IN THE SUPREME COURT OF MISSISSIPPI

NO. 2011-CA-01890

SCT

MARI LYNN HAYS ALEXANDER AND
LON FREDERICK ALEXANDER, II, BY AND
THROUGH HIS CONSERVATOR, MARI
LYNN HAYS ALEXANDER — APPELLANTS

VS.

LON FREDERICK ALEXANDER — APPELLEE

APPEAL FROM THE CHANCERY COURT OF HINDS COUNTY, FIRST JUDICIAL DISTRICT

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

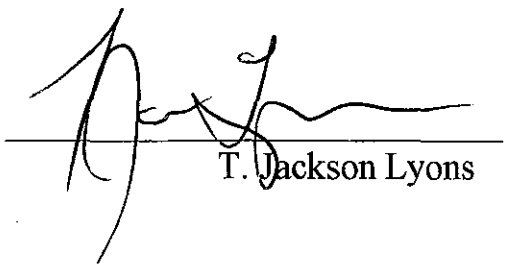
This case is about whether the particular procedure chosen by the plaintiff Mari Lynn Hays – a modification proceeding – and the facts permit the Court to reach the issue of whether it should depart from prior holdings and legislate a new rule that divorced parents of temporarily or permanently disabled adult children have a legal duty to provide continued support. The Appellee Lon Alexander ("Lon") believes the evidence shows that he has provided support to his adult son and therefore the issue is not ripe. Nor, based on prior holdings of the Supreme Court of Mississippi, is a modification proceeding the proper avenue to seek relief.

The issues can be adequately assessed through record review and briefing. Additional judicial effort for oral argument would not likely assist the court in reaching a decision.

CERTIFICATE OF INTERESTED PARTIES

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. Mari Lynn Hays ("Mari Lynn") was the plaintiff-movant in the trial court and is the Appellant here. She resides with the Parties' son in Jackson, Mississippi.
2. Mari Lynn's lawyers are James Bell and Sarah Ann Ellis with the firm Bell & Associates, P.A., in Jackson, Mississippi.
3. Lon Alexander is the Appellee and he resides in Jackson, Mississippi.
4. Lon's appellate counsel is T. Jackson Lyons, practicing from offices in Jackson, Mississippi. Danna O'Brien who practices with the James & O'Brien Family Law Group in Ridgeland, Mississippi represented Lon in the trial court.



T. Jackson Lyons

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ISSUES

Mari Lynn phrases the issues as ones invoking the familiar standard of review for chancellors' rulings: manifest error-substantial evidence. A reading of Mari Lynn's brief, together with the trial court's ruling, shows that what she desires is for the appellate courts of Mississippi to extend, modify, or change prior law relating to whether parents, under certain circumstances, have a legal responsibility of continued "child" support after the child reaches the age of majority.

The question, phrased within the facts of this case, appears to be whether Mississippi courts have the authority to compel parents of children who are temporarily disabled at the time the child reaches the age of majority to continue supporting that child.

Lon believes there are two important issues to address before Mari Lynn's issue, as restated here, can be reached. The first is a procedural matter. Under Mississippi law child support is the right of the child. The Parties' son has not appeared directly to sue his parents for continuing child support. The case was fully litigated as a modification proceeding. The pleading through which Mari Lynn appears as a conservator was filed after the hearing and after the final judgment. So far as appears from this case, Mari Lynn's appointment as "conservator" is a transparent expedient for the purpose of suing Lon, not recovering continued

support from a disabled child's parents.

The question, then, assuming that Mississippi law allows for support of a temporarily disabled child at the time the child reaches the age of majority, is whether a modification proceeding is the proper procedure for bringing a claim against the parents in the name of the child.

The second threshold issue is one that can be characterized as a matter of ripeness. A lawsuit against the parents for child support past the age of majority presumes that the parents are failing to provide support, that is, that they have breached a legal duty. The proof here is that both Lon and Mari Lynn are providing support to their son.

The question is whether the issue of changing or extending Mississippi law to provide post-majority child support for a disabled child should be reached where the proof is clear that both parents are providing post-majority support and Lon has testified that he will continue to do so.

If the court resolves either of these preliminary matters in Lon's favor, Mari Lynn's issue is moot.

STATEMENT OF THE CASE

A. Procedural History

Mari Lynn sued Lon for an irreconcilable differences divorce in August of 2001. [V. 1: C.P. 1] The complaint recited that matters of support, marital property, and the like would be settled by agreement. [V. 1: C.P. 2-3] Evidently things did not go as smoothly as anticipated and a final judgment of divorce, incorporating the agreement, did not materialize until October of 2002. [V. 1: C.P. 27 *et seq.*]

Eight years later Mari Lynn came back to court to request modification of the original decree and citation of Lon for contempt. [V. 1: C.P. 56] In her motion Mari Lynn stated that the Parties' son, Lon Frederick Alexander, II, known as Rick, was both medically ill and also suffered from mental disorders. [V. 1: C.P. 57] Due to the increased medical expenses, Mari Lynn asked for the alimony and child support provisions of their Agreement to be. [V. 1: C.P. 58]

Lon duly answered [V. 1: C.P. 66 *et seq.*] and a hearing was held on April 21, 2011, the Hon. J. Dewayne Thomas presiding. [See transcript, V. 3] Judge Thomas entered a final judgment on June 29, 2011. [V. 1: C.P. 111-21] Substantially all the relief Mari Lynn sought was denied.

After the hearing but before the final order, Mari Lynn sought a conservatorship for Rick. The conservatorship proceeding has not been made a part

of this record. However, there are two orders in the record relating to the conservatorship. After the hearing in this matter, the chancellor entered an order in mid-June, 2011, joining Mari Lynn as plaintiff in a representative capacity. [V. 1: C.P. 109]

The second order relating to the conservatorship was entered *nunc pro tunc* in December of 2011. [V. 1: C.P. 142-43] The chancellor explained in the order that Mari Lynn was in the process of preparing an amended motion for modification, as plaintiff in a representative capacity, at the time the final order was issued at the end of June. The chancellor deemed the amended motion as filed and denied relief to the same extent as the original order.

Following a post-judgment motion, the trial court entered an amended judgment in December of 2011. [V. 2: C.P. 139-40] Mari Lynn timely filed her notice of appeal on December 19, 2011. [V. 2: C.P. 145]

B. Facts

Lon and Mari Lynn were married for nearly sixteen years and they had one child. [V. 1: C.P. 2] The final decree of divorce in 2002 incorporated their "Agreement for Custody and Maintenance of Child and Settlement of Property Rights." Because Mari Lynn sought to modify the alimony provision as a means of having additional support from Lon for Rick's needs, *infra*, some attention to the

Agreement here is necessary.

