

COPY

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

THOMAS S. BEDDINGFIELD

APPELLANT

V.S.

NO. 2008-^{CA}13-00512

JENNIFER L. BEDDINGFIELD

APPELLEE

FILED

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COURT OF APPEALS**

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

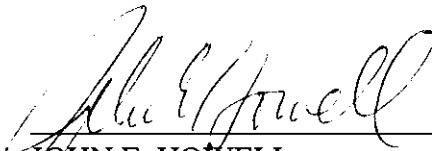
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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TABLE OF CONTENTS

PAGE

CERTIFICATE OF INTERESTED PERSONS	2
TABLE OF CONTENTS	3
TABLE OF CASES	4
STATEMENT OF ISSUES	5
STATEMENT OF CASE	6
STATEMENT OF FACTS	7
SUMMARY OF ARGUMENT	9
ARGUMENT	10
CONCLUSION	22
CERTIFICATE OF SERVICE	23

TABLE OF CASES

CASES:

<i>Armstrong v. Armstrong</i> , 618 So. 2d 1278 (Miss. 1993).	14
Brennan v. Brennan; 636 So.2d 1320;	14,21
<i>Cheatham v. Cheatham</i> , 537 So.2d 435, 438 (Miss.1988).	13
<u>Cherry v Cheery</u> , 593 So.2d 13, 19 (Miss. 1991)	20
COSENTINO v. COSENTINO; 912 So.2d 1130; (MS 2005)	18
COSENTINO v. COSENTINO; 2008-MS-A0702.002;	18,19
<u>Dorsey v. Dorsey 2007 MSCA 2006-CA-00328 - 010808;</u>	12
<i>Haney v. Haney</i> , 907 So.2d 948, 952 (¶¶17) (Miss. 2005).	12
Hemsley v. Hemsley , 639 So.2d 909, 914 (Miss. 1994).	14,15
Labella v. Labella; 722 So.2d 472;	21
<i>Lauro v. Lauro</i> , 847 So. 2d 843, 848 (¶¶13) (Miss. 2003)	14,17
Massey v. Massey;475 So.2d 802;	20
McEachern v. McEachern; 605 So.2d 809;	20,21
McINTOSH v. McINTOSH; 2008 MS - lw080326230;	14
<i>Miller v. Miller</i> ; 874 So.2d 469; (Miss.2004).	12
Labella v. Labella; 722 So.2d 472;	21
<i>Roberson v. Roberson</i> , <u>949 So.2d 866</u> , 871 (¶¶21) (Miss. Ct. App. 2007).	12
<u><i>Trittle v. Trittle</i>, 956 So.2d 369</u> 380 (¶¶41) (Miss. Ct. App. 2007).	12

STATEMENT OF ISSUES

Jennifer Beddingfield had the burden of proving the 12 relevant factors for a request for alimony set out in *Armstrong v Armstrong*, 618 So. 2d 1278 (Miss. 1993).

A. Thomas Beddingfield's income to support himself and an award of alimony.

B. Thomas and Jennifer's earning capacity.

C. Needs of each party

D. Standard of living of both parties, both during the marriage and at the time of support determination.

E. Fault or misconduct.

1. There was no evaluation of the needs or income of Thomas Beddingfield.

2. There is no substantial evidence to support:

A. Thomas' ability to pay;

B. That there was any deficit in the equitable distribution of marital assets that would give occasion for alimony.

STATEMENT OF THE CASE

This cause came on for hearing on the Complaint for Divorce filed by Thomas Beddingfield; Counter-Complaint for Divorce filed by Jennifer Beddingfield and the Consent for Divorce entered into by the parties and approved by the Court.

The issues before the Court were equitable division of marital property and Jennifer's request for alimony.

The trial consisted of three witnesses and the Court made a division of the marital property and awarded periodic alimony and lump sum alimony. The only request for alimony was for periodic.

