Parties agree that there will be a substantial change in the needs of the minor child every five (5) years and thus the Non-Custodial parent shall be responsible for providing to the Custodial parent, every five (5) years a copy of his/her current year's tax returns or W-2 form immediately upon filing his/her tax returns. Should the Non-Custodial parent have an increase in pay of $10,000 or more, child support shall automatically be raised to an amount equal to fourteen percent (14%) of his/her new adjusted gross income and an Order directing same shall be entered."***

Is the escalation clause dependent upon all of the following:

(1) **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.**

The only criteria that is applicable in the escalation clause is the non custodial parent's increase in income.

The criteria of: Inflation rate, child's expenses , and custodial parent's separate income are not contained in the escalation clause to automatically increase child support. ***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) The Court has held that 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). 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).**

How does the Rogers decision conflict with the Supreme Court decisions:

(1) It addresses the agreement of the parties regarding the escalation of child support as a contract between the parents regarding the escalation of child support, which apparently is outside the authority of the court.

(2) The escalation of child support is based only upon the increase in income on the part of Mark Andrew West, Sr.

No other criteria is required under Rogers other than an increase in income on the part of the father. The decision completely ignores the other criteria being applicable for an escalation clause to have an automatic adjustment based upon income alone. It fails to take into consideration the Inflation rate, child's expenses, and custodial parent's separate income.

The Court should so find that the Rogers v Rogers, 919 So2d 184 (Miss. App. 2005) decision conflicts with prior decisions of the Mississippi Supreme Court, which have not been overturned or reversed, and should be held inapplicable to the case at bar.

Williams v Williams, 810 So2d 613 (Ms. Ct App. 2001) cited in her opinion by the Chancellor, involved an agreement during the trial that there had been a material change and an agreement had been reached by counsel. Clearly distinguishable from the case at bar.

C. ISSUE II: 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 Chancellor further held that the Court was not required to make a written finding into the record as to whether or not the child support guidelines were applicable. (TR 66) The Court erroneously finding that it is not required to make an on-the-record finding as to the applicability of the child support guidelines as required on both the initial award of child support and any subsequent modification of child support. Turner v. Turner, 744 So.2d 332 (Miss. 1999). See also, Mississippi Code Annotated Section 43-19-101 (1972, As Amended).

CONCLUSION

For the aforesaid reasons, the Lower Court committed reversible error in failing to set aside the Court's prior Judgment of Divorce containing an invalid escalation clause, make a finding into the records as to the applicability or inapplicability of the child support guidelines; Mississippi Code Annotated Section 43 - 19-101 (1972 as amended); and grant a modification or adjustment of child support to be paid by Mark Andrew West, Sr. , Appellant, so as to be within the child support guidelines. Having failed to do so, the Court committed reversible error which mandates that this Cause be reversed and rendered, and /or reversed and remanded to the lower court for further hearing striking the escalation clause and setting proper child support to be paid pursuant to Mississippi Code Annotated Section 43-19-101 (1972, As Amended) if same be applicable.

Respectfully submitted,

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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 coy of the foregoing APPELLANTS BRIEF to:

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Dated this the 21st day of June, 2008.

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