Child support was set at $1,500.00 per month to continue until Rick reached the age of 21; payments were to begin in November of 2002 when Rick was one month from his fifteenth birthday. [V. 1: C.P. 37] No reduction of this amount was to occur while Rick was in college. [V. 1: C.P. 37] Lon paid monthly child support until Rick was twenty-one, a period of six years and one month, making the total amount paid by Lon for child support of $109,500.00. While the amount Lon had paid for Rick's brief attendance at Millsaps College is not delineated in the record, Mari Lynn did not disagree with Lon's lawyer's calculation of total child support at the time Rick reached the age of twenty-one to have been about $126,000. [V. 3: T. 55] Lon was to pay for Rick's medical insurance and the Parties were to share equally the cost of deductibles and co-pays. [V. 1: C.P. 37]

In addition to child support, the Agreement provided for equalizing the financial accounts. Lon was to immediately pay $40,000.00, and also "roll over" to Mari Lynn an investment account in the amount of $75,000.00. [V. 1: C.P. 40-41] As lump sum alimony, Lon was to pay Mari Lynn $100,000.00, in four equal installments commencing April 1, 2003. [V. 1: C.P. 41]

The Agreement called for a form of periodic payment from Lon to Mari Lynn that was named "installment alimony." The monthly "installments" were to begin in

November of 2002 and continue for 108 consecutive months, or nine calendar years, making the last payment due in October of 2011. [V. 1: C.P. 42] The monthly amount was $9,500.00. The Agreement provided that the installments would terminate on Mari Lynn's death, but survive Lon's as a charge on his estate. [V. 1: C.P. 42]

The Agreement further provided that the "installment alimony" was "non-modifiable. Such payment shall be deductible by Lon and includable by Mari Lynn for state and individual income tax purposes." [V. 1: C.P. 42] Absent Mari Lynn's death prior to the 108th payment, the total paid by Lon under the "installment alimony" provision would amount to $1,026,000.

Mari Lynn admitted that at the time of the divorce she was represented by counsel and was aware the alimony award could not be modified and that it would continue even if she remarried. [V. 3: T. 34] Lon agreed that it had always been his understanding that if he paid the amounts due under the provisions that the alimony would one day stop. [V. 3: T. 91] Lon allowed that some months it was difficult to come up with $11,000 for child support and alimony, but that he never questioned it because it would one day end. [V. 3: T. 91]

At the time of the hearing, the Parties agreed that Lon was in arrears but were unable to agree on the amount. [V. 3: T. 126] The chancellor ruled that Lon was in

arrears in the amount of $59,000.00, and neither party has appealed this finding. [V. 1: C.P. 120] Judge Thomas' calculation also means that Lon did pay over $900,000.00 between November of 2002 and ending with partial payments in October and November of 2010. [V. 1: C.P. 118-19] Mari Lynn admitted that Lon had paid over $900,000.00. [V. 3: T. 55]

All told, since the Parties' divorce in October, 2002, Lon has paid to Mari Lynn for her support and Rick's over $1,140,000.00.

Both Lon and Mari Lynn are medical professionals; Lon is a physician [V. 3: T. 84] and Mari Lynn is a nurse. [V. 3: T. 3] At the time of the hearing, Mari Lynn was working part time at the University of Mississippi Medical Center ("UMC") and her monthly earnings from nursing prior to the hearing were $3,082.54. [V. 3: T. 3; Ex. 4, Rule 8.05 Statement] Rick receives Social Security Disability Income of $449.00 per month. [V. 3: T. 25; Ex. 4]

As part of the divorce agreement, Mari Lynn retained the former marital domicile that she valued at about $350,000, with an equity of redemption of about half that amount. [V. 3: T. 38; Ex. 4] Mari Lynn said she had an investment account worth about $250,000, plus a cash account with a securities broker in the amount of $38,000.00. [V. 3: T. 38, 41] Further examination revealed, however, that a tax-advantaged IRA was in the amount of $128,000, while a BBA represented about

$130,000. [V. 3: T. 80]

The arithmetic shows that of the $1.14 million that Lon has paid in support for Mari Lynn and Rick, Mari Lynn has financial accounts worth about $296,000, and equity in her home of about $175,000. Subtracting the nearly $300,000 in financial accounts, leaves about $850,000 that appears to have gone toward living expenses for Rick and Mari Lynn. That sum divided by the eight and a half years from the date of the Parties' divorce in October, 2002, to the hearing on the motion to modify in April of 2011, is an annualized amount of about $100,000.

At the time of the April, 2011, hearing, Mari Lynn and Rick had monthly expenses of about $8,135. [V. 3: T. 52] The arithmetic works out to annual figure of $97,620.00.

Rick did not appear personally at the hearing. Mari Lynn, Lon, and Rick's psychotherapist, John Allin, described his health history and it is somewhat involved. Rick was born with bladder exstrophy, epispadias, and bilateral inguinal hernias. In lay terms, he was born with his bladder on the outside of his body and his genitals were split down the middle. His hips were non-proximal. A number of surgeries over the years reconstructed his bladder, genitalia, and he is able to walk. [V. 3: T. 4-5]

Over the course of his childhood, Rick has developed other psychological and

physical disorders. Of his care providers, only John Allin, PhD., appeared at the hearing. Allin is a clinical psychologist in private practice who sees psychotherapy patients. [V. 3: T. 56-57] Rick was referred to him when Rick was a little boy by Rick's psychiatrist, Kurt Buechler, M.D. Allin has diagnosed Rick with several disorders, including Asperger's syndrome, obsessive-compulsive disorder ("OCD"), anxiety, attention deficit disorder, and, periodically, depression related to his other difficulties. [V. 3: T. 57]

Allin defined Rick's Asperger's as a "high-functioning" form of autism. [V. 3: T. 57] Rick's intelligence is intact but he is unable to pick up on social cues as persons without the disorder do. [V. 3: T. 58] As for the OCD, when Rick was younger it manifested as a difficulty writing – Rick frequently would erase what he had written. Today, the main symptom is Rick's showering at length to ensure he is clean. [V. 3: T. 59] He also ruminates often about what he has said to make sure that he did not offend. [V. 3: T. 59]

Complicating Rick's situation is that the dialysis to treat his renal disease cleanses the medications from his blood that are used to treat his other problems. [V. 3: T. 60] The renal disease has contributed to his anxiety and depression. [V. 3: T. 60]

Allin opined that when Rick went to college he was academically prepared

but not socially and was overwhelmed by the new environment. [V. 3: T. 61] Allin felt that Rick is now capable of finishing college, but with assistance. For example, Allin thought it would not be a good idea for Rick to attempt living independently. [V. 3: T. 62] Allin believed that managing his medical issues would be difficult for Rick and that Rick still lacked social maturity and independent living skills. [V. 3: T. 62-63]

Allin offered a plan prepared by the psychiatrist Buechler as a reasonable means to Rick's attaining the skills necessary to live autonomously. [V. 3: T. 65; Ex. 7] Characterizing the plan as one that would take years rather than months, Allin focused on Rick's first identifying a career appropriate to his medical and psychiatric issues, then regaining a driver's license for personal mobility, and to progressively work toward longer and longer periods of independent living. [V. 3: T. 65-66; Ex. 7]

In response to questions from the court, Allin agreed that the implications of his testimony were that Rick would need a parent or someone to offer some supervision and make sure Rick was where he should be and did what he needed to do to remain healthy. [V. 3: T. 70]

In mid-2005, Rick learned that he had end-stage renal disease. According to Mari Lynn, family members were tested for genetic matches for transplant purposes.