STATEMENT OF FACTS

The Parties were married February 5th 1995 and separated May 28th 2006. There were no children. Jennifer was at time of trial living with friends and had stored some of her property in the 16 X 80 trailer that rests upon real estate that she inherited from her father.(T-8) Thomas lives in the last marital home with his mother.(T-22) Both trailers have more indebtedness than value.(T-23) (T-37)The debt on the trailer in Jennifer's possession is in Thomas and his mother (T-39)and the indebtedness on the trailer in Thomas' possession is in Thomas and Jennifer.(T-69)

Thomas was last employed September 1 2006 at Quality Logistics and drew unemployment through February 2007 (T-32) Thomas once played in a band and cut grass.(T-34) Thomas now has his mother, who is afflicted with Huntington's disease, living with him and is occupied taking care of her and does collect her rents on her mobile home park; consisting of twelve lots.(T-34) Thomas testified that he had sought employment "very little".(T-32)

Jennifer was last employed December of 2007 at Fred's Stores(T-51) at minimum wage. She opined that she is disabled (T-53) but there is no corroboration and no determination by social security. She corroborated Thomas assertion that his mother needs assistance "like a small child".(T-56)

There was some evidence by both parties of the other's misconduct without corroboration. The parties completed a list of the property that they considered to be marital and the Court made a division. The Court divided the property with Jennifer receiving 27 items valued at \$16,703.00 and Thomas receiving 21 and five of those were "when located", valued at \$8379.00 (not inclusive of land , trailer or vehicle) Thomas also received the 2005 trailer and the debt; with the land and the debt.

The Court determined that Thomas could work(RE-O-21) and without regard to his occupation as his mother's keeper, set alimony, periodic and lump sum. Thomas at one time earned some money cutting grass and used the trailer to get equipment to the jobs.(T-33) That trailer was made the property of Jennifer.

SUMMARY OF THE ARGUMENT

The facts and evidence do not support an award of alimony. There is no evidence that Thomas can or has the ability to make the alimony payments set by the Court. The alimony does not allow Thomas any standard of living. It is Jennifer's burden of proof to show that alimony is necessary to enable her to maintain a standard of living. There is no proof of any standard of living either at the time of separation or at the time of determination. There is no deficit in the division of marital property in favor of Thomas; rather he has all of the debt and one-third of the unencumbered assets. Jennifer has failed to show by substantial evidence that Thomas can or has the ability to pay any alimony. Jennifer has not showed that Thomas has even enough income to support himself. Thomas' assets are insufficient to support an award of alimony.

ARGUMENT

SUBSTANTIAL EVIDENCE TO SUPPORT LUMP SUM ALIMONY

The property division made by the chancellor does not leave a deficit in the allowance made to Jennifer; rather she acquired most of the unencumbered property. (RE-J- 5&6)

	Item #	Description	Value (Exhibit 4) (RE- J-5&6)
Jennifer has items:	1	16 X 80 trailer	\$8000.00(RE-E-20)(27000 owed)
	2	Sony Camcorder	\$50.00
	3	X-box	\$50.00
	4	Kirby Vacuum	\$75.00
	6	60" TV	\$100.00
	7	Pioneer stereo	\$50.00
	8	1996 Eclipse	\$3500.00
	11	Bulldog	\$300.00
	12	Bulldog	\$0
	13	1 acre Neshoba	\$800.00
	14	Dining suite	\$149.00
	15	Living Room Suite	\$300.00
	16	Bedroom suite	\$75.00
	17	Sanyo TV	\$0
	18	Sanyo TV	\$0
	19	Sony Game	\$50.00
	20	Nintendo	\$79.00
	22	Sanyo DVD	\$0
	23	Movies	\$0
	24	Murray mower	\$0
	27	Gateway computer	\$200.00
	34	12' trailer	\$1200.00
	35	12 x12 storage	\$1200.00
	44	Stackable Washer/ Dryer	\$200.00

50	10 x10 fence	\$50.00
51	Air conditioner	\$25.00
52	Tanning Bed	\$250.00

Total \$16,703.00

These are the values that Jennifer assigned, except for the Eclipse and the only value for it was found in Thomas income/expense. The Chancellor used this exhibit.(RE-E-22-25)

