IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-01083

ROBERT S. CORKERN — APPELLANT

VS.

AMANDA S. CORKERN — APPELLEE

APPEAL FROM THE CHANCERY
COURT OF AMITE COUNTY, MISSISSIPPI

APPELLANT'S PRINCIPAL BRIEF

T. Jackson Lyons
T. JACKSON LYONS & ASSOCIATES, P.A.
P.O. Box 4690
Jackson, Mississippi 39296
Tel. (601) 969-0731
email appealsinms@bellsouth.net
MSB #[redacted]
Appellate Counsel to Robert S. Corkern

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-01083

ROBERT S. CORKERN — APPELLANT

VS.

AMANDA S. CORKERN — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby 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 the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Robert S. Corkern ("Robert") resides in Batesville, Mississippi, and is the Appellant.
2. Mr. Corkern is represented here by the undersigned T. Jackson Lyons, practicing from offices in Jackson, Mississippi.
3. The appellee is Amanda Corkern ("Amanda"), living in Madison, Mississippi.
4. Ms. Corkern is represented by Mark R. Holmes with the firm Robison & Holmes, PLLC, McComb, Mississippi.
5. The parties' minor daughter, Caroline E. Corkern, at the time of this writing is almost six and one half years old and resides with her mother.

T. Jackson Lyons

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Other Authorities:

ISSUES

I. Whether the trial court erred in failing to modify the divorce decree's provision for alimony and child support either under the material-change-in-circumstances standard or to order an adjustment of the financial provisions pursuant to the Parties' Agreement that if the financial awards exceeded 30% of Robert's "gross before tax salary" that the awards could be adjusted to come within the confines of 30% of his "gross before tax salary."

II. Whether the trial court erred by not ruling that payments of the principal of the mortgage loan are deductible to Robert as a form of alimony?

III. Whether the trial court erred in failing to award Robert equitable credit for the amounts he has paid on Amanda's and Caroline's behalf?

STATEMENT OF THE CASE

A. Procedural History

Preliminarily, the Court and its staff should be aware that this case has a long record: eight bound volumes containing nearly one thousand pages and four "binders" of exhibits which total about 1,700 pages. It is a record long enough to invoke the metaphor of the film-maker with dozens of hours of film to be edited into a movie of watchable length. It is almost certain that with a record of this length any two persons, let alone adversaries, would chose different facts to select and combine into a readable brief. Readers may anticipate perhaps more than the usual disagreements over the story told in the record.

This case is a sequel to the Parties' divorce and the divorce decree's incorporation of the Parties' Amended Property Settlement, Child Custody and Support Agreement ("Agreement"). The Parties filed a joint complaint for divorce on the grounds of irreconcilable differences. (V. 1: C.P. 11) Amanda was the plaintiff in the action and was represented by counsel, David H.

Strong, Jr.[1] (V. 1: C.P. 12) The Agreement recited that Strong only represented Amanda and that Robert acknowledged he was entitled to legal representation. (V. 1: C.P. 25)

The Parties' marriage lasted three and one half years; they married in June of 2001, and separated January 1, 2005. (V. 1: C.P. 11) The Parties' daughter Caroline was born September 29, 2003. (V. 1: C.P. 11) A final judgment of divorce was entered August 12, 2005. (V. 1: C.P. 30)

Robert filed his complaint for modification in May of 2007. (V. 1: C.P. 54-62) A series of amendments to the complaint followed and the complaint that was tried was filed on January 30, 2008. (V. 2: C.P. 214-29) The final verified complaint relates that Robert's primary source of income, the Tri-Lakes Medical Center in Batesville, had entered bankruptcy and was no longer honoring its obligations to him. (V. 2: C.P. 215)

Following an answer to the final amended complaint (V. 2: C.P. 254), a trial was conducted before the Chancery Court of Amite County, the Hon. Debbra Halford presiding, from July 8 through 10, 2008. (V. 6: T. 1) At the close of the hearing, the chancellor took the case under advisement. (V. 8: T. 348)

Two post-trial temporary orders were entered regarding the former marital domicile real property in Amite County and visitation. The chancery court ordered Robert not to dispose of any assets without prior order of the court. (V. 3: C.P. 353-60) The temporary visitation order was entered on July 30, 2008. (V. 3: C.P. 375) The Amite County real property sold a month later for $1.6 million with the approval of the chancellor.[2] (V. 3: C.P. 378)

---

[1]Mr. Strong currently serves as a Circuit Court Judge in the 14th District.

[2]The sale's net proceeds of $290,320.12, were disbursed under court order on June 17, 2009 as follows:

Amanda's attorney	$3,088.50
Alimony, expenses, furniture	$45,575.71
Amanda's dues at Reunion County Club	$12,932.78
Post-Judgment Alimony (Sept. 2008 to Aug. 2009)	$60,000.00

A final judgment was filed on March 2, 2009, granting some requested relief and denying other modification requests. (V. 4: C.P. 482-512) Robert filed a post-judgment motion on March 10, 2009, to which Amanda responded on March 13, 2009. (V. 4: C.P. 520-24; C.P. 525) An order granting some relief and denying other requests in Robert's post-judgment motion was entered on May 20, 2009. (V. 5: C.P. 572-75) There remained pending two other post-judgment motions, Robert's for lawyer's fees and Amanda's counter-motion for post-judgment relief. The chancellor entered the last order in the case on June 8, 2009. (V. 5: C.P. 591) Robert filed his notice of appeal from the chancery court's final judgment and final orders on July 1, 2009. (V. 5: C.P. 604)

B. Facts

Robert's amended complaint sought to adjust his financial obligations under the Parties' 2005 divorce Agreement either under the terms of the Agreement or under Mississippi common law relating to modification. In either case, Robert must show a material decline in income. The fact recital will first set out the terms of their Agreement and then facts relating to Robert's income, both from his direct medical practice and from his other businesses. Because he also claims that he has overpaid some provisions of the Parties' Agreement, facts concerning his payments to Amanda will last be stated.

The Parties' Agreement settled the usual divorce issues of alimony, property, custody, and child support, but in a way most lawyers and judges would consider unusual. About the

---

Child Support (Feb., July, Aug., 2009) $6,000.00
Caroline' Expenses (Sept. 2008 to May 2009) 5,343.98
Amanda's attorney $6,000.00
Amanda's mortgage (July, Aug., 2009) $4,866.30
Robert's attorney $15,000.00
Trustmark National Bank (judgment against Robert for $135,689.56) $31,512.85
Chancery Clerk (escrow by court order to secure Amanda's awards under 2005 Agreement) $100,000.00

Red Exhibit Binder: Ex. 31, 32, 35, 37

Parties' 2005 Agreement the chancellor remarked at a hearing during the pendency of this modification proceeding that it was "indeed a most unusual . . . property settlement agreement . . . Clearly it was the product of the parties' agreement, not an independent ruling by the court . . .." (Red Exhibit Binder,[3] Ex. 9 at 2)

Why the chancellor would emphatically remind the Parties that the court had nothing to do with their deal is revealed by its terms. At least compared to Mississippi law's conventional awards available to divorcing couples, the most unusual feature is the Agreement's final provision. Section XII expressly qualifies all of the Agreement's preceding financial awards. Section XII's two paragraphs provide for different contingencies – reduced salary and disability – that expressly allow Robert to adjust all financial provisions without exception and without regard to the nature of the other provisions. (V. 1: C.P. 26)

The first paragraph of the Agreement's last section begins "notwithstanding the provisions of this agreement" and goes on to give Robert full discretion to adjust all of the Agreement's financial provisions. Or at least Section XII does not state that Robert must first file suit, though obviously he has done so. The contingency required for Robert to exercise his contract right to adjust the financial provisions is that the total amount of the financial obligations elsewhere provided in the Agreement must exceed 30% of his "gross before tax salary." (V. 1: C.P. 26)

Section XII's second paragraph provides that the entire "agreement shall become modifiable in the event [Robert] becomes disabled from employment as a physician and his income is reduced as a result of the disability." (V.1: C.P. 26) There are two interpretive difficulties – discussed *infra* – with Section XII's provisions. First, Section XII declares that

---

[3]At the hearing, the Parties stipulated to the admission into evidence of all exhibits. (V. 6: T. 3) These were bound with Acco clips in three volumes and placed in red slip folders. There is an additional bound volume of exhibits in a conventional red "clerk's papers" binder. Two exhibits are missing from the Plaintiff's binder, P 23 and P 29, and P 25 is not indexed. The missing exhibits are not important to the appeal.

certain paragraphs of the Agreement that at least ostensibly provide property settlement and lump sum alimony – awards generally regarded as not modifiable under Mississippi law – may be adjusted downward to confine Robert's financial obligations to within 30% of his gross before tax salary. Second, Section XII provides no express guidance about how Robert is to exercise the right to adjust the Agreement's financial awards.

The other financial provisions also state conditions that are not a clean match with the traditional norms of divorce awards. The Agreement's Section II deals with the Parties' real property and in structure resembles a typical property settlement: in return for quitclaiming her interest in a house in Batesville and real property in Amite County, Amanda would purchase a home in the Reunion subdivision in Madison, with a value not to exceed $440,000.00. Robert was to contribute $120,000.00, toward the new home, including the down-payment. (V. 1: C.P. 20)

This tidy property settlement soon strays from conventional property division: "After [Robert] pays the total of $120,000.00, if [Amanda] remains unmarried, [Robert] will continue to pay the house note and all related indebtedness. If [Amanda] chooses to move and sell the home, then any principal payments made by [Robert] shall be split equally between the parties as long as [Amanda] moves to a location within two hours of Batesville, Mississippi. If [Amanda] does not move within two hours of Batesville, Mississippi, then [she] forfeits any and all principal paid directly by [Robert]. . . . [Amanda] shall be entitled to any and all equity in the home not paid directly by [Robert]." (V. 1: C.P. 20-21) Robert also agreed to pay the Reunion homeowner's association assessments or "other related fees which may be assessed as part of residing in the Reunion Country Club development area." (V. 1: C.P. 21)

Section III ¶a provides that Robert shall pay $620,000.00, as lump sum alimony, periodically at the rate of $5,000.00 per month to begin in February of 2006. (V. 1: C.P. 21) Paragraph (a) repeats that the sum is "lump sum alimony payable over a period of time and shall not be modifiable nor terminated upon death or remarriage." (V. 1: C.P. 21) On its face, this

seems unambiguous until one recalls that "notwithstanding the provisions of this agreement, should [Robert's] obligations under this agreement ever exceed thirty percent of his gross salary, then [Robert] shall be allowed to make adjustments . . .." One provision says it is not modifiable, presumably through the conventional operation of Mississippi law, while another provision says that the earlier provision may be adjusted under certain circumstances stated in the contract.