She testified, "Everybody in the family was tested. He was fortunate enough to get a transplant. He kept that for two years. And it did eventually fail. So now he is on [hemo-dialysis] three days a week for four hours at a time." [V. 3: T. 6]

Lon's wife, Jill, turned out to be a match and became the donor to Rick. [V. 3: T. 93] Lon agreed that he and Mari Lynn also wanted to donate, but he was rejected due to his weight. [V. 3: T. 93] With some emotion, Lon recounted the procedure at the University of Alabama: "The real truth is this, that organ was given. . . . At no time did [Mari Lynn] even step two doors down and thank [Jill]. It was just a nightmare. There was tension. And frankly, I was caught in the middle. I had my wife in one operating room. I had my son in the other. Everyone seemed angry at me." [V. 3: T. 120]

Mari Lynn agreed that she had never said the words "thank you." [V. 3: T. 126] However, she never prevented Rick from thanking Jill saying, "I didn't write, you know, a letter for him or anything." [V. 3: T. 125] Mari Lynn believed Rick's failure to thank Jill was a result of his Asperger's. [V. 3: T. 125]

Though Rick matriculated in 2006 at Millsaps College after high school, his renal disease and subsequent kidney transplant failure meant that he was not able to complete college. [V. 3: T. 17] Rick developed a seizure disorder in 2007 when he was twenty. A neurologist has treated this disorder and, at the time of the hearing,

Rick's last seizure was nearly a year past. The important point was that Rick's driver's license was suspended or taken away, but that when he reached a year out from the last seizure he could apply again for his license. [V. 3: T. 11]

From Lon's perspective, Rick is the "smartest thing" he has ever seen. [V. 3: T. 93] Lon related that Rick was not epileptic, and that Rick had had four seizures. [V. 3: T. 94] Lon agreed with Allin and Mari Lynn that Rick was not self-sufficient at the time of the hearing. [V. 3: T. 116-17] Although Rick has Asperger's, Lon denied that it was what one thinks of as classically autistic. [V. 3: T. 118] Like Bill Gates who also has Asperger's, Lon observed that Rick's intellect was intact, that Rick had captained the high school quiz bowl, had won the geography bee, and had been accepted by Millsaps College. [V. 3: T. 118]

In the fall of 2010, Rick enrolled at Holmes Community College and did well, ending the semester with a 4.0 average. [V. 3: T. 16] According to Mari Lynn, Rick did not return the following Spring semester because fees were still owed from the previous semester and he could not register. [V. 3: T. 16] Lon, under the terms of the divorce settlement agreement, was required to pay the fees. [V. 3: T. 16] The amount of the fees in question was $679. [V. 3: T. 46]

Mari Lynn complimented Lon for always having done more for Rick than the bare minimum required by the Agreement. For example, Lon was not obligated to

but did buy Rick a car and paid for the insurance. [V. 3: T. 35-36]

Lon and Jill married in 2005 and they have a young son who was born in December of 2010. [V. 3: T. 82] Shortly after Jill's donation of the kidney to Rick, they learned she was pregnant. [V. 3: T. 98] The transplant and pregnancy compromised her remaining kidney's function. [V. 3: T. 98] Regrettably, this child, too, is afflicted with congenital difficulties. He was born two months premature and has been hospitalized for surgical treatment of the hemangiomas on his body. [V. 3: T. 98]

In addition, during the delivery Jill experienced heart and kidney failure. [V. 3: T. 99] The medical bills for Jill and their son amounted to several hundred thousand dollars. [V. 3: T. 99] At the time of the hearing, Lon said it was not yet clear how Blue Cross-Blue Shield would handle the bills. [V. 3: T. 99]

Lon's Rule 8.05 financial statement, Exhibit 8, shows gross monthly pay of $12,916.66, with a net income of $6,444.86. According to Lon, these numbers came from bank statements and conversations with his accountant. [V. 3: T. 83] His monthly living expenses are $27,234.78. [Ex. 8] The 8.05 statement also reveals that Lon has $100,000 in credit card debt, a mortgage debt of $705,566, an IRS debt of $29,616, car lease of about $20,000, and a debt to CMMC of over $50,000. [Ex. 8] All told, Lon has liabilities of over $900,000.

Lon noted that on his Rule 8.05 financial statement that his listed monthly expenses did not include the IRS or credit cards. The difference between his listed monthly expenses of $27,000 and income of $6,444 was that he was not paying the expenses: he was behind on the mortgage, car leases, the IRS debt, the back office rent; he is also not answering the phone to avoid bill collectors. [V. 3: T. 96-97]

Readers are warned that Lon's financial situation, and how he arrived there, is as involved a story as Rick's medical issues. In 2008, Lon returned to Jackson after having been recruited by Central Mississippi Medical Center ("CMMC"). [V. 3: T. 84] Lon and CMMC agreed to a financial arrangement is known as an income guarantee where CMMC fronted him money with the expectation that the practice he started in 2008 would be the same as when he left in 2003. [V. 3: T. 84]

In return, Lon owed CMMC three years of service. Lon opined that both he and CMMC expected his practice to flourish as it had at the beginning of the decade. [V. 3: T. 85] Unfortunately for Lon and CMMC, their expectations were disappointed. Lon reported that he is currently working as a physician without an office. After opening his office at CMMC in October of 2008, by March of 2011 he had laid off his two employees and vacated the office at CMMC prior to being evicted. [V. 3: T. 85-86]

As part of his recruitment agreement, CMMC was to abate rent for the office

for one year, after which time Lon would be charged rent. As Lon put it, when the time came for him to pay, he informed CMMC that he could not pay rent, and CMMC told him to leave. [V. 3: T. 86] At the time of the hearing, Lon was negotiating with CMMC on a claim of $54,000 in rent arrearage. [V. 3: T. 86]

Lon said flatly that he was not sure why his practice at CMMC had failed. [V. 3: T. 85] He noted that CMMC was not the same hospital it had been when he left in 2003, and that other aspects of South Jackson, such as the large Metro Center Mall, appeared to be withering. [V. 3: T. 85] Lon explained that he had done stints of 7 nights on call, and taken more call in order to generate business. [V. 3: T. 85] By the time of the hearing, his only regular source of income was "moonlighting" at Forrest General Hospital in Hattiesburg. [V. 3: T. 85]