Thomas has items:	5	Hoover vacuum	\$0
	7	tape deck	\$50.00
	9	speakers	\$99.00 when located
	21	Toshiba VCR	\$50.00
	25	Stihl weed eater	\$100.00 when located
	26	Sony digital camera	\$0 if located
	28	2005 trailer	\$0 (more owed than worth)
	29	Phillips DVD	\$0
	30	TV	\$0
	31	Stihl weed eater	\$300.00 when located
	32	1999 Ford	\$4000.00
	36	12 x 20 storage	\$1200.00
	39	6 acres	\$0(no equity)(T-23)
	40	King bed	\$800.00
	41	Full bed	\$200.00
	42	living suites (2)	\$1000.00
	43	Dining suite	\$30.00
	45	Stihl leaf blower	\$50.00 when located
	46	laptop	\$200.00
	49	Antique desk	\$100.00
	53	Washer/dryer	\$200.00
		Total	\$8,379.00

The parties each testified that there was more owed on the 2005 trailer(T-7) and land than it was worth;(T-26) therefore there is no equity; rather a burden. The 16 x 80, 1997 mobile home on Jennifer's list is valued at \$8000.00 and has \$27000.00 owed; but the debt was given to Thomas as lump sum alimony. The Court discussed the use of lump sum alimony in: **Dorsey v. Dorsey**;

2007 MSCA 2006-CA-00328 - 010808;

"If after the equitable distribution of the marital property, both parties have been adequately provided for, then an award of **alimony** is not appropriate." *Tritle v. Tritle*, 956 So.2d 369_ 380 (¶¶41) (Miss. Ct. App. 2007). If the chancellor determines that "one party is left with a deficit, then the prospect of **alimony** should be entertained." *Roberson v. Roberson*, 949 So.2d 866, 871 (¶¶21) (Miss. Ct. App. 2007).

With regard to the chancellor's refusal of a **lump sum alimony** award, we also find the chancellor did not commit error. Generally, "**lump sum alimony** is a tool to assist a chancellor in transferring assets to a spouse who has no legal title, but who contributed to the accumulation of property in the marriage." **Haney v. Haney**, 907 So.2d 948, 952 (¶¶17) (Miss. 2005).

The asset distribution in this case did not leave Jennifer with a deficit prior to awarding lump sum alimony. There is no evidence that Jennifer contributed any to the accumulation of any marital property. Particularly it appears that Thomas' mother contributed more to the accumulation of what little property the parties had; she is on the debt for the trailer and Jennifer testified that their money came from Mrs. Beddingfield.(T-17) In **Miller v. Miller**; 874 So.2d 469; (Miss.2004) this Court examined similar circumstances:

4

¶¶8. We examine the chancellor's findings for consistency with the Supreme Court's identification of four factors that are to be considered in making an award of lump sum alimony. Separately or jointly these factors do not provide much assistance unless the fundamental consideration is kept in focus, which is whether after equitable distribution an "equalizer" is needed.

¶¶9. Lump sum alimony is a hybrid divorce concept, providing support as does other alimony but also making an unalterable distribution of property as does equitable distribution. These are the factors:

(1) Substantial contribution to accumulation of total wealth of the pay or either by quitting a job to become a housewife, or by assisting in the spouse's business.

(2) A long marriage.

(3) Where the recipient spouse has no separate income or the separate estate is meager by comparison.

(4) Without a lump sum award the receiving spouse would lack any financial security.

Cheatham v. Cheatham, 537 So.2d 435, 438 (Miss.1988).

There is no evidence for the Chancellor to consider in establishing the standard of living to which Jennifer wishes to be afforded or to which Thomas has the ability to maintain. In examining the factors set out above ;

(1) there is no evidence that Jennifer contributed to;(T-17) or that there is any wealth to be considered;

(2) these parties were married eleven years; not a long marriage;(T-5)

(3)Jennifer has had income from employment (T-6) from which she received a W-2 more recently than has Thomas; the key word is "comparison". There is no evidence that Thomas can support himself much less Jennifer, too.

(4)Jennifer testified that she was going to rely upon acquiring a disability check ;(T-8)

Thomas relies upon his mother for support;(T-22) neither of these litigants has any financial security nor is there evidence that any was ever shared by them.