Section III also provides that if "[Amanda] demonstrates a need for additional monies, continues to stay home with the minor child and remains unmarried, [Robert] will continue to pay [Amanda] the sum of $5,000.00 per month until the minor child reaches the age of fifteen years. These payments shall not be made if [Amanda] remarries or co-habitates . . .." (V. 1: C.P. 21-22)

The Agreement provided for child support in the monthly amount of $2,000.00, to begin on September 1, 2005. (V. 1: C.P. 19) In addition, Section I ¶ e calls for Robert to pay for all Caroline's future extracurricular activities such as athletics, scouting, and the like. Robert is also to supply, in addition to the regular monthly child support payment, a clothing allowance for Caroline "not to exceed $12,000.00 per calendar year." (V. 1: C.P. 19) At the time of the Agreement Caroline was less than two years old and is presently less than seven.

Paragraphs f and g of Section I call, respectively, for Robert to pay all educational expenses through graduate school should Caroline endure so far and to provide Caroline a car complete with insurance, maintenance, and gasoline. (V. 1: C.P. 19)

As related in the procedural history section, Robert's final amended pleading related that his primary source of income from Tri-Lakes Medical Center in Batesville had effectively terminated due to the hospital's financial crisis and subsequent bankruptcy. Robert, his current accountant Keith Winfield, and his former accountant Angela Fisher, all offered testimony – Fisher by deposition – about these events.

Winfield in licensed in Mississippi, Alabama, and Florida and was stipulated as an expert accountant. (V. 6: T. 61-62) Winfield's firm was Tri-Lakes auditor and he came to know Robert

slightly through his business with the hospital. (V. 6: T. 77) To present Robert's financial situation, Winfield reviewed with the court Robert's tax returns from 2003 through 2007. In 2003, Robert had wages income of $472,000,[4] a business loss of $958,000, business income of $437,000 and a farm loss of $39,000. This yielded an Adjusted Gross Income of negative $82,320.00, and obviously no taxable income. (V. 6: T. 65; Defendant's Exhibit Binder One, Ex. 5) The business loss of nearly a million dollars was a consequence of Robert's company Aviation Advantage, LLC, having purchased an airplane and depreciating it. (V. 6: T. 66) Robert's return for 2003 had to be amended because his accountant had failed contemporaneously to elect or take an available 30% bonus depreciation. (V. 6: T. 67) In addition, Robert had four residential rental properties that lost about $24,000. (V. 6: T. 68-69)

For 2004, the tax return showed wage income of $467,000; business loss of $505,000; a profit from the medical-related entities and rental properties of $10,500; a new consulting business generated $29,000; the airplane company lost $527,000 – of which $355,000 was depreciation – and a farm loss of $29,000. (V. 6: T. 69-70; Defendant's Ex. 6) Robert's Adjusted Gross Income for 2004 was again negative, $63,586. (Ex. D 6)

In 2005 Robert had wage income of $290,000, and a business loss of $305,000. The medical companies had profits of $302,000, and the farm lost $21,000. (V. 6: T. 72; Ex. D 7) The Adjusted Gross Income was $192,000. (Ex. D 7) The aviation company again showed a loss, $305,000, with depreciation of $213,000. (V. 6: T. 72; Ex. D 7) During this year Robert had a capital loss – in hard cash, not depreciation – of $100,000. (V. 6: T. 72-73) This represented earnest money on real property that yielded a capital loss of $85,000, for tax purposes, but Robert could only deduct $3,000, with the balance carried forward. (V. 6: T. 73) Two residential properties were sold with a loss of $35,000. (V. 6: T. 73)

The 2006 return initially filed was the last produced by Robert's former accounting firm

---

[4]Numbers are rounded unless otherwise indicated.

before Winfield took over. (V. 6: T. 74) It shows wages income of $192,000; and a business loss of $55,000. (V. 6: T. 74; Ex. D 8) Winfield took a moment to explain that the delightful consequence of depreciation may be to reduce income and tax, but its downside may show when the asset is sold. The aviation company sold the plane in 2006 for $1.2 million while it had cost $1.735 million. (V. 6: T. 74) On the earlier returns, depreciation amounted to $1.517 million leaving an adjusted basis in the aircraft of only $218,000. $1.2 million less $218,000 leaves ordinary income of $982,000. (V. 6: T. 74) The tax was equal to 40% of $982,000. (V. 6: T. 75) Emergent Health had income of $1.5 million and the other business entities had income of $1.5 million, for total income of $2.474 million, and a tax bill of over $830,000. (V. 6: T. 75; Ex. D 8)

Robert's financial advisor, David Vance, questioned these numbers and Winfield was contacted. (V. 6: T. 77) That Emergent Health and Healthcare Engineers made so much money in 2006, when they never had before, was the first thing catching Winfield's attention. (V. 6: T. 77) Winfield said that as Tri-Lakes auditor he had also been looking at the other side of the equation, the amount Tri-Lakes was owed by Emergent Health and Healthcare Engineers. (V. 6: T. 78) Robert's companies' liabilities, in the amount of $1.045 million, were not reflected in the 2006 return. (V. 6: T. 78) Amending the 2006 return lowered Robert's Adjusted Gross Income from 2.474 million to $1.448 million with nearly one million of that amount attributed to the airplane sale. (V. 6: T. 78)

The real profit from the companies was about $480,000. (V. 6: T. 78) The previous accountant had simply failed to book the debt and so did not book the expenses either. (V. 6: T. 78) Winfield explained that Robert had a management contract and emergency room contract with Tri-Lakes but that the hospital's debt on these contracts was not paid in a conventional manner. Rather than paying what the contracts called for, Tri-Lakes paid the payrolls of two entities owned by Robert, Emergent Health and Healthcare Engineers. (V. 6: T. 79)

Robert's former accountant, Fisher, explained that Robert's non-wage income was derived through two parent companies and their related entities. (Defendant's Exhibit Binder

Two: Ex. 33 at 11) Emergent Health was the parent company to Batesville Emergency Physicians, Batesville Hospital Management, and United Healthcare and Hospice, and D-Med. (Ex. 33 at 11) Healthcare Engineers was founded by Robert and other investors and it held the activities of Grenada Doctor's Clinic, Sardis Clinics 1 and 2, Hamlin Family Practice Clinic, and Mississippi Minor Medical Center Clinic. (Ex. 33 at 12)

Robert's wife, Edith Melissa "Missy" Corkern, is by training a nurse but has worked in healthcare management for a number of years. (V. 6: T. 5) Missy and Robert met when she worked for the University of Mississippi Medical Center's Emergency Physicians Group, where she managing the staffing of five or six emergency rooms. (V. 6: T. 6) When Robert broke away from the UMC group she remained full-time at the University and worked part-time for Robert's companies beginning in 1998. (V. 6: T. 5, 10) In 2000 or 2001 she started working full-time for Robert's related companies.[5] (V. 6: T. 11)

Prior to Tri-Lakes' bankruptcy, she was paid through an entity called Batesville Emergency Physicians which is no defunct due to the Tri-Lakes bankruptcy; since the bankruptcy she has been paid by another of Robert's related companies, Batesville Hospital Management Company ("BHM"). (V. 6: T. 6) Missy said that following the Tri-Lakes bankruptcy, most of Robert's companies were effectively defunct. (V. 6: T. 6, 44-45) BHM, however, operates a long-term acute care hospital, referred to throughout the proceedings as the "LTACH" which is a small specialty hospital that is located within Tri-Lakes, a hospital-within-a-hospital. (V. 6: T. 7)

As the manager of Robert's companies, Missy was able to testify about which still have operations, and which do not. Those still extant include the parent companies of Emergent Health and Healthcare Engineers LLC. (V. 6: T. 44, 45) However, The Grenada Clinic, Sardis clinics, and Mississippi Minor Medical Clinic are defunct, as is D-Med. (V. 6: T. 44, 56) The Greenville entity was also defunct. (V. 6: T. 57) Hamlin Family Practice still exists and has a bank account

---

[5]Robert and Missy married in October of 2006. (V. 6: T. 9)

with a low balance. (V. 6: T. 44) United Healthcare and Hospice and BHM still exist, have bank accounts, and report for tax purposes under Emergent Health. (V. 6: T. 45) The residential real property company, Homeseekers LLC still exists, files returns, and has a bank account. (V. 6: T. 46)

Prior to Tri-Lakes Medical Center's bankruptcy, the arrangement between Robert and Tri-Lakes was that it would extend "credit" to his companies by paying their payrolls and that he would extend "credit" to Tri-Lakes by performing services under the contracts. (V. 6: T. 79) Winfield said that the back-and-forth on the money was almost a wash. (V. 6: T. 79) In other words, Tri-Lakes sent bills to Robert's companies which were not paid, and Robert sent bills to Tri-Lakes which were only paid in part. (V. 6: T. 79-80)

For tax year 2006 the prior accounting firm had failed to pick up the change in the debts running between Robert's entities and the hospital from the year before, booking receivables but not payables. (V. 6: T. 79-80) The companies billed the hospital which paid some, and Tri-Lakes sent bills to the companies which were not paid. (V. 6: T. 80) Because Emergent Health and Healthcare Engineers account on a cash basis, losses cannot be deducted unless there is a note, which Winfield put in place. (V. 6: T. 80)

In other words, the companies on the original 2006 return showed so much profit because the accountant booked receivables as cash, albeit on an entity accounting on a cash basis. The tax return claimed it as cash, but the trial balances showed no money. (V. 6: T. 81) Winfield described this difficult situation as one he did not, and would not, create, but that he had inherited the accounting position from the prior accounting firm. In order to protect the position and show the debt, he had Emergent Health and Healthcare Engineers execute notes. (V. 6: T. 81)

Winfield said that was done "to further protect ourselves, if we were going to prove the expense side, they were already accruing the revenue side." (V. 6: T. 81) In response the chancellor said, "Okay. I got you." Winfield then said, "I'm not saying it's right, but I wouldn't

want to say that in front of the IRS." To which the chancellor again responded, "I got you. Go ahead." (V. 6: T. 81)

Winfield said the tip-off that the debt/expense side was not being booked was that the Schedule E for Emergent Health showed it making $1.5 million when it never had before. (V. 6: T. 81) Proper accounting on both sides of the ledger left a profit of short of $500,000, which was in line with prior years. (V. 6: T. 81-82) The amended return reduced the AGI and reduced the tax liability by about $365,000, which still left a tax bill of about $437,000. (V. 6: T. 82; Plaintiff's Exhibit Binder, Ex. 38)

The 2007 return prepared by Winfield shows wages income of $89,000, and while this is more than $100,000 less than 2006, the big change was in the income of Robert's businesses. Winfield related that Tri-Lakes had entered bankruptcy in August of 2007, discharging its debt to Robert's companies as a pre-petition debt. (V. 6: T. 83-84, 85) Of course, Emergent Health's and Healthcare Engineer's debts to Tri-Lakes were not affected. (V. 6: T. 84) Since Tri-Lakes was no longer advancing payroll, revenue was virtually eliminated and there were also substantial expenses remaining. For 2007, Robert's AGI was a negative $528,000. (V. 6: T. 85; Ex. D 9)