Lon's tax return from 2009, the most recent year completed at the time of the hearing, showed that Lon's medical practice had lost almost $26,000 that year. [Ex. 9] His practice operated as a single physician professional limited liability company. [V. 3: T. 88] He allowed that his 2010 return would be more dismal than the 2009 return. [V. 3: T. 88] One of the reasons for this is that, in terms of the forgiveness of the practice guarantees, Lon gets a form 1099 from CMMC for $200,000 to $300,000 of income; Lon was unsure of the accounting outcome, but ventured that it would not "be pretty." [V. 3: T. 90]

The income guarantee, the failure of Lon's practice to produce sufficient income, along with Lon's obligations under the 2002 divorce Agreement, combined to produce a debt to the United States Treasury. Lon said he was trying to pay off an original debt of about $50,000. [V. 3: T. 107] The remaining amount of the debt was $29,616.61. [V. 3: T. 108; Ex. 10]

Lon has received at least one "moratorium" from the Internal Revenue Service and has entered into the $5,000 per month installment plan. [V. 3: T. 88] He has also received two notices of an intent to levy and, at the time of the April hearing, his last payment to the IRS was in February, 2011. [V. 3: T. 88-89]

Lon was asked how he had been able to make a $9,500 monthly payment to Mari Lynn, a $5,000 monthly payment to the IRS, and also maintain himself, his wife, and young child. He bluntly remarked that he paid Mari Lynn preferentially, with "the IRS [losing] most months. So [the IRS] is not happy with me." [V. 3: T. 89] Lon said he liquidated assets in 2007 and 2008 to pay the divorce Agreement's obligations. [V. 3: T. 91] He elaborated: since 2007 retirement accounts have been liquidated, he has no savings left, he has taken on $100,000 in credit card debt, and borrowed $70,000 from his whole life insurance policy. [V. 3: T. 92] Lon noted that his only remaining financial asset was his checking account with about $10,000 in it. [V. 3: T. 92]

To recap the financial decline in his medical career, Lon referred to the Rule 8.05 statement from the time of the Parties' divorce in 2002. He was then earning $42,167 per month. [V. 3: T. 100] In 2003 he left Jackson and went to Meridian's Rush Foundation Hospital where he went from a private practice paying hundreds of thousands of dollars and malpractice premiums to being a hospital employee. [V. 3: T. 95, 100] While in Meridian, the hospital paid his salary and also health insurance so he did not have to share the deductibles and co-pays with Mari Lynn. [V. 3: T. 100] He said he had three "binders" full of medical bills for Rick that were never presented for splitting with Mari Lynn. [V. 3: T. 95]

In 2006, Lon left Meridian and went to a hospital in Columbus. [V. 3: T. 100] The arrangement there was similar to that at CMMC: an income guarantee where the hospital fronts expenses and whatever is not spent is retained as income and the physician owes the hospital three years of work. [V. 3: T. 111] Lon acknowledged that he never completed the Columbus commitment and that was another contingent liability, though the hospital has not pursued him. [V. 3: T. 111]

Lon estimated his income from moonlighting and at CMMC to have been between $220,000 and $240,000 during the year prior to his deposition before the hearing. [V. 3: T. 110] Statements from Lon's personal checking account were admitted as composite Exhibit 12. While Mari Lynn's lawyer prepared summaries

of the deposits from calendar 2009 and 2010, a similar summary of debits was not prepared. While someone will no doubt have the unrewarding job of checking these numbers, from the documents it appears that the account had deposits from December 29, 2008, through February 24, 2011, of $1,460,266. [Ex. 12]

Debits from the account over the same period amounted to $1,444,506. [Ex. 12] The difference between the deposits and debits is $15,760. This sum does not match the end of February, 2011, balance of $24,051, from the bank statements because the account period represented by these documents began with a balance of $8,292. [Ex. 12]

As Lon put it, his current net worth is less than zero. [V. 3: T. 100] The house in Jackson, which he bought in December of 2008 for $800,000, is now worth about $700,000, which is the amount he still owed at the time of the hearing. [V. 3: T. 100, 105] This leaves no equity in the home as an asset. [V. 3: T. 100] According to Lon, he "looted" his other assets to pay his debts, including the monthly $9,500 to Mari Lynn. [V. 3: T. 100-01]

At the time of the hearing, Lon was looking for gainful employment, including expanding his role at Hattiesburg's Forrest General, to support the balance of the payments due under the Agreement, to repay the IRS, pay the back rent to CMMC, and pay off his $100,000 credit card debt. [V. 3: T. 101-02]

At the time of the hearing Lon was paying $950 per month for Rick's private Blue Cross-Blue Shield health insurance policy. [V. 3: T. 96, 106-07] As Lon acknowledged, there had been times of largesse in his medical career, when he had money and did not split the medical bills with Mari Lynn. He also did not split the car provided for Rick, insurance for it, or clothes for Rick. [V. 3: T. 102] Presently, Lon opined that he could not restart child support payments in the original amount of $1,500 per month because he lacked the resources. [V. 3: T. 101]

Turning to the chancellor's decision that is challenged on appeal, the chancellor pointed out that even if Rick's renal failure was not foreseeable at the time of divorce, causing a material change in circumstances, the Parties had reached an arms length agreement regarding support. The trial court deemed the support provision to be adequate and sufficient and that there was no allegation that the agreement was a result of duress, fraud, or overreaching. [V. 1: C.P. 114-15]

As for modifying the alimony provision of the Agreement, the chancellor noted that the policy underlying Mississippi modification law is that once an agreement has been reached and also approved by a court, the agreement is to be enforced absent the circumstances ordinarily vitiating contracts, e.g., fraud, then the courts of Mississippi are bound to take a dim view of efforts to modify the divorce settlement agreement "'just as [the courts] do when persons seek relief from

improvident contracts [of other kinds].'" [V. 1: C.P. 114, *quoting Bell v. Bell*, 572 So.2d 841, 844 (Miss. 1990)]

Chancellor Thomas concluded that since the Parties had reached an agreement that was entered into knowingly and voluntarily, it would be enforced as written. Alimony would terminate at the end of 108 months and would not be modified. [V. 1: C.P. 113-15]

As for post-majority child support, the chancellor began with the statutory and common law rules regarding a child's emancipation and the legal duty of a parent to support the child. He ruled that there was no legal duty to support a child having attained the age of twenty-one. [V. 1: C.P. 115]

With respect to children who are disabled in some manner upon reaching the age of twenty-one, the chancellor observed that some states have allowed for continued parental support either through legislation or by court ruling. [V. 1: C.P. 115-16] The chancellor observed that Mississippi has no legislation in this area, nor has the Supreme Court of Mississippi ever expressly authorized courts in Mississippi to award post-majority support in instances of disability. [V. 1: C.P. 116]

In rejecting Mari Lynn's request for modification of alimony or child support, the trial court ruled that a modification proceeding was not the proper means to that

end. Chancellor Thomas expressed a "sincere hope" that either the Mississippi Legislature or the Supreme Court of Mississippi would address continued support of a disabled adult child. [V. 1: C.P. 117]

The chancellor's contempt rulings were not appealed from, but for completeness' sake, the trial court ruled that Lon was not in contempt on any of the bases alleged by Mari Lynn. [V. 1: C.P. 118-19]

ARGUMENT

I. The Chancellor correctly ruled that the Parties' Agreement calling for monthly "installment alimony" was enforceable and not modifiable.