EVIDENCE TO SUPPORT AN AWARD OF PERIODIC ALIMONY

This Court has set out the factors to be considered in an award of periodic alimony:

a. Periodic Alimony

¶¶ 50. "The award of periodic **alimony** arises from the duty of the husband to support his wife." *Watson*, 724 So. 2d at 354 (¶¶17) (citing *McDonald v. McDonald*, 683 So. 2d 929, 931 (Miss. 1996). "The husband is required to support his wife in the manner to which she has become accustomed, to the extent of his **ability to pay**." *Id.* (quoting *Brennan v. Brennan*, 638 So. 2d 1320, 1324 (Miss. 1994)). "In the case of a claimed inadequacy or outright

denial of **alimony**, we will interfere only where the decision is seen as so oppressive, unjust or grossly inadequate as to evidence an abuse of discretion." *Id.* at 354-55 (quoting *Armstrong*, 618 So. 2d at

6

1280). "**Alimony** is considered only after the marital property has been equitably divided and the chancellor determines one spouse has suffered a deficit." *Lauro v. Lauro*, 847 So. 2d 843, 848 (¶¶13) (Miss. 2003). In light of the fact that the chancellor essentially split the marital estate equally, we cannot find that the chancellor abused her discretion in denying an award of **alimony** to Gay.

McINTOSH v. McINTOSH;2008 MS - lw080326230;

Additionally, a year after deciding *Armstrong*, the Mississippi Supreme Court enumerated factors in *Hemsley* which should be considered when chancellors are attempting to reach a reasonable **alimony** award:

- (1) the health of the husband and his earning capacity;
- (2) the health of the wife and her earning capacity;
- (3) the entire sources of income of both parties;
- (4) the reasonable needs of the wife;
- (5) the reasonable needs of the child;
- (6) the necessary living expenses of the husband;
- (7) the estimated amount of income taxes the respective parties must pay on their incomes;
- (8) the fact that the wife has the free use of the home, furnishings and automobile, and
- (9) such other facts and circumstances bearing on the subject that might be shown by the evidence.

Hemsley, 639 So. 2d at 912-13 (citing *Brabham v. Brabham*, 226 Miss. 165, 176, 84 So. 2d 147, 153 (1955)).

The evidence in this case is uncorroborated as to items 1 and 2; although it appears that Thomas is healthy and capable of employment.(T-31) The evidence also supports Tommy's assisting his ailing mother; as he did during the marriage.

(3) the entire sources of income of both parties. The sources of income of the parties does not establish that Thomas makes any certain amount of money, only that he cares for his mother and collects her rents and she pays his bills.(T-35) The Chancellor found that Thomas was able to work.(RE-O-22) The evidence shows that Thomas is occupied taking care of his mother, who is afflicted with Huntington's disease(T-22) and needs the care of a little child.(T-56) Mrs. Rebecca Beddingfield testified that she could not afford nursing care (T-45) nor did she want persons unknown to her (T-49) taking care; as her experience was that home health nursing was unreliable.

The evidence on item 4, the reasonable needs of the wife, is not developed in the record. Jennifer testified that she wanted \$1000.00 in alimony.(T-76)

(5) the necessary needs of the child; there is no child therefore moot.

(6)The necessary living expenses of Thomas are set out in his income/expense (RE-E-4&5); but regardless of what these expenses are, the evidence was that Thomas' mother was living with him, receiving his care and paying his expenses.(T-22) Thomas sets out expenses that total \$1920. (itemized expenses of \$1670. And \$250 payment to Vimville Property on the 6 acres)(RE-E-5) the evidence of his ability to earn was that he once made \$14.00 per hour; which on a 40 hour week is \$560.00 before taxes. If taxes subtract 25% for taxes will give Thomas an adjusted

gross of \$420.00 per week; or (x 4.3) \$1806.00 per month. There is no evidence to support any other income that Thomas has access. Thomas present occupation, care giving his ailing mother, appears to pay better than did his hourly job at Quality Logistics.

