IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2004-CA-02215-COA

PIERRE LOUIS D'AVIGNON **APPELLANT**

v.

KAREN D'AVIGNON **APPELLEE**

DATE OF JUDGMENT:	10/8/2004
TRIAL JUDGE:	HON. CARTER O. BISE
COURT FROM WHICH APPEALED:	HARRISON COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	SCOTT WATSON WEATHERLY
ATTORNEY FOR APPELLEE:	EDWARD F. DONOVAN
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	MODIFIED ALIMONY
DISPOSITION:	AFFIRMED-08/01/2006
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE KING, C.J., CHANDLER AND ISHEE, JJ.

ISHEE, J., FOR THE COURT:

¶1. Seeking an increase in Louis D'Avignon's alimony obligations, Karen D'Avignon filed a complaint for modification of alimony in the Chancery Court of Harrison County. Louis also filed a motion for modification of alimony, requesting that his alimony obligations be reduced or terminated. The chancery court denied Louis's motion and awarded Karen an upward adjustment in alimony based on the provisions of the property settlement agreement. Aggrieved by the judgment, Louis appeals. Finding no error, we affirm.

FACTS

¶2. Karen and Louis D'Avignon were married on August 2, 1969 in Biloxi, Mississippi. Karen, who received an undergraduate degree in education from Mississippi State University, taught school

in West Point, Mississippi, while Louis finished his fourth year of study at Mississippi State University. Louis received an undergraduate degree in accounting in December of 1970, and the following semester, he entered the business and finance masters program. In January of 1971, while Karen was in the education masters program, the parties' first child was born.

¶3. In May of 1971, Karen obtained her graduate degree in special education and began working with Starkville schools. After completing the masters program at Mississippi State University, on February 14, 1972, Louis began active duty with the United States Air Force. Louis's military career required the family to move on numerous occasions. Over the course of approximately nine years, the family relocated to Virginia, Germany, Maine, Colorado, Mississippi (while Louis was in Korea for an unaccompanied tour), and Florida.

¶4. When the parties moved to Virginia, Karen withdrew her two years of retirement from the Mississippi Public Employees Retirement System in order to assist with the expenses of the move. While in Virginia, Karen worked at the Cerebral Palsy Center and earned Virginia retirement credits while employed there. In August of 1973, Louis was transferred to Germany, and the family moved with him. Karen gave birth to their second child while in Germany. In 1976, Louis was transferred to Maine, and Karen withdrew her Virginia retirement to assist with moving expenses. The parties' third child was born in Maine.

¶5. In 1978, Louis received another transfer, and the family moved to Colorado. Louis was next sent to Korea for an unaccompanied tour, which lasted nearly a year and a half. During his Korean tour, Karen and the children moved to Gulfport, Mississippi. Karen began teaching school in Mississippi, at Harrison Central. The parties planned to move to Fort Walton Beach, Florida upon his return. Karen withdrew her retirement upon Louis's return for a family vacation to Disney World. Soon after their relocation to Florida however, Louis requested a divorce.

¶6. In December of 1981, an agreement was reached, and the parties divorced in Harrison County, Mississippi, on the grounds of irreconcilable differences. Pursuant to the terms of the child custody, child support, and property settlement agreement, Karen retained primary custody of the couple's three minor children, and Louis agreed to pay child support in the amount of $200 per child, per month. Louis's alimony obligations amounted to $500 per month for a ten-month period, which began in November of 1981. The agreement further provided that, beginning on September 15, 1982, Louis's alimony payments would be reduced to $200 per month. An escalation clause was also included in the agreement. It provided for annual adjustments of the child support and alimony obligations "commensurate with any percentage increase in the net earnings (gross earnings minus federal tax, state tax and social security) of the Husband." The escalations in payments were to begin in January of 1983. Louis earned $2,167.98 per month at the time of the divorce.

¶7. In 1996, Louis retired from the Air Force with the rank of lieutenant colonel. He then began working overseas in Saudi Arabia. In 1998, Louis returned to the United States and lived in New Mexico. He planned to return to Saudi Arabia in May of 2000. On March 9, 2000, Karen filed a complaint for modification of alimony. A temporary order was entered, which increased Karen's monthly alimony from $260 per month to $550 per month, and Louis returned to Saudi Arabia.

¶8. Louis resigned from his position in Saudi Arabia in the spring of 2003. Upon returning to the United States, he filed a motion seeking review and modification of alimony. Louis sought to have Karen's alimony reduced and/or terminated due to a substantial material change in circumstances. Louis asserted that his recent unemployment combined with Karen's income of approximately $75,000 per year constituted a material change. He further asserted that his sole source of income was his military retirement pay of $3,197 per month.