A. Standard of Review

In reviewing chancery court judgments, Mississippi appellate courts use "a deferential standard of review in considering challenges to the findings of a chancellor. Pursuant to this standard of review, we will not reverse a chancellor's findings unless they are manifestly or clearly erroneous or unless an erroneous legal standard was applied. (citations omitted)" *Parker v. Parker*, 929 So.2d 940, 943 ¶ 8 (Miss. 2005). While the appellate courts have, over the years, used a number of descriptions for this standard, such as "narrow," "limited," and the like, absent legal error or clear error in finding facts, Mississippi's appellate courts will not merely substitute their judgment for the chancellor having heard the parties and witnesses.

B. "Alimony" of whatever kind cannot be used as a "back door" means of providing for child support.

Leaving aside for the moment the nature and terms of the Parties' divorce settlement Agreement, Mari Lynn asks the court to reverse and remand for the purpose of having Judge Thomas increase alimony payments in order to provide additional child support. (See Blue Brief at 18-21) There are some obvious logical problems with this position. The first is practical: the chancellor concluded that Lon could not be held in contempt on alimony arrearages because his monthly income was significantly less than the amount of alimony he is already obliged to pay.

Mari Lynn appears to argue that the trial court erred in this conclusion because "Dr. Alexander has voluntarily worsened his financial situation." (Blue Brief at 20) Generally, in a case like this a former spouse saying that the other party has "worsened" their financial status means there is some evidence suggesting that a party has deliberately stopped making money in order to vex the other party. There is not a scintilla of evidence in the record to support this assertion and no record fact is cited.

To the contrary, the collapse of his practice at CMMC appears to have been quite a surprise to Lon. He certainly spent money in the first year or so of his three-year commitment to CMMC as though the practice would not only become self-

sustaining but lucrative.

If anything, the record reflects that Lon "voluntarily worsened" his financial picture in order to benefit Mari Lynn and Rick. There is no evidence contradicting Lon's statements that he has no savings left, no retirement accounts, large credit card debt, and a $70,000 loan against his life insurance policy. Nor is there any doubt that in the years between 2002 and 2011, Lon paid support for Mari Lynn and Rick in the amount of $1.14 million.

Mari Lynn is correct that, in retrospect, Lon would have been better off not buying an expense home in Jackson or leasing expensive automobiles. (Blue brief at 20) The point is that Lon could not have foreseen that he could not merely pick up in 2008 the lucrative practice he left in 2003. And, obviously, he had large income guarantees until he could build the practice again. Unfortunately, that result never happened.

As some evidence that, even though "[Lon's] present financial position may be precarious, [he nevertheless] has the funds to purchase what he chooses and to pay bills he chooses to pay," Mari Lynn asserts that Lon has an earning capacity of some $200,000 per year. She cites to the transcript at 110. (Blue brief at 21) The record citation is not to Lon's or anyone else's opinion of his earning capacity. Instead Lon was testifying about what he had made in the year prior to his

deposition, roughly 2010. About half the amount came from CMMC and the other half from moonlighting at another hospital.

But the main problem with the argument is not "lay" logic of a practical nature, but legal logic. The purpose of alimony "is not punitive, but instead, is designed to assist the spouse in meeting his or her reasonable needs while transitioning into a new life." *Holley v. Holley*, 892 So.2d 183, 185 ¶ 7 (Miss. 2004), *citing Tilley v. Tilley*, 610 So.2d 348, 354 (Miss.1992). The "new life" referred to is generally life without being married to the payor.

Distinguished from alimony payments, the purpose of child support is for the care, support and maintenance of the child. See, Miss. Code Ann. § 43-19-101 (legislatively created presumptions of percent of adjusted gross income for child support purposes); Miss. Code Ann. § 93-5-23; Miss. Code Ann. § 93-11-65 ("In addition to providing for support and education, the order shall also provide for the support of the child prior to the making of the order for child support, and such other expenses as the court may deem proper"); *Moulds v. Bradley*, 791 So.2d 220, 226 ¶ 15 (Miss. 2001)(*en banc*)(even in cases with wealthy parents, purpose of child support remains the support of the child).

The general standards courts use in determining amounts of alimony and child support are also distinct. Generally, under Mississippi law a court awards alimony

in an amount that provides the recipient a reasonable allowance that is commensurate with the standard of living to which the recipient had become accustomed during the marriage measured against the recipient's own resources and the payor's ability to pay. *Johnson v. Johnson*, 877 So.2d 485, 495-96 ¶¶ 43-45 (Miss.App. 2003). The factors enunciated in *Armstrong v. Armstrong*, 618 So.2d 1278, 1280-81 (Miss.1993), are a helpful separation of the general considerations relevant to balancing a former spouse's standard of living with the other former spouse's ability to pay.

Child support awards are now largely creatures of statute. Miss. Code Ann. § 43-19-101, and its companion section, Miss. Code Ann. § 43-19-103, as noted *supra* have only attention to the needs – including special needs – of the child and the income of the parents. The "need" of a former spouse has no bearing on the calculation.

Research has revealed no case in which a Mississippi appellate court has allowed alimony to be increased in lieu of, or in place of, child support. Without some authority found in Mississippi's positive law, the court should decline Mari Lynn's request to increase child support through the back door of alimony by ordering Lon to pay an even larger amount than he can currently pay. *See*, *Pittman v. Pittman*, 909 So.2d 148, 153 ¶ 11 (Miss.App. 2005)(award of "child support" in

lump sum for purpose of buying car reversed; no authority permitting lump sum award of child support).

In support of her argument that the alimony provision in the Parties' settlement Agreement is modifiable, Mari Lynn claims that the provision is ambiguous because it creates a "hybrid" award, combining elements of periodic and lump sum alimony. Therefore, the award is construed as periodic, rather than lump sum. (Blue brief at 18) Mari Lynn is correct that the "installment alimony" provision is a hybrid award. She is not correct in asserting that this means the provision is *per se* ambiguous and therefore must be interpreted to be periodic alimony.

Mari Lynn admitted during the hearing that it was not ambiguous: one hundred eight payments of $9,500 was the total of the installments and the provision was not modifiable. Mari Lynn appears to be unaware that Mississippi law has, in recent years, granted parties some freedom in crafting awards to meet their own particular needs. Those awards are often, as here, hybrids of the conventional awards.