According to Winfield, Robert had applied for IRS approval of a carryback to 2005 and 2006. The carryback would produce a total refund of about $125,000 which, if approved, would not yield cash to Robert but would reduce the unpaid balance on the 2006 return. (V. 6: T. 86) After receiving demands from the state and federal taxing authorities for $48,000 and $508,000, respectively, a six-week hold was requested while the Internal Revenue Service determined whether the carryback would be allowed. (V. 6: T. 95; Ex. P 39, 40) Winfield related that the request for the carryback was filed in June immediately prior to the hearing and that as of the date he testified there had not yet been a response from the IRS. (V. 6: T. 120)

Winfield said that according to the amended returns Robert's state tax liability would be reduced to $36,000, and the federal tax liability to $437,000, whereas the originally calculated tax liability was $834,000. (V. 6: T. 100-01) With interest and penalties for not having timely

paid 2006 taxes. Robert's actual tax liability to the United States was about $450,000. (V. 6: T. 105)

Amanda's accounting expert, Ronnie Thaxton, and Winfield agreed that Thaxton's exhibit summarizing Robert's income and losses from the tax returns was correct, save for the amended 2006 return and the requested net operating loss carryback to 2005 and 2006. (V. 6: T. 97; V. 8: T. 321; Ex. D 63) Mr. Thaxton's summary of Robert's income and losses is as good a place as any to view a gravy train that, as Robert and Winfield testified, derailed in 2007. Leaving aside income and losses from the aviation, farm, and residential real property operations, Thaxton's form reveals the following stream of income from all medical-related sources, including direct wages and profit from his entities:

2005 (divorce year) $627,298

2006 ..... $666,291

2007 ..... -$450,558

(Ex. D 63)

On cross-examination Winfield testified that cash flow and taxable income are not necessarily the same. (V. 6: T. 106-07) To approximate cash availability, Winfield said one could take a tax form and look at things like how much debt was retired; one would begin with taxable income then add back depreciation and subtract debt payments. (V. 6: T. 107) This arithmetic would give a good indication of a person's spendable income. (V. 6: T. 107) Winfield said he did not know that information for Robert's last few years. (V. 6: T. 107)

The former accountant, Fisher, did know that information. She testified that comparing Robert's wage income from the first nine months of 2007 to the same period of 2006 revealed that it had dropped 44%; using the last two full years at the time of her deposition in November of 2007, Robert's wage income had declined 34%. (Ex. D 33 at 18-19) As for the businesses' profits and losses, Fisher observed that there had been a radical change in the stream of income due to Tri-Lakes cessation of payments. Comparing the first nine months of 2006 to the same

period in 2007, the companies experienced a decrease in income of $527,000, or about a 62% decrease. (Ex. D 33 at 20) Fisher said that the Tri-Lakes contract had yielded cash flows of almost $717,000 in 2005; $1.336 million in 2006; then only $125,000 when payments stopped in 2007. (Ex. D 33 at 20) At the time of her deposition in November, 2007, Robert's personal debts amounted to $2.6 million, not including the tax debt to the state and federal governments. (Ex. D 33 at 22)

According to Winfield, Robert's most immediate problem is that half-million dollar tax debt. (V. 6: T. 94; Exs. P 39, 40) In addition, the parent company through which payroll was being run for Robert's entities' employees was behind in payroll tax payments: $44,481 for May and June, 2008, and to the state $3,469 for June, 2008. (V. 6: T. 94-95; Ex. P 39)

Having been Tri-Lakes auditor and at the time of the hearing an unsecured creditor, Winfield was in a good position to discuss the hospital's bankruptcy and its affect on Robert's income. (V. 6: T. 88-89) In preparing an audit for 2006, the hospital appeared to have a profit of $3 million. (V. 6: T. 89) But in January of 2007, Winfield saw the Medicaid cost reports indicating that the hospital owed Medicaid some $7 million. (V. 6: T. 89) Winfield allowed that this discovery "scared the bejesus" out of him and he hired a specialist in hospital costs analysis to more closely examine the situation. (V. 6: T. 89) The specialist's examination revealed the over-reimbursement was a mere $5 million; so instead of a $3 million profit, the hospital had a $2 million loss. (V. 6: T. 89-90)

When the hospital was acquired by a non-profit group in 2005, the financing was guaranteed by the United States Department of Agriculture for about 80 or 90% of the loaned about, which was about $27 or $28 million. (V. 6: T. 91) Winfield said that Robert had a close relationship with the non-profit group, but that Robert was not a director or owner. (V. 6: T. 91) According to Winfield, the bankruptcy filing was a defensive measure to protect itself from a take-over by the creditors. (V. 6: T. 90) Apparently that strategy was short-lived; the creditors GE Credit and UPS Bank forced the hospital to hire an outside contractor to run it in late 2007. (V. 6:

T. 92; Red Binder Ex. 10, November 2007 bankruptcy court filing by General Electric Capital Corp.)

Robert testified that he is by training an emergency room physician. (V. 7: T. 202) His initial role with the Tri-Lakes Medical Center was providing staff for its emergency room and the hospital. (V. 7: T. 202) He learned that the hospital was close to bankruptcy when he arrived on the scene. (V. 7: T. 202) Then owned by the public, Tri-Lakes board asked Robert to help keep it going until it could be sold. (V. 7: T. 202) In 2005 he helped engineer the sale to a non-profit entity, and, confirming Winfield's testimony, Robert said he was neither an owner nor member of the board of directors of the non-profit owner. (V. 7: T. 202-03)

In February of 2007 the hospital received notice from Medicaid that reimbursement would be completely cut off due to the previous over-reimbursement. Medicaid funds represented about 20% of the hospital's bottom line. (V. 7: T. 203) From February through the summer of 2007 the hospital negotiated with Medicaid and reached an agreement that Medicaid would reinstate payments, but at half of the original rate. (V. 7: T. 203) Instead of losing 20% of its revenue, it would only lose a still disastrous 10%. (V. 7: T. 203)

Robert explained to the chancellor that the Medicaid per diem was not recalculated when it should have been. (V. 8: T. 309) The cost report that so shocked Winfield caused them to learn that the per diem should have been recalculated as much as a year and a half earlier. (V. 8: T. 309) Robert chalked up the decreased per diem to a greatly increased census of the psychiatric part of the hospital. (V. 8: T. 309) Because the larger psychiatric census led to decreased overhead, the cost report was impacted and, bottom line, the hospital should have been reimbursed less to take care of psychiatric patients. (V. 8: T. 309-10)

Robert confirmed that payments under his management deal with the hospital had ceased and, as pre-petition debts, were never going to be paid. (V. 7: T. 205) But the debt his companies owed to the hospital remained and were a large liability. (V. 7: T. 205) He allowed that one good reason to stay in Batesville and rebuild a medical practice was to deal with his companies' debt.

(V. 7: T. 205) At the hearing, Robert said he thought the debt owed to the hospital was about $2 million. (V. 7: T. 208; Ex. P 14) Robert allowed that as a physician his reputation was good and that in time he would build a practice that yielded him more than $89,000 per year. (V. 7: T. 207)

He has been employed by the Batesville Clinic since December of 2007 and has net take-home pay from the Clinic of about $7,000 per month, with gross pay of $4,333 every two weeks. (V. 7: T. 210; V. 8: T. 263, 295; Ex. P 16) Batesville Clinic is set up as a partnership but Robert was not a partner and is a purely salaried employee. (V. 8: T. 261) He also works in the LTACH. (V. 8: T. 297)

About his companies that were funded by Tri-Lakes, Robert confirmed that the only extant entities were Emergent Health, Healthcare Engineers, Batesville Hospital Management, Batesville Emergency Physicians, and the LTACH. (V. 7: T. 238-39, 240) Further, Healthcare Engineers, while still extant, was in the renal care business but has no current operations. (V. 7: T. 241) The same is true of Batesville Emergency Physicians. (V. 7: T. 240)

On examination by the chancellor, Robert explained that the private now-defunct clinics were set up in an effort to increase the referral base to Tri-Lakes. (V. 8: T. 304) Robert described the clinics as being unable to support their overhead in part due to the time lag between building a patient base, billing for services, and being paid. (V. 8: T. 305, 307) Confirming Winfield's testimony, Robert said that the hospital never had sufficient funds to pay his management contract's fees but Tri-Lakes was able to cover the overhead of the "feeder" clinics. (V. 8: T. 305-06) The hospital made entries on its books showing what was due to him/Batesville Hospital Management, and what was due to the hospital from the clinics owned by his various entities. (V. 8: T. 305)

Due to Robert's income and losses coming from several sources, the chancellor ordered him to prepare and file a sworn financial statement prior to the hearing. Robert actually filed two such sworn statements together with Rule 8.05 financial statements. (Exs. D 12, 13, 14) The first financial statement is dated April 2, 2008, with the second dated June 25, 2008, a couple weeks

before the hearing. (Exs. D 13 and 14) As Robert acknowledged during the hearing, some of the liabilities stated on the financial statements are inaccurate. (V. 7: T. 227-29)

These forms were prepared by Robert's financial advisor, David Vance. (V. 7: T. 215) The errors revealed at the hearing are primarily that Mr. Vance listed some debt obligations at their original face amounts in cases where payments had been made, reducing the amount actually remaining due. (V. 7: T. 226-28) In the case of a small loan from one Robert Turner, that loan of $28,000 had been repaid altogether. (V. 7: T. 228-29)

On cross-examination, Robert conceded that payments had been made on a debt to AmSouth Bank, now Regions, for $100,000, and that he did not know the amount left. (V. 7: T. 225-26; Ex. D 55) Another loan from AmSouth, in the original amount of $420,000, Robert had been making payments on for five years and the original face amount should not have been shown on the form as a liability. (V. 7: T. 226-27; Ex. D 56)

However, as to his debts to the Covenant Bank, Robert believed that the amounts recorded on the financial statement were correct and confirmed that he owed Covenant a large sum that he could not pay. (V. 7: T. 230-34) Similarly, with respect to a debt for $500,000 owed to the First Security Bank in Batesville, Robert confirmed that it was still unpaid. (V. 7: T. 234-35; Ex. D 61) Robert incurred this debt to purchase the Certificate of Need to operate the LTACH. (V. 7: T. 235-36)

Whatever the give-in-the-gears may have been with respect to Mr. Vance's and Robert's carelessness in stating certain debts, there is no dispute about Robert's current income or obligations under the Agreement. These numbers are summarized in Robert's financial declaration prepared prior to trial. The Rule 8.05 form shows gross monthly salary $8,666 and total monthly income of nearly $13,000, the difference being a mineral royalty payment of $4,288. (Ex. D 12) Robert's net monthly income is $8,162. (Ex. D 12) Under the Agreement, Robert is obligated to pay the following monthly sums to Amanda:

Mortgage $2,344

Health Insurance	$304
Child Support	$2,000
Alimony	$5,000
TOTAL	**$9,648**

Annualized, this amount is $115,776. This sum does not include Caroline's school expenses or any allocation of Caroline's $12,000 annual clothing budget.