¶9. Karen requested an increase in alimony, asserting that she should be compensated for her years as a military wife and for her withdrawal of retirement funds to assist with the family's moves. She further contended that the ending of Louis's child support obligations and her need to replenish her retirement fund constituted a material change in circumstances sufficient to justify a modification. Moreover, although it was not included in her pleadings, Karen asserted during the hearing that she was entitled to a portion of Louis's military retirement, pursuant to the Uniformed Services Former Spouses Protection Act.

¶10. The chancery court entered an order denying Louis's request for modification of alimony on June 7, 2004. The court also denied Karen's request to receive a portion of Louis's military retirement on the grounds that her request was untimely, as it was filed eighteen years after the divorce. The court then looked to the plain language of the property settlement agreement, although neither party raised the issue, and found that it did not provide that the alimony to be paid by Louis was limited to a percentage of his net military earnings. The court noted that the property settlement agreement "only [specified] that the alimony and child support to be paid out of his military income [was] to be accomplished through the Air Force accounting office." From this reading of the property settlement agreement, the court determined that Karen was entitled to a percentage of Louis's total net earnings regardless of the source of the income. Because the annual increases in alimony paid by Louis were based solely upon his military pay, the court ordered Louis to provide Karen with an accounting showing his gross earnings from all sources from the date of his retirement. Based on Louis's gross earnings from all sources of income, the parties were to determine the proper amount of alimony payable to Karen, pursuant to the percentages provided in the property settlement agreement.

¶11. Seeking correction of a scrivener's error, Karen filed a motion for alternation, amendment, or correction of the chancery court's judgment on June 18, 2004. Louis filed a motion for clarification on August 27, 2004. He requested that the chancery court explain why Karen was entitled to a percentage of his total net earnings from the date of his retirement, when that date was three years prior to the date that Karen filed her request for modification.

¶12. The chancery court entered a judgment on October 8, 2004, correcting the scrivener's error and clarifying the June 7, 2004 order. The court stated that, although "a pure modification would be effective at best from the date of filing of the Petition," a property settlement agreement is a matter of contract. Consequently, the court reasoned that the increase in alimony was effective and due at the time specified in the escalation clause of the property settlement agreement. The court then reiterated that Karen was entitled to go back three years prior to the date of filing, as the statute of limitations for contractual matters is three years.

¶13. Aggrieved by the court's decision, Louis asserts the following issues for this Court's review: (1) the chancellor erred in not setting aside the May 2000 temporary order and not reducing alimony payments back to $260 per month or terminating them altogether, as the evidence showed there had been no substantial change in circumstances justifying the increase; (2) the chancellor abused his discretion in fashioning an award for Karen based on an escalation clause in the property settlement agreement which was not pled or argued by Louis at trial; (3) where Karen filed a motion for modification as opposed to a motion for contempt, the chancellor erred in going behind the date of filing in awarding relief; (4) the chancellor erred in ruling that the escalation clause was not limited solely to Louis's military pay, but rather applied to all sources of his income, as this clearly was not the intent of the parties.

STANDARD OF REVIEW

¶14. Our review of domestic relations matters is limited. *Carrow v. Carrow*, 741 So. 2d 200, 202 (¶9) (Miss. 1999). The chancellor's findings of fact will not be disturbed on appeal if they are supported by substantial credible evidence. *Pacheco v. Pacheco*, 770 So. 2d 1007, 1009 (¶8) (Miss. Ct. App. 2000) (citing *Dunaway v. Busbin*, 498 So. 2d 1218, 1221 (Miss.1986)). We will not reverse the decision of a chancery court unless the chancellor abused his or her discretion, was manifestly in error, or applied an erroneous legal standard. *Carrow*, 741 So. 2d at 202 (¶9) (citing *Turpin v. Turpin*, 699 So. 2d 560, 564 (¶15) (Miss. 1997)).

ISSUES AND ANALYSIS

I. The chancellor erred in not setting aside the May 2000 temporary order and not reducing alimony payments back to $260 per month or terminating them altogether, as the evidence showed there had been no substantial change in circumstances justifying the increase.

¶15. Alimony may be modified upon a showing that there has been a material and unanticipated change in circumstances. *Elliot v. Rogers*, 775 So. 2d 1285, 1287 (¶8) (Miss. Ct. App. 2000) (citing *Anderson v. Anderson*, 692 So. 2d 65, 70 (Miss. 1997)). The material change "must occur as a result of after-arising circumstances of the parties not reasonably anticipated at the time of the agreement." *Grice v. Grice*, 726 So. 2d 1242, 1251 (¶30) (Miss. Ct. App. 1998) (quoting *Varner v. Varner*, 666 So.2d 493, 497 (Miss. 1995)).