Some basics first: settlement agreements between divorcing spouses are contracts like any others and subject to the same law regarding validity, enforceability, and interpretation. *West v. West*, 891 So.2d 203, 210-11 (Miss. 2002). The chancellor in this case was correct when he noted that divorce settlement

agreements, like other contracts, are not ordinarily modified or relief provided for a divorcing party's improvident deal. *West*, 891 So.2d at 211. Also, absent circumstances going to the validity of the assent, i.e., fraud, coercion, overreaching, "parties should be allowed broad latitude." *Speed v. Speed*, 757 So.2d 221, 224-25 (Miss. 2000).

Mari Lynn is correct in stating the four types of alimony recognized in Mississippi: periodic, lump sum, rehabilitative, and reimbursement. (Blue brief at 18) She is again correct in her characterization of periodic alimony being paid in usually monthly installments and modifiable in the event of a material change in circumstances. Also correct is the description of lump sum alimony, often a kind of property division, being a fixed sum that cannot be modified. (Blue brief at 18)

However, there is a difference between the awards available to a chancellor if the decision is the court's, and the awards available to parties who wish to modify conventional awards for reasons they deem reasonable. It is established law in Mississippi that parties can, to a degree, mold conventional awards to suit themselves: "Absent 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).

Cases such as *McDonald v. McDonald*, 683 So.2d 929 (Miss. 1996), explore

how parties may create hybrid awards to meet their needs, and describe the limits on that power. Justice Prather, speaking for the Court, observed that divorcing couples had "a limited freedom to contract for non-modifiable alimony payments which differ in some respects from traditional lump sum alimony." *Id.* at 932.

The *McDonald* Court warned that the "limited freedom" to alter aspects of domestic law was an *ad hoc* balance between not unduly restricting parties' freedom to knowingly reach an agreement best suiting their needs, and the law's adherence to traditional characteristics of divorce awards. *Id.* Justice Prather stated the obvious: lawyers devising an agreement with provisions not corresponding to traditional awards may invite litigation "and frustrate the purpose of the agreement." *Id.*

In answering the question of whether the McDonalds' agreement provided lump sum or periodic alimony, the Court looked for assistance to its earlier decision in *East v. East*, 493 So.2d 927 (Miss. 1986). The Easts' agreement provided a periodic amount certain that would not terminate upon the payee's remarriage nor cease at the payor's death, but would constitute a charge on the payor's estate.

Again, lump sum alimony is a fixed and certain sum that may be paid in installments like periodic alimony but remains a fixed unmodifiable liability and does not cease on the payor's death. Periodic alimony is a sum paid periodically that

terminates upon the recipient's remarriage or the payor's death and may be modified if the parties' circumstances materially change. *McDonald*, 683 So.2d at 931. Notably absent from the Easts' agreement was what one might have assumed to be the *sine qua non* of lump sum alimony, to wit, the lump sum.

The *East* Court nevertheless held that the periodic payments were lump sum alimony because the agreement did not allow Mrs. East to seek modification and increase the periodic payment, a core attribute of periodic alimony. In *McDonald*, as in *East*, the Supreme Court looked at how the parties' agreements dealt with the characteristics of the recognized types of alimony. Generally, *McDonald* teaches that courts should examine the financial provision at issue and sort through the language to identify the basic characteristics of the contract award compared to the fundamental characteristics of the traditional awards. The conventional award the provision most closely resembles will be use to determine the issue between the parties.

In this case, the "installment alimony" was an amount certain, $9,500, to be paid monthly. This may be a characteristic of either lump sum alimony paid in installments or regular periodic alimony. The provision stated that it would be taxable to Mari Lynn and deductible to Lon. The tax consequences are a characteristic of periodic alimony. Lump sum alimony is not usually deductible to

the payor and income to the recipient. 27 U.S.C. § 71(b)(1)(D) ("alimony" includable in gross income means any payment if "there is no liability to make any such payment for any period after the death of the payee . . . and there is no liability to make any payment . . . after the death of the payee . . ..")

The provision mandated one hundred eight payments of $9,500, which could not be modified. Periodic alimony is continuing and may be modified and terminated, a characteristic not present here. Lump sum alimony does, notwithstanding *East*, usually have a lump sum, in this case that sum is $1,026,000.

The provision at issue here also called for the obligation to survive Lon's death, and become a charge on his estate – at least to the extent that life insurance did not cover the balance. Again, this is a characteristic of lump sum alimony. The provision does not mention Mari Lynn's remarriage, but clearly contemplates that only her death would cause the payments to terminate early. Again, periodic alimony terminates upon the recipient's remarriage, a characteristic not present here. However, termination on the recipient's death is characteristic of periodic alimony.

In sum, the only characteristics the provision in the Parties' Agreement shares with periodic alimony are the payments' periodicity (though that characteristic is shared with lump sum alimony paid in installments), tax treatment, and termination on Mari Lynn's death. The conventional award characteristics shared with lump

sum alimony are: (1) periodic payments of a sum certain; (2) the payments are not modifiable; (3) obligation to survive Lon's death and become a charge on his estate; and (4) the obligation does not terminate upon Mari Lynn's remarriage.

The core attribute of periodic alimony is that it is "permanent" and continues indefinitely but may be modified up or down or even terminated, depending on changes in the parties' circumstances. None of these features are present in the Parties' settlement Agreement.

While Lon urges the court to hold that the hybrid award in this case is best characterized as lump sum alimony, there is reason to inquire whether it matters ultimately what label is attached to the provision. If the court holds that the agreement will be enforced as written – as the chancellor concluded – since there is no evidence that Mari Lynn's assent to it was coerced or obtained fraudulently, does it matter whether the court calls it "periodic alimony" that cannot be modified, or "lump sum" alimony that terminates early only on Mari Lynn's death?

The Court of Appeals was confronted with this issue in *Elliott v. Rogers*, 775 So.2d 1285 (Miss.App. 2000)(*en banc*)(cert. den. Jan. 25, 2001). The disputed provision in the divorcing parties' contract in that case read: "Husband shall pay to Wife . . . the sum of $4,000 per month, unless Wife shall die or remarry. . . . Said payments shall be deductible to Husband and taxable to Wife. In the event of

Husband's death . . . Husband's heirs and representatives shall be bound to make said payments until the earlier of Wife's death, remarriage or the expiration of said 120 month period." *Id.* at 1287-88, ¶ 9.

Having just been through this exercise, readers will recognize aspects of both lump sum and periodic alimony present here. As here, the parties agreed on a sum certain payable for a specific number of months. The tax consequences suggested periodic alimony, while the consequences upon the payor's death argued for lump sum treatment. The chancellor ruled that the provision was periodic alimony.