During the hearing, the trial court abruptly interjected to order that Missy Corkern's tax returns be produced. (V. 7: T. 242) The chancellor initially reviewed the returns *in camera*, but then ruled that they should be produced to Amanda. (V. 8: T. 347-48) The judge's rationale was that she was "convinced that they are – there has been a long standing commingling of funds in Doctor Corkern's control between him and his wife." (V. 8: T. 348) The returns for 2006 and 2007 are Exhibits P 41-43. Physically they are found behind Exhibit P 25.

The returns show that in 2006 Missy had regular wages income of $95,759. (Ex. P 41) She is also a member of Healthcare Engineers, LLC, one of Robert's companies, and it showed a loss of $33,868. (Ex. P 41, 42) The 2006 return was amended to include this loss. The 2007 return shows a regular wage income of $91,679. (Ex. P 43) According to Exhibit P 43, Missy had a share of Healthcare Engineers' profit in the amount of $7,910, but was allocated a $103,170 loss from Batesville Hospital Management, the entity through which Robert formerly managed Tri-Lakes and now runs the LTACH. (Ex. P 43) The W-2 for 2007 shows her regular wages coming from Batesville Emergency Physicians. (Ex. P 43)

Missy testified that her annual income is about $100,000 and that it had been the same since she started working for Robert's companies in 2001 or 2002. (V. 6: T. 13) She had been paid through Batesville Emergency Physicians but after Tri-Lakes stopped funding overhead Batesville Emergency Physicians no longer had any funds. (V. 6: T. 13) She is now being paid through Batesville Hospital Management which still has income because it manages the LTACH. (V. 6: T. 13) Robert testified that UMC had been paying Missy about $100,000, and that was the

basis of continuing her income at that level after she started working for his companies. (V. 7: T. 241)

Robert's former accountant, Angela Fisher, anticipated a suspicion that Robert would use his companies to make it appear his own income had declined while Missy's pockets were lined. (Ex. D 33 at 19) Fisher noted that Missy's income increased only slightly between 2006 and 2007. (Ex. D 33 at 19)

As for Robert's claims that he had overpaid certain obligations under the Agreement, both Amanda and Robert offered testimony. In the seven months after the divorce in August of 2005, and prior to the time alimony was supposed to commence in February of 2006, they did not to follow the express terms of the Agreement with respect to child support and alimony. (V. 7: T. 136) Amanda remained on their joint checking account and essentially treated it as her own for about seven months after the divorce. (V. 7: T. 136; Ex. P 26)

From the month of the Parties' divorce, August of 2005, through April 4, 2006, Amanda made payments from the account for items such as her own credit card, child support she owed to a former husband Jim Wild, moving expenses from Amite County to an apartment, rent on the apartment, cell phone bills, and numerous ATM payments. The seven month total is $157,000. (Ex. P 26) During this time, Robert would have owed – aside from the Reunion home expenses – $16,000 in child support (commencing September 1, 2005) and $15,000 (beginning February 1, 2006) in alimony. However, as pointed out in Robert's lawyer's letter, the Agreement requires each party to be solely responsible for their own debts *only after* February 1, 2006. (V. 1: C.P. 24-25)

The total of the Amanda's post-February debts paid by Robert amounted to $26,684.02. (Ex. P 24) For two months Robert did not send specific checks to Amanda for alimony and child support, but even deducting that $14,000 leaves $12,684.02. As Amanda said, her's and their daughter's needs were met and they wanted for nothing. (V. 7: T. 140)

During the hearing Robert's lawyer made his position clear that he paid for many things

he was not obligated to pay for and Amanda complained that he had not paid for other things and was therefore in contempt. (V. 7: T. 152) Robert's position is that Amanda could not have it both ways. The chancellor interjected at that point saying, "[I]f he is alleging that he's paid some of the stuff that she says he hasn't, let him show me proof and we'll get on past it . . . [I]f somebody voluntarily pays something that they're not under a court order to pay, I don't think they can then complain about it at a later date." (V. 7: T. 153)

Exhibit P 25 shows that from April 13, 2006 through November 1, 2006, Robert paid $174,290.40, for child support, alimony, and other items called for under the Agreement. From December of 2006 through December of 2007, Robert paid $116,397.70. (V. 7: T. 197-98; Ex. P 38) The grand total comes to $568,703.00 (V. 7: T. 201)

With respect to the house provision in their Agreement, Robert has paid more than the required $120,000. (V. 7: T. 195) He had paid $131,188. (V. 7: T. 196; Ex. P 11) The total amount of his overpayment for the house is $11,188. The mortgage loan principal was $396,000.00. Since he is responsible, under the Agreement, to pay Amanda's mortgage, the total value he has invested in her home is $527,188. The Agreement allowed Amanda a maximum value of the home to be $440,000.00, making the overage beyond what the Agreement required $87,188. (V. 7: T. 196; Ex. P 11; V. 1: C.P. 20)

At the time of the hearing, Robert asked for equitable credit to be given him in the total amount of $57,715.51, as follows:

Overpayment of Amanda's personal debt	$ 26,648.02
less unpaid alimony and child support	$ 14,000.00
Credit amount	$ 12,684.02
Federal tax refund	$ 26,512.00
State tax refund	$ 6,075.00
Overage on home	$ 11.188.24
Moving expenses	$ 1.256.25

TOTAL ..... **$ 57,715.51**

(Ex. P 37)

The trial court's opinion and final judgment granted Robert most of the relief he sought in establishing his visitation rights and he raises no issue on appeal with the chancellor's appropriate disposition of that issue. With respect to modifying the financial awards incorporated into the divorce decree, the Court declined to apply Section XII of the Parties' Agreement. (V. 4: C.P. 487) The chancellor stated, "The burden of proof was on [Robert] to prove only by a preponderance of the evidence that there had been a various [sic] equal to or greater than thirty percent (30%) of his income or to otherwise prove that there had been a material change in circumstances in his financial condition, not anticipated at the time of the divorce." (V. 4: C.P. 487)

The trial judge went on to say that there was no "credible evidence before the Court to prove that Robert has suffered a thirty percent (30%) decrease in his income, such as would trigger the modification under the terms of the parties' agreement." (V. 4: C.P. 488) The judge alluded to requiring Robert to provide a sworn statement of his assets and liabilities. She then opined, "The Court is inclined to believe that Robert has contemptuously violated the Uniform Chancery Court Rules and has provided false information regarding his assets, income, and expenses to the Court either knowingly or under circumstances he should have known were not true." (V. 4: C.P. 488)

Noting Robert's claim to a significantly reduced income, "the credible evidence does not support his claim. Even his Certified Public Accountant did not corroborate this assertion. The creative accounting methods used to minimize tax liability created problems for the Court in its attempt to analyze those records to determine whether an unforeseen material change had occurred . . .." (V. 4: C.P. 488)

The chancellor opined that in order to prove his financial status had suffered that Robert should have "develop[ed] for the record the financial status of these entities through [] financial

statements, bank statements, cash flow statements or other credible evidence." (V. 4: C.P. 489) A failure to disclose such items was characterized by the chancellor "as an attempt to deceive the Court about his finances . . .." (V. 4: C.P. 489) The judge concluded that the "exact financial condition" of Robert's various business entities "was not established at trial." (V. 4: C.P. 489) The judge reiterated that "Robert's proof of his financial status was inadequate and appeared to be deliberately false and misleading." (V. 4: C.P. 489)

Later in the opinion, the chancellor ruled that Robert came to court with unclean hands. Referring to the sworn – and admittedly inaccurate in some respects – financial statement, the judge said that it contained false and incomplete information and the judge could "reach no other conclusion than to find that Robert was intentionally attempting to mislead the Court as to his financial condition. The disparity in income, property values and debts as shown on his Rule 8.05 Financial Declaration, as compared to the financial statements used in his business ventures, his income tax returns, and other documents is significant." The judge claimed that Keith Winfield had testified that the judge had insufficient information on which to make a determination for cash available for Robert to pay his bills. The judge further opined that "all information provided by Robert, his attorney, and Certified Public Accountant are paper losses of income" designed to lower tax liabilities. (V. 4: C.P. 503) Finally, the judge said that Mr. Winfield had "admitted, very shockingly, that 'this is the way we did it, but I would not want the IRS to know that we did it that way.'" (V. 4: C.P. 503)

Referring to a financial disclosure statement provided to a bank, the judge noted Robert told the bank on October 1, 2007, that he had a net worth of $4.88 million and a yearly income of nearly $1.7 million. (V. 4: C.P. 504) The court opined that the vast differences between an October, 2007, financial disclosure to Covenant Bank, compared with his financial disclosure and Rule 8.05 form prepared just before trial in July, 2008, was so great that the judge concluded Robert was not before the court with clean hands and that he "has failed to provide [sic], with particularity, his inability to perform [the Agreement's financial obligations]." (V. 4: C.P. 504)

With respect to Robert's claim of a credit for having overpaid on the divorce Agreement's requirement that he pay $120,000 toward the Reunion house, the chancellor opined that "there was not sufficient evidence presented to the Court to prove that Robert had satisfied the One Hundred and Twenty Thousand Dollar ($120,000.00) requirement." Then the judge said that she would decline to modify the Agreement "in light of the Court's finding regarding Robert's failure to prove a material change in circumstances." (V. 4: C.P. 494)

As for allowing him credit for amounts he paid in excess of the sums called for in the Agreement, the trial judge declined any part of Robert's requested credit of $57,715.51. (V. 4: C.P. 486) The court said that the record was "confusing" as to any overpayments and stated that the court had "previously ordered Robert to produce an accounting of these sums by Alford, Hollow & Smith, C.P.A., but Robert failed to produce any accounting of these sums." (V. 4: C.P. 486)

The undersigned officer has diligently searched the docket sheets and the entire record for such an order and it cannot be found. Nor are there any transcribed bench orders save those otherwise noted in the transcript of the trial and the exhibits bound in the red clerk's papers volume. As the Designation of the Record shows, Robert requested the entire record of all proceedings in this case. (V. 5: C.P. 612)

Robert asked the trial court to clarify, reconsider, or amend the final judgment. Robert noted that the court had failed to interpret Section XII's 30% clause, specifically that section's use of the term "salary." Robert again urged the trial court to allow him credits for the post-February expenses he paid. Robert objected to the trial judge's use in her opinion of an October, 2007, financial statement that was obtained by Amanda's counsel after the hearing and, obviously, long after discovery had closed and Robert's ability to materially responded ceased. (V. 4: C.P. 520-22)

The trial court entered an order on Robert's post-judgment motion, first ruling that the term "salary" as used in the Agreement's Section XII meant the same as "income." (V. 5: C.P.