¶16. Louis asserts that the following constitutes a material change in circumstances: (1) Karen currently earns more than $75,000 per year; (2) at the time of the divorce, she earned from $20,000 to $30,000 teaching school in Florida; (3) Karen's estate is far superior to his. Louis further asserts the facts that, subsequent to the entry of the temporary order, he quit his job in Saudi Arabia, where he earned $53,000 per year tax free. Based on these facts, Louis argues that the chancellor erred in not reducing or terminating his alimony obligations.

¶17. In support of his argument, Louis cites *Beacham v. Beacham*, 383 So. 2d 146 (Miss. 1980), contending that it is factually similar to the case at bar. He quotes the following language from *Beacham*: "[a]limony is not a bounty, to which Mrs. Beacham became entitled to receive indefinitely simply by reason of the fact that at one time she had been married to Mr. Beacham. . . . It cannot be said that she is in any way dependant for a livelihood upon receiving alimony from Mr. Beacham." *Id.* at 148. Louis excludes the following sentence from his quotation: "[i]n the divorce decree, it was judicially established that the marriage had been broken up and terminated because of [Mrs. Beacham's] own misconduct." *Id.* Consequently, Louis fails to address the emphasis the court placed on Mrs. Beacham's misconduct in finding that termination of alimony was warranted.

¶18. In finding that Mr. Beacham's alimony obligation should be terminated, the *Beacham* court stressed "that alimony will not be allowed to the wife unless the decree for divorce is in her favor." *Id.* at 147 (citing *Coffee v. Coffee*, 145 Miss. 872, 872, 111 So. 377, 378 (1927)). The court noted that an exception to this rule is where the wrongdoing wife is destitute and in poor health. *Id.* (citing *Gatlin v. Gatlin*, 248 Miss. 868, 871, 161 So. 2d 782, 783 (1964) (overruled on other grounds)). Furthermore, the court determined that Mrs. Beacham did not meet this exception, as she was in "the prime of life, enjoying good health, earning a very substantial salary and with every reasonable prospect for a secure future in the form of retirement pay and social security." *Id*. at 148. Thus, *Beacham* is clearly distinguishable from the case at bar. Karen was not a "wrongdoing wife," and the parties divorced on the grounds of irreconcilable differences.

¶19. Regarding Louis's voluntary reduction in income, i.e., his decision to leave his job in Saudi Arabia, he testified during trial that he had been offered a job (which he subsequently accepted) in San Antonio, Texas, with a salary of $60,000. As for Karen's increased salary, the court in *Spradling v. Spradling*, 362 So. 2d 620, 624 (Miss. 1978), held that the law of alimony does not

contemplate penalizing an alimony recipient "for being industrious and endeavoring to accomplish something rather than depend on [the alimony payor] regardless of future circumstances." Accordingly, we find substantial evidence to support the chancellor's finding that neither party demonstrated an unanticipated material change in circumstances warranting a modification. This issue is without merit.

II. The chancellor abused his discretion in fashioning an award for Karen based on an escalation clause in the property settlement agreement which was not pled or argued by Louis at trial.

¶20. Louis argues that because the escalation clause in the alimony provision of the property settlement agreement was neither pled in Karen's complaint, nor addressed during the trial, the chancellor erred in sua sponte converting Karen's modification action into a contempt action. He further asserts that the chancellor's actions deprived him of due process, as he was never afforded an opportunity to prepare or to put on a defense to that theory of relief.

¶21. It is well established that "[u]nder the general prayer, any relief will be granted which the original bill justifies and which is established by the main facts of the case, so long as the relief granted 'will not cause surprise or prejudice to the defendant.'" *Crowe v. Crowe*, 641 So. 2d 1100, 1104 (Miss. 1994) (quoting *Smith v. Smith*, 607 So. 2d 122, 127 (Miss. 1992)). Furthermore, Rule 54(c) of the Mississippi Rules of Civil Procedure provides in part that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled by the proof and which is within the jurisdiction of the court to grant, even if the party has not demanded such relief in his pleadings."

¶22. In addressing this issue, we first note that Karen included a prayer for general relief in her complaint for modification of alimony. Furthermore, Louis cannot reasonably argue that he was surprised by the chancellor's ruling based on the alimony provision of the parties' property

settlement agreement; Karen attached a copy of the property settlement agreement to her complaint for modification of alimony. Moreover, Louis cannot assert that he was prejudiced by the judgment, as it affords him the opportunity to return to court with his financial information and to be heard by the chancellor before the adjustments to his alimony obligations are made. Thus, in light of the chancellor's broad discretionary powers to dispense appropriate relief, we find that the pleadings were sufficient to put the parties on notice that the chancellor would examine the alimony provision of the parties' property settlement in determining whether to modify alimony. Therefore, this issue is without merit.

III. Where Karen filed a motion for modification as opposed to a motion for contempt, the chancellor erred in going behind the date of filing in awarding relief.