Jennifer testified that during their marriage she had assisted caring for Mrs. Beddingfield (T-56) and that Thomas mother had supplemented their income at that time.(T-17)

The obligations and assets of the parties were two trailer homes, both encumbered above the value. Jennifer in her Counter-Complaint for Divorce requested "the 1997 Gateway Mobile Home located at 10020 BIA 2212 Philadelphia, Mississippi, subject to the indebtedness owed on the property, to provide a home for herself." Thomas and his mother live in the other trailer, on the land also encumbered, at 2911 Rob Sims Road, Meridian, Mississippi.(T- 22-23)

(7)The Chancellor noted in his opinion that there is no evidence impacting the taxes or the effect that an alimony award would have on either party.(RE-O-21)

(8)The fact that Jennifer was awarded only items without any debt that she is liable upon. Jennifer testified that Thomas and his mother were liable on the debt for the Gateway mobile home that is located on the one acre in Neshoba County.(T-39)

The length of the marriage.

Thomas and Jennifer were married on February 4, 1995 and separated May 2006. Not a lengthy marriage.(T-5)

Among the other facts and circumstances bearing on the subject is that there is no evidence that Thomas has the ability to pay the alimony as awarded. His position as his mother's caretaker is a necessary one that Jennifer took some part in prior to her leaving the home.(T-56)

"As these two issues are intertwined, they will be discussed together. Periodic **alimony** is only considered after the marital estate is equitably distributed and there is a finding that one of the parties suffers a disparity of income and living standards." Lauro v. Lauro, 847 So.2d 843, 848 (13)(Miss. 2003).

The chancellor at page 21 of his opinion undertook to discuss alimony and the factors that he considered in his consideration. The court recognized that Thomas is taking care of his ailing mother and that she pays his expenses. The court recognized that one of the necessary evidentiary features of an alimony consideration is the marital standard of living and that there is no evidence to support that factor.

The chancellor does not undertake to explain what factors establish that there are funds with which to pay an alimony award. The evidence does not develop what income Thomas will have when he goes to work and his mother has to pay someone else for her care. It is speculative at best to determine that there will be adequate funds to support Thomas alone and more speculative to guess that he or his mother will have funds after their own necessities to pay any alimony.

The chancellor identified the specific requirements and necessary factors to be analyzed for an award of alimony. The court spoke to the need to identify and support an award of alimony in

COSENTINO v. COSENTINO; 912 So.2d 1130; (MS 2005)

¶¶ 12. While a chancellor is not required to address each of the *Ferguson* factors,

he is obligated to address those factors which are relevant. *Wells v. Wells*, 800 So.2d 1239, 1244(¶¶ 8) (Miss.Ct.App.2001). In the present case, *Ferguson* factors six and seven are relevant, and therefore should have been addressed by the chancellor. While a full and appropriate analysis may well have indicated a need for alimony, no such full and appropriate analysis was conducted. Accordingly, we reverse the award of alimony and remand for an appropriate analysis of the *Ferguson* factors, and if justified, an analysis of the *Armstrong* factors by the chancellor.

2008-MS-A0702.002; COSENTINO v. COSENTINO;

¶¶10. As for the chancellor's treatment of factor seven, we also find nothing in the record to support this finding. The chancellor justified her alimony award by stating, inter alia, that:

The husband, Dr. Cosentino, has a flourishing radiology practice from which he earns a large income and shares none of the profits. At the time of trial, he was a sole practitioner in a lucrative practice. Mrs. Cosentino is not employable in her chosen field of medical technology and, at the time of trial in 2003, was 55 years old. She could easily outlive the assets apportioned to her pursuant to the property settlement if she continues to live in the manner to which she became accustomed during the 33[-]year marriage.

Phyllis has not worked in the field of medical technology in excess of 25 years. Her training is obsolete and would require substantial education and retraining before she would be marketable in this occupation. Absent alimony income, Phyllis'[s] only means of income would be that generated from the management of funds she received from the equitable distribution of marital property she equally split with her husband.

Clearly, the chancellor's finding that Phyllis "could easily outlive" her share of the marital estate is speculative at best, as the converse is also true: Phyllis may not outlive her share of the marital estate. The proper

question before the chancellor was whether Phyllis needed alimony at the time of the property division, not whether she may need it at some time in the future. We find that the chancellor's alimony award of \$7,000 per month is against the overwhelming weight of the evidence and is hereby reversed and rendered.