572) However, as to the requested $57,700 in credits against amounts due, the court reconsidered and partly granted Robert's request in the amount of the tax refunds Amanda had received that had been paid by Robert. (V. 5: C.P. 573) Concerning Robert's claim of "trial by ambush" with the October 2007 financial statement to a bank, the trial judge responded that the record had specifically been left open at the conclusion of the trial for purpose of additional submissions. (V. 5: C.P. 574-75)

SUMMARY OF THE ARGUMENT

Interpreting the Agreement is a question of law and the chancellor erred in failing to conduct the standard three-tier analysis to determine the meaning of Section XII, which allows Robert to adjust the financial award so that he pays no more than 30% of his "gross before tax salary." The trial judge erred in ruling that the words "salary" and "income" are synonymous in this context where "income" is used more inclusively within the same provision. Alternatively, the chancellor erred in failing to credit the mountain of evidence that Robert has huge debts and that his primary source of income prior to 2007 no longer exists. The change in Robert's income is a materially changed circumstance that was not contemplated at the time of the August, 2005, divorce Agreement.

The chancellor erred in declining to rule that some payments of Robert's were income to Amanda and deductible to him. It is not contested that Robert had been paying the mortgage note at the time of the hearing. Mississippi law requires incorporation of federal tax law into divorce settlements if, as is the case here, those agreements are silent about tax treatment. Federal tax law characterizes loan payments as deductible to the payor and income to the payee.

Mississippi law allows former spouses who have paid some financial benefits to or on behalf of the payee credit for those payments and the chancellor erred in not allowing Robert all of the credit he requested.

ARGUMENT

I. The trial court's ruling that Robert failed to show grounds for modification of the

divorce decree incorporating the Parties' August 2005 Agreement should be reversed.

A. Standard of Review

Generally, a Mississippi appellate court reviews cases for legal error and does not otherwise reverse the decisions of chancellors except under certain defined exceptions. Those exceptions are where a court has abused its discretion or has manifestly erred. *Andrews v. Williams*, 723 So.2d 1175, 1177 ¶ 7 (Miss.App.1998). If substantial evidence in the record supports the chancellor's findings, the appellate court will not reverse. *Wilbourne v. Wilbourne*, 748 So.2d 184, 186 ¶ 3 (Miss.App. 1999). Questions of law, of course, are reviewed under a *de novo* standard. *Stacy v. Ross*, 798 So.2d 1275, 1278 ¶ 13 (Miss. 2001).

The issue of whether the trial judge correctly interpreted the Parties' written Agreement requires a different standard of review. Generally, as stated *supra* the appellate court will not reverse a chancellor's findings unless they are manifestly wrong, clearly erroneous, or an erroneous legal standard was used. However, "the standard of review for issues concerning the construction of a contract are questions of law that are reviewed de novo." *City of Hernando v. North Mississippi Utility Co.*, 3 So.3d 775, 782 ¶ 18 (Miss.App. 2008).

B. The chancellor erred in failing to adjust downward the alimony, child support, and housing monetary awards because Robert proved his obligations under the Parties' divorce Agreement exceeded 30% of his "gross before tax salary" which proof entitled him under the Agreement to the reduction.

It is a commonplace that settlement agreements between divorcing spouses are contracts like any other and generally subject to the same law regarding validity, enforceability, and interpretation. *West v. West*, 891 So.2d 203, 210-11 (Miss. 2002). The Supreme Court summarized and effectively codified contract interpretive law in *Pursue Energy Corp. v. Perkins*, 558 So.2d 349 (Miss. 1990). The "three-tier" process for construing contracts announced in *Perkins* applies to settlement agreements in divorces. *West*, 891 So.2d at 210-11.

First, the "four corners" test is applied: the agreement's language is examined in its

entirety and provisions are not viewed in isolation but altogether in combination. If the words chosen by the parties are clear and not ambiguous, then they represent the intent of the parties and courts are required to effect that intent. The four corners analysis depends on applying ordinary English language meanings. There are exceptions to the "ordinary language" rule, most commonly where the contract – declaring the private law between the parties – uses words or phrases that are legal terms of art with distinct legal meanings. *Perkins*, 558 So.2d at 352.

The *Perkins* Court cautioned that there may be cases where a cursory examination of the instrument leads to a conclusion that it is unclear – for example, where different provisions seem contradictory. The apparent lack of clarity may be illusory, however, and a court's job is to harmonize the provisions in accord with the parties' apparent intent if that can be done. *Id.*

If the document remains ambiguous or unclear, then courts may employ a variety of "canons of construction" to interpret it. The most familiar of these canons is that ambiguities are resolved against the party having written the contract. *Id.* at 352-53. Language in a contract is ambiguous if it is susceptible of more than one reasonable interpretation. *Mississippi Farm Bur. Cas. Ins. Co. v. Britt,* 826 So.2d 1261, 1265, ¶ 14) (Miss. 2002). Analogous to descent and distribution statutes that embody normative expectations in the absence of express wishes stated in a will, the fairness of applying canons of construction is based on the premise that they provide a court with a presumptively objective inference of the parties' intent based in history and the long experience of the common law. *Id.* at 353.

If, however, the canons do not reveal the intent of the parties, then the final tier is reached: extrinsic evidence and parol testimony. *Id.* The hope is that the parties' intentions become clearer through considering the circumstances attending the parties' creation of the document. The familiar parol evidence rule puts a firm brake on getting to this last tier, however. The basic rule is that, absent contentions of fraud, mistake, or other claims going to the validity of assent, then evidence regarding what the parties thought they were doing is not admissible unless the document is ambiguous. *Id.* The last point is that parol evidence may not be used to

vary or change the meaning of the contract's terms, only to explain and clarify them. *Id.* at 354. Finally, as Justice Prather noted in *Perkins*, the "tiers" of analysis are not mechanical steps and may overlap given the facts of a particular case. *Id.* at 351, fn. 6.

Also like any other contract, chancellors and appellate courts acting within chancery do not ordinarily modify, or provide relief from, a divorcing party's improvident deal. *West*, 891 So.2d at 211; *see, In re Marriage of St.Germain*, 977 So.2d 412, 418-19, ¶ 20 (Miss.App. 2008)(mere deficiency in property division provides no basis for relief). In this case, the face of the Agreement shows it is one-sided in Amanda's favor. However, "'[i]n property and financial matters between the divorcing spouses themselves, there is no question that absent fraud or overreaching, the parties should be allowed broad latitude.'" *Id.*, *quoting Speed v. Speed*, 757 So.2d 221, 224-25 (Miss. 2000).

This last rule is qualified where divorcing parties undertake to "modify" traditional divorce law governing financial awards. The general rule is that "[a]bsent fraud or a contractual provision stating otherwise, neither a property settlement nor lump sum alimony may be modified." *Norton v. Norton*, 742 So.2d 126, 129, ¶ 12 (Miss. 1999), *citing Mount v. Mount*, 624 So.2d 1001, 1005 (Miss. 1993). The quoted statement's second exception – contracts providing otherwise – to the general rule prohibiting modification of traditional divorce awards is a relatively recent innovation in Mississippi law.

How parties may mold traditional concepts to suit themselves, and the extent to which courts will allow deviations from traditional characteristics, is best explained in, and exemplified by, cases like *McDonald v. McDonald*, 683 So.2d 929 (Miss. 1996). While parties are accorded great flexibility in making financial arrangements attending their divorce, the Supreme Court has only "granted divorcing couples a limited freedom to contract for non-modifiable alimony payments which differ in some respects from traditional lump sum alimony." *Id.* at 932.

Justice Prather, speaking for the *McDonald* Court, implicitly cautioned that the "limited freedom" to alter aspects of domestic law was an *ad hoc* balance between not "unduly

restrict[ing] parties' freedom to knowingly reach an agreement . . . that best suits their needs" with the law's adherence to "the traditional characteristics" of divorce awards. *Id.* Justice Prather stated the obvious: a lawyer devising an agreement with provisions that do not correspond closely with traditional characteristics of the tools of divorce law may, as happened here, invite litigation and frustrate the purpose of the agreement. *Id.*

"In such cases," Justice Prather went on, "it is for [the courts] to determine whether the agreement . . . provides for what is essentially lump sum alimony or periodic alimony, and, in cases in which the intent of the parties is not clear, payments will be presumed to be payments of periodic alimony." *Id.* at 932-33. Of course, courts look past often self-serving labels to the substance of what is provided in a document to determine how to characterize a particular provision. *Beezley v. Beezley*, 917 So.2d 803, 807, ¶ 12 (Miss.App. 2005), *citing Bowe v. Bowe*, 557 So.2d 793, 795 (Miss. 1990).

While *McDonald* involved the question of whether a provision of the parties' settlement agreement was lump sum alimony or periodic alimony, these principles would apply to any "hybridized" provision containing aspects of different kinds of financial divorce awards or, indeed, new characteristics original to the parties' agreement and unfamiliar to the established common law. *McDonald* also teaches that the courts should examine the financial provision at issue and sort through the language to discover what type of traditional award the provision most closely resembles.

The *McDonald* Court used the example of *East v. East*, 493 So.2d 927 (Miss. 1986), to explain how "innovative" financial provisions should be interpreted. The parties' agreement in *East* provided a periodic amount that would not terminate upon the payee ex-wife's remarriage nor cease at the payor ex-husband's death but would constitute a charge against his estate. *McDonald*, 683 So.2d at 932, *quoting East*, 493 So.2d at 929.

Lump sum alimony is defined as a fixed and certain sum which may be paid in installments and remains a fixed liability of the payor that does not terminate upon death. *Id.* at

931. Periodic alimony, by contrast, is a sum paid periodically that terminates upon the recipient's remarriage or the payor's death. *Id.* The provision in *East* stated a sum certain to be paid monthly, a characteristic of periodic alimony. And the Easts' agreement did not state what one might have thought to be the *sine qua non* of lump sum alimony, to wit, the lump sum.

As Justice Prather pointed out, the *East* Court let this requirement slide because the Easts' contract also did not allow Mrs. East to seek modification of the periodic payment, a core attribute of periodic alimony. In *McDonald*, as in *East*, the Supreme Court looked at how the parties' agreement dealt with the general characteristics of the recognized types of alimony. While this does not seem to be a mechanical addition where the legal characteristics present in the agreement are enumerated and toted up in columns labeled "lump sum" and "periodic," nevertheless weight was assigned in these cases according to the core attributes of the different types of awards. Hence the Easts were allowed to provide for lump sum alimony without a lump sum where all other characteristics stated in the agreement were in accord with the traditional attributes of lump sum alimony.