Speaking for the Court, Judge Southwick called this conclusion into question. "[I]f this is the alimony that is justified because of the need for support, then the 'parties cannot by contract deprive, and it is doubtful if any court has the authority to deprive itself of the future authority to modify ordinary periodic alimony, or make it continue beyond the remarriage of the wife or the death of the husband.'" *Id.* at 1288 ¶ 13, *quoting East*, 493 So.2d at 931.

Judge Southwick then pivoted and observed that deciding what to call the provision at issue could be described as an "exercise in labeling." As noted *supra*, the Supreme Court has attempted to avoid mere "labeling" by parsing the language of the parties' agreement in order to identify what core attributes the provision shares with conventional awards. But, as in *Elliott*, some payment provisions may

be "incongruous with any of the . . . recognized categories. This makes relevant whether labeling is even necessary when represented parties have entered an agreement as to alimony. Looking at the issue from a different point in time, should a chancellor refuse to approve an alimony agreement that cannot be fitted into one of the three recognized categories?" *Id.* at 1288 ¶ 14.

Noting that the precedents allowed parties to go further in devising financial arrangements than a chancellor has authority to impose, the *Elliott* Court reasoned that "[e]ven though the . . . precedents require us to look beyond the language of the agreement, we note . . . another and equally strong equity. That is the desire to enforce the agreement of the parties reached at the time of the divorce. The problem with labels may well have arisen from the fact that able counsel were trying to accomplish a variety of tasks with this part of the agreement." *Elliott*, 775 So.2d at 1289 ¶ 18. The Court of Appeals declined to reverse the chancellor because to do so might unravel the bargain struck by the parties.

Judge Southwick concluded with the observation that "whatever equities might allow a modification, none is shown here. We conclude that the payments in this case, agreed as to amount and duration and which do not neatly fit within any alimony category, are within the broad latitude that divorcing couples have to resolve their affairs." *Id.* at 1289-90 ¶ 19.

The same may be said here. The Parties made careful plans for Mari Lynn's support. And at this time, she is the only one of the former marital partners who may be said to have any assets related to or deriving from the marital assets of a marital partnership that is now a decade dead. The court should affirm the Chancellor's decision that the Parties' agreement must be enforced as written.

II. This is not a proper case to decide whether Mississippi's appellate courts should legislate a legal duty for parents to support children who are temporarily disabled when the child reaches the age of majority.

A. There is no justiciable controversy

While Mari Lynn attempts to shape her argument for adult child support around the familiar manifest error-substantial evidence standard of review, it is clear that Mari Lynn is asking for the court to extend, modify, or change Mississippi law. For example, in the blue brief at 14 Mari Lynn posits that Mississippi precedent exists "for a parent to support an adult disabled child, yet the duty runs from parent to child." On the next page, Mari Lynn states that the Supreme Court of Mississippi has "confirmed that there is a strong moral duty to continue child support post-minority for an adult disabled child, [it has] not rule[d] on whether there was (sic) a legal duty."

This apparent confusion is a result of the fact that no decision from

Mississippi's appellate courts has ever had a proper occasion on which to reach the question to which Mari Lynn seeks an answer.

Nor is this case an appropriate vehicle to explore whether Mississippi should recognize a legal duty for parents to support a temporarily disabled child past the child's twenty-first birthday. The simple answer is that the proof incontrovertibly shows that both Rick's parents have supported him well beyond his twenty-first birthday.

Since Rick reached the age of 21, Lon has paid the college expenses, albeit under order to do so. Lon pays $950 each month for crucial medical insurance. Lon has supplied Rick a car and paid the insurance for it. Neither the price paid for the car nor the amount of the insurance paid by Lon are in the record. But for a young man whose first steps toward autonomy included regaining his driver's license, the car and its expenses held a value beyond mere dollars.

Mari Lynn's Rule 8.05 statement confirms her financial contributions to Rick's well being. The record is replete with Lon's past contributions that have allowed Mari Lynn and Rick to live a classically privileged American middle class lifestyle.

Unfortunately it must be said that the only apparent reason this case has continued past the discovery of Lon's financial impairments is a desire on Mari

Lynn's part for Lon to contribute more. It is clear from the record of Lon's finances that even if a court ordered him to pay child support he could not be held in contempt for failing to obey the order for the same reasons the trial court was unable to hold him in contempt here: an inability to pay.

Mari Lynn posits that the "crux of the lawsuit . . . is [Lon's] failure to provide sufficient funds to cover Rick's needs." (Blue brief at 14) There is ample evidence of Rick's multiple needs. But Mari Lynn has offered no evidence of the quantum of Rick's needs, or the amount of a shortfall that, presumably, Lon and Mari Lynn would work to see covered.

Why Mari Lynn seeks a sort of pyrrhic victory is best known to her. But without some proof of the failure or refusal on Lon's or her part to support Rick, there is no obvious justiciable issue. As the Court of Appeals has stated, "Distinct from the typical thresholds of personal and subject matter jurisdiction, claims must present 'controversies that are definite and concrete, that touch the relations of real parties having antagonistic interests.'" *Swaney v. Swaney*, 962 So.2d 105, 107 ¶ 8 (Miss.App. 2007), *quoting* 1 Jackson, *Mississippi Civil Procedure* § 1.21 (1999).

That there seems to be antagonism between Mari Lynn and Lon, even after all this time, does not mean they have legally antagonistic interests, or that Rick has an "antagonistic interest" respecting his parents. The *Swaney* Court continued, "'[i]t is

one of the fundamentals of judicial procedure that courts will not undertake to decide abstract questions when there is no actual justiciable issue between the purported litigants.' (citation omitted) One component of a justiciable claim is ripeness. (citation omitted) . . . '[A] cause of action must exist and be complete before an action can be commenced, and, when a suit is begun before the cause of action arises, it will generally be dismissed if proper objection is taken.' (citations omitted)" *Id.* at 107-08 ¶ 8.

In this case the purported cause of action is Lon's breach of his duty to support his temporarily disabled son past his son's twenty-first birthday. Assuming that such a legal duty exists in Mississippi, there can be no breach of the duty where it is clear that Lon is financially supporting his son.

B. The expedient of Mari Lynn suing Lon in a putatively representative capacity is an improper means to seek relief.

Apparently after the hearing, but before the final judgment, Mari Lynn learned about *Taylor v. Taylor*, 478 So.2d 310 (Miss. 1985). Only after the hearing did Mari Lynn attempt to sue Lon in a putatively representative capacity.

In *Taylor* the Supreme Court declined to reach the issue of whether Mrs. Taylor had a legal duty to support the parties' incapacitated son. Consistent with its earlier ruling that contempt proceedings were not an appropriate means for one

divorced parent to seek post-majority child support from the other, the Supreme Court held that a modification proceeding was not a proper means for one former spouse to seek post-majority child support from the other. *Id.* at 312, *citing Watkins v. Watkins*, 337 So.2d 723 (Miss. 1976).