The chancellor here is speculating that Thomas can be employed at a wage that will support his needs and that his mother can support herself(T-45) without Thomas assistance. The evidence is that Thomas mother had his or Jennifer's assistance during the marriage and that her condition is "as a small child".(T-33,48,56) There is no analysis of how Thomas will support this award of alimony on what wages and whether his mother will be required to support him or Jennifer as she did during the marriage. The only evidence is that there was not enough money during the marriage; at least provided by the parties. Th evidence shows that Thomas mother lent support during the marriage while both parties worked. This does not support a conclusion that there will be sufficient funds upon divorce to pay alimony of any kind.

WHAT THE REASONABLE NEEDS OR THE STANDARD OF LIVING OF JENNIFER

The Chancellor thought it important to note that there was no evidence from which to determine the standard of living of the parties. It is possible that the Chancellor was mindful of the necessity of that proof to support an award of periodic alimony.

Massey v. Massey; 475 So.2d 802;

Among the items the chancellor must consider in determining the amount of support payable to a wife are "not only the reasonable needs of the wife but also the right of the husband 'to lead as normal a life as reasonably possible with a decent standard of living'."

Hopton v. Hopton, 342 So.2d 1298, 1300 (Miss. 1977), quoting *Nichols v. Nichols*, 254 So.2d 726, 727 (Miss.1971).

McEachern v. McEachern; 605 So.2d 809;

Whether to award alimony and the amount to be awarded are largely within the discretion of the chancellor. *Cherry v Cheery*, 593 So.2d 13, 19 (Miss. 1991). The chancellor should consider the reasonable needs of the wife and the husband's right to lead a normal life with a decent standard of living. *Gray v. Gray*, 562 So.2d 79, 83 (Miss.1990).

No legal arguments regarding alimony were made at the hearing and the chancellor simply reduced alimony to the same extent that the child support had been reduced. From the totality of the circumstances on this record the chancellor's reduction of alimony without applying any standard was an abuse of discretion.

Based on the testimony in the record of the monthly net spendable income of Raymond and the amount of child support awarded, an award of \$150.00 per month alimony exceeds the remaining funds on hand. This is clearly an abuse of discretion and the alimony award is reversed and remanded with the child support award for a new hearing.

From what source is Thomas to produce \$300.00 per month periodic alimony and \$233.00 per month lump sum alimony. There is no proof that there is any source of funds or that other employment would create an excess over Thomas' necessary expenses. The chancellor did not apply any standard.

Labella v. Labella ;722 So.2d 472;

"A standard of living beyond the father's financial ability to provide cannot be imposed upon him." *McEachern*, 605 So.2d at 813 (citing *Adams v. Adams*, 467 So.2d 211, 215 (Miss.1985)). However, in this case, the chancellor found that, although Jean would have been entitled to an award of alimony, the child support and other debt payments rendered David's assets insufficient to support an award of alimony.

Brennan v. Brennan; 636 So.2d 1320;

In other words, in determining the amount of alimony, if any, "[t]he chancellor should consider the reasonable needs of the wife and the husband's right to lead a normal life with a decent standard of living."

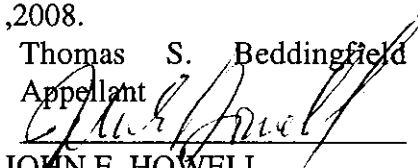

McEachern v. McEachern, 605 So.2d 809, 813 (Miss. 1992).

Without the substantial evidence establishing these necessary points there is nothing to support the award of alimony, in the case before the Court.

CONCLUSION

The award of alimony in this case is without substantial evidence to support such an award. There are necessary items of proof that are not in the record. The standard of living Jennifer, the comparison of their estates, Thomas' ability to pay and enjoy a normal lifestyle and a decent standard of living. The cause should be reversed for retrial with these issues to be determined or reversed and rendered as there is no estate from which to award alimony.

Respectfully submitted, this the 25th day of August, 2008.

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CERTIFICATE OF SERVICE


This is to certify that I, John E. Howell, Counsel for the Appellant, have caused to be mailed this date, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing **Brief of Appellant** to the following:

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Meridian, MS 39302

Supreme Court of Mississippi
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Hon. Jerry G. Mason
Chancery Court Judge
P.O. Box 5681
Meridian, MS 39302

This the 25th day of August, 2008



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