With these twists and turns of the interface between contract and divorce law firmly in mind, we turn to the Agreement's financial provisions. Since the Agreement allows Robert to adjust the financial provisions based on the "30% rule," it is necessary to identify what is meant by "gross before tax salary." As noted *supra*, in the first tier of analysis words in contracts are given their ordinary meanings and Mississippi courts routinely use dictionaries in general circulation to determine a word's "ordinary meaning." *Anglin v. Gulf Guar. Life Ins. Co.*, 956 So.2d 853, 860, ¶ 19 (Miss. 2007). "Salary" means "fixed compensation periodically paid to a person for regular work." *Random House Dictionary of the English Language*, Second Edition Unabridged. *Black's Law Dictionary* Fifth Edition says much the same but, perhaps true to its origins, its definition of "salary" embodies a class distinction between "salary" – "a stated compensation paid periodically as by the year, month, or other fixed period" – and "wages" which are, according to *Blacks's*, "normally paid on an hourly rate." One may only derive that the

"other fixed period" cannot be an hour.

The use of the term "gross" and the phrase "before tax" suggests that salary shown on W-2 tax forms prior to various deductions is intended. Also significant is the Parties' choice not to use the word "income." Obviously unearned income through investments or otherwise is subject to fluctuation – Robert's own situation in 2007 and the global crisis not long following are some evidence of this well-known phenomenon. The Parties' pegging the 30% rule to Robert's salary as a physician is some indication that they were relying on a physician's not inconsiderable ability in our society to obtain gainful regular employment.

This interpretation is also recommended by the consequences of fluctuating income from business profits. For example, by not using the more inclusive term "income," Robert is provided some assurance that if his companies' income, if any, rises again or is substantial, then this bounty is protected from the operation of the Agreement, unless of course he chooses to waive the requirement at the time. If, on the other hand, as has obviously happened here, Robert experiences large losses in his business ventures, then Amanda and Caroline are protected from these losses that otherwise might have stripped them of any benefit had the term "income" been used.

The chancellor failed to consider either the use of the word "salary" in the Agreement or that the Agreement distinguished between "salary" and "income" in the same section. Section XII used the both "salary" and "income" to mean different things. Paragraph (a) used the term "gross salary" to describe a limit that the financial provisions of the Agreement could not exceed, at least without his waiving the provision. Paragraph (b) used the term "income" to describe a circumstance where he would be entitled to modify the financial provisions if he became disabled. Paragraph (a) expressly contains a contractual right for Robert to "adjust" his financial obligations based on the amount of his "gross salary" while paragraph (b) only provided that the "agreement shall become modifiable" if Robert were disabled.

The first paragraph is mandatory – "shall be allowed" – and is based on a clearly

definable fixed amount of "gross before tax salary." The second paragraph is permissive in the sense that an agreement that "becomes modifiable" must be submitted to the system that modifies divorce decrees, and agreements incorporated therein, to wit, in Mississippi the chancery.

The word "income," by contrast, is defined more expansively to include the "return of money from one's business, labor, or capital invested; gains profits, salary, wages, etc. The gain derived from capital, from labor or effort, or both combined, including profit or gain through sale or conversion of capital. Income is not a gain accruing to capital or a growth in the value of the investment, but is a gain, a profit, something of exchangeable value . . .." *Black's* distinguishes between "income" and a capital gain relating to market values and cites *Goodrich v. Edwards*, 255 U.S. 527, 535 (1921).

"Lay" dictionaries, such as the *Random House Dictionary of the English Language*, Second Edition Unabridged, is even more expansive: income is a "monetary payment received for goods or services, or from other sources, as rents or investments." The Random House dictionary lists as synonyms "interest, salary, wages, annuity, gain, return, and earnings."

"Salary," then, may be a component of "income" but is not solely descriptive of "income." Anyone ever having had to file a United States Form 1040 knows that what is commonly regarded as "income" – whether stated on the first line in the "Income" section, W-2 wages, or stated on the "adjusted gross income" line, or the hopefully very small number on the "taxable income" line – means a great deal else besides "wages, salaries, tips, etc."

Assistance in understanding the word "salary" as used in the Agreement – and therefore seeking to find whether a term is ambiguous or not – is not limited to just one word or comparing words of related import used in the Agreement. The Agreement used the phrase "gross before tax" to modify and describe what "salary" the provision would be measured against. "Gross before tax" at least means Robert's salary prior to any diminution by income taxes.

Here the chancellor failed to look within the four corners of the Agreement to see how the

word was used, to compare the way the term is used with other words, or to use ordinary resources to discover whether the term was used ambiguously in the written document. Robert regards the phrase as unambiguous and it means his gross salary. At the time of the hearing, Robert's monthly gross monthly salary was $8,666.00. The regular monthly payments required of Robert under the Agreement are the mortgage, alimony, child support, and Amanda's health insurance. The sum of those amounts is $9,648.00. This sum not only exceeds 30% of Robert's salary, it exceeds the entire amount of his salary.

In this case the chancellor did not understand the plain language used in the Agreement, even aside from considering whether "gross before tax salary" is ambiguous. The judge wrote that the "burden of proof was on [Robert] to prove only by a preponderance of the evidence that there had been a various [sic] equal to or greater than thirty percent (30%) of his income or to otherwise prove that there had been a material change in circumstances in his financial condition, not anticipated at the time of the divorce." (V. 4: C.P. 487) Presumably the judge meant something like a "variance" of 30% of Robert's income was required to bring the provision into play.

More clearly, the chancellor went on to say that there was no "credible evidence before the Court to prove that Robert has suffered a thirty percent (30%) decrease in his income, such as would trigger the modification under the terms of the parties' agreement." (V. 4: C.P. 488) The Agreement does require a drop in Robert's then large salary, almost $300,000 in 2005, but it does not say that his salary must drop by 30%.

The Agreement says that should Robert's financial obligations "ever exceed thirty percent of his gross salary, then [Robert] shall be allowed to make adjustments such that he shall not have to pay more than thirty percent of his gross before tax salary." The provision comes into play not based on a reduced salary but by the measure of whether his financial obligations exceed 30% of it. The chancellor was mistaken in ruling otherwise.

Considering only the bargained-for terms of the Agreement, Robert is entitled to make

"adjustments" in the financial provisions based on the Parties' contract. The Agreement is silent about how the adjustments may or must be made, however. For example, does the 30% provision alter the nature of the awards because it allows the amounts to be adjusted?

Does Robert under the Agreement have the right to, for example, leave child support payments at the amount called for in the Agreement but reduce others so that the total is less than the 30% ceiling? Amanda might well have cause to object to that adjustment. Or must Robert reduce all financial provisions pro-rata so that they do not exceed the 30% ceiling?

To determine how the 30% rule should be applied, it is necessary to inquire into the nature of the financial awards. As noted *supra*, Mississippi law allows parties a limited right to contractually alter conventional forms of awards under a divorce agreement and the law allows modification of certain types of awards under the material change in circumstances standard. In this case there are essentially three awards to characterize: (1) child support; (2) alimony payments; and (3) the mortgage payment.

There is little doubt about the nature of the child support awards. The Agreement calls for a monthly payment of $2,000.00, and provides that expenses such as school, clothing, and gifts will be paid by Robert. There is no bar under Mississippi law to the upward or downward modification of child support orders. See, *e.g.*, *Evans v. Evans*, 994 So.2d 765, 770 (Miss. 2008). Thus the award of child support is subject to the 30% provision.

Turning to the alimony and mortgage payments, there are four types of alimony recognized in Mississippi law: lump sum, periodic, rehabilitative, and reimbursement. *West*, 891 So.2d at 212. Rehabilitative and reimbursement alimony are not at issue here. Section III of the Agreement expressly says that the sum of $620,000.00 is "lump sum alimony [that] is to be paid at the rate of $5,000.00 per month . . . until paid in full." Then it reiterates that the alimony "shall not be modifiable nor terminated upon death or remarriage." The provision also states that continuing monthly payments, beyond the "lump sum" term, shall be made until Caroline reaches 15 if Amanda meets the following requirements: (1) demonstrates continuing need for the money

to be a stay-at-home mom; (2) remains at home with Caroline; (3) remains unmarried; and (4) is not "co-habitating."

The provision of a lump sum and the recital of non-modification seems facially unambiguous until one recalls that "notwithstanding the provisions of this agreement, should [Robert's] obligations . . . exceed thirty percent of his gross salary, then [Robert] shall be allowed to make adjustments . . .." One provision says it is not modifiable, another provision says that the earlier provision may be adjusted under the contract.

The most patent kind of ambiguity is where a document has contradictory provisions. See, *Union Planters Bank v. Rogers*, 912 So.2d 116, 120, ¶ 10 (Miss. 2005). Of course, ambiguities are construed against the document's drafter, here Amanda, and specific language controls over general language that is inconsistent. *Id.* Section XII makes the alimony provision sound like it is the reverse of *East*, periodic alimony with a lump sum instead of *East*'s lump sum alimony without the lump sum.

In this sense then, Section XII may be considered to "convert" the nature of the award. But as Justice Prather said, the Court and parties must compare the "traditional characteristics" of awards recognized in the law to the contractual provision at issue to assist the Court in deciding what the award is. Here the Agreement provided for the $5,000.00 monthly alimony to continue until Caroline is 15. The monthly alimony could be terminated upon remarriage or cohabitation.

Termination upon remarriage and cohabitation are traditional characteristics of periodic alimony, not lump sum. *Burrus v. Burrus*, 962 So.2d 618, 621-22, ¶ 17 (Miss.App. 2006)(even though two people do not live in the same place, their personal and financial circumstances may be so intertwined that they legally cohabit). Also, though the Agreement is silent on the issue of which Party would pay taxes on the alimony, it is not disputed that both Robert and Amanda believed the alimony would be income to her and deductible to him. This is, of course, historically a characteristic of periodic alimony. *Wray v. Wray*, 394 So.2d 1341, 1345 (Miss.

1981). Notwithstanding the tax treatment of Section III under 26 U.S.C. § 71, as amended,[6] the Parties' original understanding that the alimony would be income to Amanda remains some evidence of how the Court should characterize the Agreement's alimony provision.

Given the provision's close correspondence with characteristics found only in the law of periodic alimony, the Court should conclude that the Parties exercised their limited right to alter in detail Mississippi law governing divorce awards and that the Agreement provides limited-duration periodic alimony that can be modified in amount.

Alternatively, the nature of lump sum alimony compels a cautious approach to the issue of modifying – or "adjusting" in the Agreement's language – Section III. As the *McDonald* Court said, "[o]ne advantage of lump sum alimony is that it sets forth the parties' obligations in a fixed . . . manner and is thus desirable for those parties who wish to avoid the uncertainty and expense of recurring divorce litigation." *Id.* at 932.