The *Taylor* Court reasoned that child support is the right of the child and any claim for support arises on behalf of the child. Since the custodial parent is a fiduciary of the child, but not to the other divorced spouse, no claim can arise between the divorced spouses to account for child support. The *Taylor* Court concluded that "if there is a legal duty for a parent to support an adult incapacitated child, the duty runs from the parent to the child; not from one divorced spouse to the other. The action should therefore be maintained by or on behalf of the adult child against the parent from whom support is sought." *Id.* at 313.

The record does not reflect why Rick was not legally competent to appear on his own behalf. At the time of the hearing he was 23 years old. He was academically successful in high school. His departure from Millsaps was not for academic reasons. And he had recently completed a semester at Holmes Community College with a grade point average of 4.0.

Despite Mari Lynn's interest in making Rick appear feeble-minded in her brief, it is clear from the psychologist's testimony that Rick is intellectually high

functioning and – aside from his renal disease – most of his deficits are social. Regardless of Rick's legal capacity to sue on his own behalf, it is clear that Chancellor Thomas granted a conservatorship and that Rick is a ward of the conservatorship. Though curious, the order is *res judicata.*

As conservator, Mari Lynn's complaint against Lon stated that as conservator she "requests that the Court, in equity, require the father to assist financially in the support of Rick until such time as he can become independent or autonomous, or until further order of the Court." [V. 1: C.P. 128-29] This is the entire substantive difference difference between Mari Lynn's original complaint, or motion to modify, and the "amended" motion.

Whether in her personal capacity or as conservator, there remains no justiciable issue between Mari Lynn and Lon: Lon is contributing to Rick's support.

Relevant here is that Mari Lynn as conservator is not a proper person to sue on behalf of Rick for support. According to *Taylor*, the right of support belongs to the child. The only proper proceeding for a disabled adult child to seek further financial support is by the adult child appearing personally or the suit being brought on the child's behalf. If the right to support runs from both parents to the child, then the right of action, assuming one exists, is necessarily against the parents.

Whether the suit was brought personally or by representative, the child would

have to establish need, the amount required to meet that need, and request the equity court to adjudicate the contributions of his parents based on the child's established need and each parent's ability to pay. True enough, a plaintiff may choose whom to sue – and the *Taylor* Court said the action would be maintained by or on behalf of the child against the parent from whom support was sought.

That does not forgive the plaintiff, in this context, from proving need, its quantum, that the need was not being met, and that, here, Lon had the financial means to meet that need. Even assuming a distinct need has been shown, Lon does not have the present financial ability to pay the existing alimony obligation. Awarding additional sums for Lon to pay for child support would be no more enforceable. Lon might not be relieved of the obligation, but Lon has an infant whose medical needs are also significant. Will the court place itself in the position of rationing health care and other support as between Lon's two sons?

Apparently due to becoming aware of *Taylor* only very belatedly, this case was not litigated on Rick's behalf. A conservatorship imposed at the conclusion of modification litigation cannot hide the actual nature of case: Mari Lynn v. Lon. The court should conclude that *Taylor*'s mandate applies here: since the case was not litigated by Rick or on his behalf, the chancellor's ruling should be affirmed.

Two final comments seem appropriate. First, courts of equity have virtually

plenary power within the confines of the constitutional list of equity's jurisdiction. The court should hold, consistent with *Taylor* and *Watkins*, that the proper vehicle for this sort of case is a suit by the adult child. If the adult child lacks legal capacity to sue on his or her own behalf, then equity courts have a variety of tools for protecting the child's interests. It may be that a conservatorship with the custodial parent as conservator is a proper vehicle in some circumstances. Still, the cases will have to be litigated as though the child were the plaintiff, not as here with Mari Lynn seeking relief.

In other proper circumstances, a chancellor might appoint a special master or guardian *ad litem*. As is obvious from the nature of this case, the focus of this sort of case must move away from the parents' controversies, and focus on the child's needs, the financial support necessary to meet those needs, and how the parents should support their disabled child with respect to their ability to pay.

Second, Judge Thomas and Mari Lynn have accurately pointed out that other states have by legislation or court ruling provided, at least in some circumstances, for continued support of disabled adult children. See generally, *Annotation*, Parents' obligation to support adult child, 1 A.L.R.2d 910 (1948 & Supp.); and N. O. Harlow, *Annotation*, Post-majority disability as reviving parental duty to support child, 48 A.L.R.4th 919 (1986 & Supp.).

Trying to develop a general, or majority, rule from the A.L.R. annotations is a bewildering enterprise. This is so partly because of the variety of contexts from which the issue can arise. What constitutes a "disability"?; is it temporary or permanent?; did it arise before or after emancipation? Also, states over the past sixty years have altered their law either by legislation or court rule.

Taylor recognized the apparent trend to impose on parents a legal duty of continuing support in some circumstances. *Taylor*, 478 So.2d at 313. As in *Taylor*, the court should affirm the chancellor's ruling here because however compelling a disabled adult child's interests are, the court may not "ignore the premise that the modification proceeding here presented is an inappropriate suit in which to do so." *Id.*

Prudence counsels that regardless of what other states may do, in imposing a legal duty on parents to support, here, an adult child whose disability arose before reaching the age of majority, the court would necessarily be engaging in a legislative task. Of course, courts "legislate" all the time through their holdings. No judge need be embarrassed about the reality of what courts sometimes must do.

However, the concerns that counsel caution here are manifold: how long should parents support children? How should the financial burden be borne as between the parents? What conditions or circumstances should qualify as a

"disability" triggering the parents' further duty of support? For permanently disabling conditions such as mental retardation, does the duty to support extend to the end of the parents' lives if the child outlives them? To what extent should the State's resources supplement or supplant the parents' support, and when and under what circumstances?

Also, any rules adopted to govern these situations must necessarily apply to all Mississippians, rich and poor alike. While Rick's parents both have relatively high earning capacities as medical professionals, the same may not be said for all citizens. How should a court adapt a "rule" for all socio-economic circumstances?

Because of the way this case was litigated and tried – as a modification proceeding – very few of these concerns, factors, and circumstances have been explored in this case. It is hard to say that Chancellor Thomas was wrong that a modification proceeding, with an irrelevant "conservatorship" pleading pasted on at the end of the litigation, was not a proper means of prosecuting the case.

III. Conclusion

The court should decline Mari Lynn's invitation to modify that which the Parties agreed could not be modified. The court should also decline Mari Lynn's invitation to hold that Lon has a legal duty to do that which he is already doing. The court should affirm the chancellor's ruling in all respects and dismiss the case.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

The undersigned counsel of Record to Lon Alexander hereby certifies that on this date the original of the above and foregoing Appellee's Brief, together with three copies and an electronic copy, have been filed with the Clerk of the Court by hand delivery and that copies have been served upon the following listed individuals by deposit into the United States mail, first class postage prepaid:

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SO CERTIFIED, this the 17th day of August, 2012.

T. Jackson Lyons