Since the time Mississippi's most distinguished family law jurist, Lenore Prather, gathered her majority in *Hemsley v. Hemsley*, 639 So.2d 909 (Miss.1994), and *Ferguson v. Ferguson,* 639 So.2d 921 (Miss.1994), one of the principal thrusts of divorce law has been to make divorce as complete as possible and, at least where there is sufficient financial wherewithal, to leave no lingering entanglements with the potential for "ginning up" additional litigation.

While Section XII allows Robert to adjust all the financial awards in the Agreement, it only purports to reduce *payments* to a specified ceiling, nothing more. The majority of the payments called for under the Agreement are monthly installments. This suggests that a correct interpretation of the Agreement means that the total amount of the lump sum alimony may not be "adjusted" under Section XII, but that the payment therefor, together with other payments in the

---

[6]Section 71 provides, in pertinent part, that "[t]he term 'alimony' [which is includible as income to the payee and deductible to the payor]. . . means any payment in cash if (A) such payment is received by . . . a spouse under a divorce or separation instrument . . . (D) there is no liability to make any such payment for any period after the death of the payee spouse . . ..

Agreement, may not exceed the thirty percent rule.

Turning to the Section II and its division of real property, the provision for Robert's paying $120,000.00 for Amanda's half interest in real property sounds in every way like an unmodifiable property division. But that sum has been paid and the issue here is how to characterize the monthly payment of the mortgage. Mortgage payments are inherently subject to change, most obviously through refinance or pay-off. This does not resemble a non-modifiable exchange to divide marital real property.

As stated *supra*, courts look past labels parties attach to financial provisions in their agreements. For example, in *Norton*, *supra*, the parties' agreement provided that Mr. Norton would pay $800.00 per month for 120 months to Ms. Norton in exchange for her consulting services to a business. The agreement stated that the payments were not modifiable and were not alimony. *Norton*, 742 So.2d at 129. Parol testimony showed that the Nortons intended to provide lump sum alimony through the form of a legal fiction, the employment contract. In addition, the "employment contract" payments were not terminable upon the payor's death or the remarriage of the payee – attributes of lump sum awards. *Id.* at 130, ¶ 19.

Robert believes that the periodic payments of the note following the property division is alimony to be paid under the legal fiction of a mortgage: it is a periodic payment of a specific amount and it is payable only if Amanda remains single. One of the "traditional characteristics" of periodic alimony is that it terminates upon the payee's remarriage. Nor is the note payment an irrevocable fixed amount typical of lump sum alimony because it can terminate on the contingencies named in the Agreement: Amanda's remarriage and the sale of the house. Similarly it is not in the nature of a non-modifiable property settlement because it can terminate based on the named contingencies.

Given the limited scope within which parties may modify common awards under Mississippi divorce law, the additional monthly payments of the note are more like periodic alimony than any other conventional divorce award based on the attributes stated in the

Agreement, and by process of elimination of the attributes of other types of awards. Consequently, Robert believes that periodic debt payments under Section II, ¶c may be adjusted under the Parties' 30% rule.

The Court should reverse the chancellor's ruling and remand with specific instructions for the trial court to reduce Robert's obligations in conformity with Section XII and that amounts paid for child support and alimony be equitably or ratably reduced to thirty percent of his gross before tax salary from regular employment. If the awards are ratably reduced by the appropriate fraction the given award bears to the total required to be paid under the 30% provision this would eliminate any reduction's falling disproportionately on Amanda or Caroline.

C. Alternatively, the chancellor's ruling should be reversed because Robert proved a drastic reduction in his income demonstrating a material change in circumstances entitling him to a reduction in the amounts of alimony and child support.

This issue is subject to the abuse of discretion/manifest error standard stated *supra*. Under Mississippi law child support and alimony awards may be modified under the material change in circumstances standard. In *Evans v. Evans*, 994 So.2d 765, 770 (Miss. 2008), the Supreme Court observed that the law governing child support modifications was well-settled: "'There can be no modification of a child support decree absent a substantial and material change in the circumstances of one of the interested parties arising subsequent to the entry of the decree sought to be modified." (Citations omitted) The change must occur as a result of after-arising circumstances of the parties, not reasonably anticipated at the time of the agreement. (Citations omitted) Some of the factors which may be considered in determining whether a material change has taken place include: (1) increased needs caused by advanced age and maturity of the children; (2) increase in expenses; (3) inflation; (4) the relative financial condition and earning capacity of the parties; (5) the health and special needs of the child, both physical and psychological; (6) the health and special medical needs of the parents, both physical and psychological; (7) the necessary living expenses of the non-custodial parent; (8) the estimated amount of income taxes

the respective parties must pay on their incomes; (9) the free use of a residence, furnishings, and automobile; and (10) such other facts and circumstances that bear on the support subject shown by the evidence."

The Court of Appeals recently summarized the law relating to alimony modification: "In *Steiner v. Steiner*, 788 So.2d 771, 776 ¶ 15 (Miss.2001), the Mississippi Supreme Court stated that '[s]upport agreements for divorces granted on the ground of irreconcilable differences are subject to modification.' Additionally, the court noted that '[t]he modification can occur only if there has been a material change in the circumstances of one or more of the parties.' (Citations omitted) Further, in *Tingle v. Tingle*, 573 So.2d 1389, 1391 (Miss.1990) (citing *Clark v. Myrick*, 523 So.2d 79, 82 (Miss.1988)), our supreme court stated that the material change must concern circumstances that arise after the original divorce decree was entered. The Tingle court also stated that the change could not have been anticipated at the time of the divorce." *Morris v. Morris*, 8 So.3d 917, 920 ¶ 9 (Miss.App. 2009).

Also nearly identical to the child support modification standard is the "totality of the circumstances" analysis in alimony law of whether a material change has occurred. *Id.* Because the standards are all but identical, it stands to reason that if a party demonstrates eligibility to modify a child support award, the same basis will serve for alimony modification. For purposes of this analysis, Robert reiterates his characterization of the mortgage loan payments as a form of periodic alimony and the alimony specified in the Agreement as also a hybrid form of periodic alimony.

Also, it should go without saying that while Robert had the prescience to negotiate for the 30% clause, he did so as a general precaution and not in anticipation of the events which befell his hospital and himself.

Needs of the Child

Robert concedes the obvious that at six and a half years of age Caroline's needs have grown from those evident at the hearing two years ago.

Increase in Expenses

With respect to all three parties, it is clear that Caroline's expenses may be expected to increase because she is in school now and of an age to socialize with her playmates. As for Amanda's expenses they were enormous from the outset but it is clear that with the alimony, child support, and Reunion house awards she was not responsible for paying for the usual large expenses such as a home, car, tuition, or clothes for a growing daughter.

Robert, on the other hand, is attempting to shed expenses because of his financial condition. As noted *supra*, the Amite County property sold soon after the hearing. The property in Arkansas was for sale at the time of the hearing as well but had not yet sold. Otherwise, Robert's Rule 8.05 form does not show any outsized or unnecessary expenses.

Inflation

As most know and the Court may notice, inflation is not presently a national economic concern nor has it been in the recent past.

Relative Financial Condition and Earning Capacity of the Parties

This is the factor on which the case turns. There is no question that Robert's financial condition declined rapidly and drastically beginning in early 2007 when the hospital he managed learned that it was several million dollars in debt to Medicaid. This led to the cascade of financial problems related extensively in the fact section: for a time Medicaid cut off all reimbursements to Tri-Lakes and then reinstated reimbursements at half; Tri-Lakes was unable to continue funding the several clinics run by Robert's medical entities; cash flow from his arrangement with Tri-Lakes, according to the accountant Fisher, went from over $1.3 million dollars in 2006 to $125,000.00, in 2007.

The substantial income in 2006 from the companies and his own income as a practicing physician ($666,291), coupled with the sale of the airplane yielding a tax profit of nearly one million dollars, caused him to be unable to pay his income taxes when his companies' and his personal incomes fell sharply in 2007 (-$450,000). It is not disputed that Robert has a nearly half

million dollar debt for taxes. Nor is it disputed that Robert owed Covenant Bank about $400,000.00 and First Security Bank $500,000. At the time of the hearing Trustmark Bank had a judgment against Robert for nearly $136,000. The Arkansas property had a debt of about $580,000.

On the sale of the Amite County farm, the principal debt on it was satisfied and their remained sufficient funds to pay over $30,000 to Trustmark in partial satisfaction of the judgment. During the hearing Robert testified that certain of the other amounts listed by his financial advisor as liabilities either had been paid down or paid off. Leaving aside the AmSouth loans and the debt listed to Robert Turner which Robert testified had been paid, Robert's indebtedness to the sources listed *supra* stands at $1.5 million. This amount does not include the liabilities to Tri-Lakes for which demand had been made in the amount of $2.6 million.

The record shows that at the time of the hearing in mid-2008 Robert's gross monthly salary income was about $8,666. In 2006 Robert's gross wage income was over $190,000. In 2007 it was $89,000. addition he has positive cash flow from mineral royalties of about $4,300 per month. These are, of course, income amounts with which most Mississippians would be pleased. But they are hardly enough to support his own personal expenses of about $3,000 per month, as well as Amanda's and Caroline's of about $11,000 per month – and pay taxes on the income, and repay $1.5 million or $4.1 million in debt, depending on what Tri-Lakes' Bankruptcy Court-appointed chief restructuring officer has been up to since the hearing.

Robert's earning capacity is obviously significant; he is an experienced emergency physician. Amanda is a nurse and also has substantial earning capacity which, if employed, would go some distance to alleviating these Parties' financial friction.

Health and Special Needs of the Child

The record shows no facts that Caroline has health problems either physically or emotionally.

Health and Special Needs of the Parents

For all the record shows the Parties are in good health both physically and emotionally.

Living Expenses of the Non-Custodial Parent

As pointed out in the discussion of the financial condition factor, Robert is not able to support his own expenses and the expenses either called for under the Agreement or that he has actually been paying. From September 1, 2005, to the time of the hearing in early July, 2008, Robert had paid some half million dollars for all of Amanda's and Caroline's items under the Agreement, or about an average of $14,000 per month.

Income Taxes the Parties Must Pay

This factor takes on more than usual importance in this case due to Robert's outstanding tax bill of $500,000. In addition, despite the Parties' understanding – and Amanda's 2006 return – that Amanda would take the alimony payments into income – apparently partly because the Agreement provided that she would deduct the mortgage loan interest – under the present order Robert is responsible for paying taxes on the alimony.

Free Use of a Residence, Furnishings, and Automobile

While Robert was responsible for providing Amanda a car and paying the loan debt and Reunion homeowner's assessments, Amanda remains responsible for paying the vehicle's routine expenses and repairs. The same may be said for the Reunion home's repairs and miscellaneous expenses. Robert was also responsible for paying a furniture allowance that was satisfied from the proceeds of the Amite County property sale. Nevertheless, it cannot quite be said that Amanda has entirely free use of the home, furnishings, or vehicle.

Other Relevant Circumstances Peculiar to the Parties' Situation

Robert is not aware of any factors other than those enumerated. This case's most important factors are his reduced income – even considering all sources – and the affect that has had on his ability to pay his own living expenses, taxes, debt obligations, as well as the child support and alimony.

The chancellor committed reversible error in concluding that Robert presented

insufficient evidence of his radically reduced income. There is no evidence at all that Robert has secreted assets or artificially siphoned money away from himself to his wife, Missy, who at the time of the hearing was making the same salary she had been making since 2000. The chancellor apparently became frustrated with the sheer volume of the record, the complexity of Robert's business dealings and the consequent difficulty in parsing the record, and angry when Robert admitted during the hearing that some of the debt liabilities on his sworn Financial Statements were incorrect. The reason the trial judge entered the order for the sworn statement of assets and liabilities was to clarify Robert's fast-moving economic picture. The chancellor's anger is understandable.

What is not understandable is the chancellor's using Mr. Vance's and Robert's error in misstating three debt obligations to rule that he had "unclean hands" in light of the much larger – and undisputed – picture of the economic catastrophe brought about by the failure of Tri-Lakes Medical Center.

The chancellor made other mistakes. She accused, without evidence, Missy Corkern of "commingling" funds to hide them. She accused the accountant Keith Winfield of having "admitted, very shockingly, that 'this is the way we did it, but I would not want the IRS to know that we did it that way.'" During the hearing Winfield discussed a serious error made by Robert's previous accountant, taking into income receivables that had not been paid for a business that accounts on a cash basis. He explained that it was a situation, an accounting "position," that he inherited and that to correct the tax return to reflect what was actually happening he caused the companies to sign notes.

Then the income that had been booked was offset by the usual liabilities and expenses. This then showed that the companies were producing still large profits but ones that were in line with prior years. What Winfield said in explaining the problem and how he fixed it was, "I'm not saying it's right, but I wouldn't want to say that in front of the IRS." The chancellor twice indicated during Winfield's discussion of the prior accountant's mistake that she understood his

explanation. (V. 6: T. 81) In her opinion, the chancellor makes it appear that Mr. Winfield was confessing to some shenanigan's to hide income. The chancellor was mistaken.

In a similar vein the chancellor excoriated Robert for submitting Rule 8.05 forms that were inconsistent with "financial statements used in his business ventures, his income tax returns, and other documents. . .." Unfortunately the judge cited no actual numbers showing any disparity. Robert concedes that his financial situation rapidly worsened as Tri-Lakes collapsed during the course of 2007. And then funds due to his companies were discharged in bankruptcy so he was left to start over and pick up the pieces in 2008.

What the chancellor appears to have been alluding to was a document obtained by Amanda after the hearing but prior to the entry of judgment. This was a financial statement apparently provided by Robert or someone else to Covenant Bank. The trial judge justified admitting this document after the hearing because the record had been left open at the conclusion of the trial for purpose of additional submissions.

There is no order to effect the record's remaining open or being reopened. Nor does a motion to reopen the record appear. Amanda's lawyer tossed the document over the court's transom. A chancellor's discretionary power to reopen the record – or leave it open – is a consequence of the equity powers of the chancery court: "Equity delights to do complete justice and not by halves." See V. A. Griffith, *Mississippi Chancery Practice* § 28 (2d ed. 1950).

In *Wakefield v. Puckett*, 584 So.2d 1266, 1268-69 (Miss. 1991), the Supreme Court stated a four-factor approach to guide a chancellor's discretion in reopening a record in light of new evidence. The trial court must consider: (1) whether the cause of the omission is excusable; (2) whether the evidence is relevant to a material issue; (3) whether the absence of the evidence will result in a miscarriage of justice; and (4) whether another party will be significantly or unduly prejudiced if the case were reopened. *Id.* at 1268-69. As a standard guiding a court's discretion, the standard of review is necessarily an abuse of discretion standard. *Id.*

Manifestly the trial judge considered none of these factors and that, in itself, is an abuse

of discretion. But obviously the more important principle is that reopening the record – or leaving it open – does not permit a court to admit evidence without that evidence being subject to the ordinary requirements of due process. The chancellor's use of this document – to infer that whether Robert was lying to the bank or lying to the court, he's still lying – is akin to the long discredited trial by affidavit. *Louk v. Louk*, 761 So.2d 878, 884 ¶ 21 (Miss. 2000)(trial by affidavit to be avoided except in summary judgment context or where both parties waive right of cross examination). The chancellor erred in basing her conclusions at least partly on a document not subject to the test of due process.

II. The chancellor erred in failing to rule that the Reunion house loan payments were deductible to Robert and income to Amanda.

Robert argued to the trial court that he should be allowed to deduct his alimony payments and the payments on the house note. While the Court has the power, under the law cited *supra*, to characterize the weird "lump sum" provision for purposes of state law adjustment or modifiability, it does not have the authority to alter the terms of the Parties' Agreement that declare the "lump sum" "shall not be . . . terminated upon death or remarriage." It appears to Robert now that 26 U.S.C. § 71(d) does not allow him to claim a deduction because his agreement to pay the alimony "shall not be . . . terminated upon death or remarriage." Under Section 71 the term "alimony" "means any payment in cash if- . . .(D) there is no liability to make any such payment for any period after the death of the payee spouse . . .."

However, the question of whether Robert should be able to deduct the principal[7] payments on the Reunion house is a different question. This question is similar to one in *Ivison v. Ivison*, 762 So.2d 329 (Miss. 2000), where the Ivisons' property settlement agreement did not address the tax consequences of Herbert's mortgage payments.

The *Ivison* Court held that "[i]t is axiomatic in Mississippi that the 'law in force at the

---

[7]The Agreement provides that Amanda has the privilege of deducting the *interest* on the mortgage. (V. 1: C.P. 21)

time that a contract is made forms a part of it and is written into the contract as much as if expressly incorporated therein.' (Citation omitted) In August 1993, when Herb and Leigh entered into the divorce agreement, 26 U.S.C. §§ 71 and 215 were in effect. The Temporary Treasury Regulations were also in force. Temp. Treas. Reg. § 1.71-1t (1984). These laws provided that . . . mortgage payments would constitute taxable alimony to Leigh and be deductible by Herb unless the parties designated them as non-taxable and non-deductible." *Id.* at 335 ¶ 19.

For obvious reasons of long-term predictability and planning, Section 71 of the United States Code remains in force and has not been amended since 1986. It provides, in pertinent part: "Gross income includes amounts received as alimony or separate maintenance payments. . . The term "alimony or separate maintenance payment" means any payment in cash if- (A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument, (B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215 . . . and (D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse. . . . The term "divorce or separation instrument" means- (A) a decree of divorce or separate maintenance or a written instrument incident to such a decree, (B) a written separation agreement, or (C) a decree (not described in subparagraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse."

As in *Ivison*, the Parties' Agreement is silent about the tax treatment of the mortgage payments, save that the interest shall be deductible by Amanda. The *Ivison* decision and the Parties' Agreement incorporating relevant parts of the Internal Revenue Code require that the chancellor's decision on deductibility to Robert be affirmed in part and reversed in part and either an order rendered here or the case remanded with instructions for an order to be entered declaring Robert's mortgage principal payments deductible to him.

III. Amanda does not dispute that Robert has made payments to her or on her and the Parties' daughter's behalf and the chancellor erred in not allowing Robert credit for these undisputed amounts.

Under certain circumstances, Mississippi courts have allowed former spouses alimony credit for amounts paid to or on behalf of the payee "even though those payments have not taken the traditional form of a personal check marked 'alimony.' See *Spalding v. Spalding*, 691 So.2d 435, 439 (Miss.1997) (payments made directly to payee by Social Security Administration deriving from payor's disability benefits to be credited against alimony); *McHann v. McHann*, 383 So.2d 823, 825 (Miss.1980) (payor spouse's payment of payee's household utilities, home repairs, auto insurance and taxes to be credited against outstanding alimony)." *Franklin v. Franklin*, 864 So.2d 970, 978 ¶ 32 (Miss.App. 2003).

The *Franklin* Court noted that the rationale for these results is that payments under the decree to the payee are income to meet reasonable needs and that where those needs are met directly then the payee is not burdened with making them. Payments directly to third parties are considered substitute income. *Id.* ¶ 33. On the other hand, any party making "extra-judicial modification does so at [the person's] peril." *Crow v. Crow*, 622 So.2d 1226, 1231 (Miss.1993).

As Amanda did here, Carolene Franklin "argues that Danny has simultaneously failed to pay alimony and made gratuitous overpayments. That argument is untenable." *Id.* ¶ 35. The trial court awarded Amanda amounts for furnishings and alimony and Caroline's expenses in the amount of $45,575.71. (V. 4: C.P. 512) These items were paid from the proceeds of the Amite County farm. Other post-judgment amounts were also paid through those proceeds again without credit to Robert for amounts he has unquestionably paid. (Red Exhibit Binder: Ex. 31, 32, 35, 37)

At the hearing, Robert claimed the court in equity should give him a credit of $57,715.51. In the judgment granting in part and denying in part Robert's requested relief on the post-judgment motion, the chancellor granted Robert credit against the alimony for the tax refund checks Amanda kept. That amount was $32,587.00. The Court should reverse and either render judgment here or remand with instructions to give Robert equitable credit in the amount of

$25,128.51.

IV. Conclusion

The Court should reverse the chancellor's decision that Robert does not have a contract right to adjust the financial awards to come within the guideline of 30% of his gross before tax salary. Alternatively, the Court should reverse the chancellor's ruling that Robert failed to show a material change in circumstances entitling him to a modification of the alimony and child support awards. The Court should also reverse the chancellor's refusal to rule that some payments are deductible by Robert. And finally, the Court should reverse the chancellor's failure to allow Robert credit for certain payments made on behalf of his daughter and former spouse.

Respectfully submitted,

ROBERT S. CORKERN

By:_____
T. Jackson Lyons, Appellate Counsel to Robert Corkern

Counsel:

T. Jackson Lyons
T. JACKSON LYONS & ASSOCIATES, P.A.
P.O. Box 4690
Jackson, Mississippi 39296
Tel. (601) 969-0731
email appealsinms@bellsouth.net
MSB #[redacted]

CERTIFICATE OF SERVICE AND FILING

The undersigned counsel of record hereby certifies that the above and foregoing Appellant's Principal Brief, together with the required electronic and paper copies, has been filed with the Clerk of the Court by personal deposit of the undersigned into the United States Mail, first-class postage prepaid. A copy has also been served through first-class mail on the following addressees:

Hon. Debbra Halford
Chancery Court Judge for District 4
P.O. Box 575
Meadville, Mississippi 39653

Mr. Mark R. Holmes
Robison & Holmes, PLLC
P.O. Drawer 1128
McComb, Mississippi 39649-1128

SO CERTIFIED, this the 22nd day of March, 2010.

T. Jackson Lyons