¶23. In his motion for clarification, Louis objected to the chancery court's determination that the alimony increase should take effect three years prior to the filing of the petition for modification. The chancery court entered a judgment on the motion stating that, although a pure modification would be effective from the date of filing of the petition, the increase in this case is a matter of contract, and is therefore effective from the date that the increase would have been due under the terms of the escalation clause. The court further stated that Karen was entitled to go back three years from the date of filing because the statute of limitations for contract matters is three years, pursuant to Mississippi Code Annotated section 15-1-29 (Rev. 2003).

¶24. Contempt actions for unpaid alimony are subject to a seven-year statute of limitations pursuant to Mississippi Code Annotated section 15-1-43 (Rev. 2003). In the case sub judice, Louis was not cited with contempt for failure to meet his alimony obligations. Instead, the court granted relief based on contract principles, finding that Louis failed to perform under the terms of the escalation clause. It is a well-established principle in Mississippi that "[a] true and genuine property

settlement agreement is no different from any other contract, and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character." *West v. West*, 891 So. 2d 203, 210 (¶13) (Miss. 2004) (quoting *East v. East*, 493 So. 2d 927, 931-32 (Miss. 1986)). Consequently, we find that the chancellor did not err in applying the three-year statute of limitations to this contract issue. This issue is without merit.

IV. The chancellor erred in ruling that the escalation clause was not limited solely to Louis's military pay, but rather applied to all sources of his income, as this clearly was not the intent of the parties.

¶25. A property settlement agreement creates contractual obligations. *Id.* (citing *In re Estate of Hodges,* 807 So. 2d 438, 445 (¶26) (Miss.2002)). Consequently, the provisions of a property settlement agreement must be interpreted according to contract principles. *Id.* The Mississippi Supreme Court established a three-tiered process for contract interpretation. *West*, 891 So. 2d at 210 (¶14) (citing *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 351 (Miss. 1990)).

¶26. We must first consider the "four corners" of the agreement, i.e., examine the actual language used by the parties in the agreement. *Id.* (citing *Perkins*, 558 So. 2d at 352). If the language of the contract is unambiguous, we are "not concerned with what the parties may have meant or intended . . . for the language employed in a contract is the surest guide to what was intended." *Beezley v. Beezley*, 917 So. 2d 803, 807 (¶14) (Miss. Ct. App. 2006) (quoting *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985)). Our next approach, if the language of the contract is not clear, is to "harmonize the provisions in accord with the parties' apparent intent." *West*, 891 So. 2d at 210 (¶14) (quoting *Perkins*, 558 So. 2d at 352). If the intent of the parties continues to be ambiguous, we may utilize the canons of contract construction at our discretion. *Id.* at 211 (¶14) (citing *Perkins*, 558 So. 2d at 352-53). Parol or extrinsic evidence may be considered as a last resort. *Id.* (citing *Perkins*, 558 So. 2d at 353).

¶27. Louis argues that the alimony provision of the property settlement agreement is unambiguous because it only references increases in connection with "cost of living expenses" provided through Louis's military pay. Louis insists that it was the intent of both parties that the escalation clause would apply only to Louis's military pay. According to Louis, this intent is clear because Karen did not file a motion for contempt or reference the escalation clause in her motion for modification. Louis also asserts that the agreement must be construed more strongly against Karen because he was not represented by separate counsel at the time of the divorce.

¶28. A well-established principle of contract construction is that vague or ambiguous terms are always construed more strongly against the party drafting the agreement. *Banks v. Banks*, 648 So. 2d 1116, 1121 (Miss. 1994) (citing *Globe Music Corp. v. Johnson*, 226 Miss. 329, 334, 84 So. 2d 509, 511 (1956)). Thus, if the language of the escalation clause is vague or ambiguous, it must be construed more strongly against Karen.

¶29. The chancellor noted in his judgment that the plain language of the agreement does not specify that the alimony to be paid by Louis is limited to a percentage of his military net earnings. Paragraph four of the property settlement agreement states:

> The parties agree that the child support obligations and the alimony obligations will increase annually commensurate with any percentage increase in the net earnings (gross earnings minus federal tax, state tax and social security) of the Husband. Alimony increases will exclude pay increases by rank or longevity. That is, the net earnings of the Husband for the year 1981 will be compared with the net earnings of the Husband for the year 1982. If the Husband's net earnings for the year 1982 are more than his net earnings for the year 1981, then by whatever percentage his net earnings have increased, it will become the obligation of the Husband to increase his monthly child support and alimony payments by a similar percentage.

¶30. The escalation clause plainly states that Louis's alimony obligations will increase annually according to any increases in his net earnings. The provision does not state that the net earnings must be from a specific source. Given the unambiguous language of the escalation clause, it is not

necessary to look past the plain language of the provision to discern the parties' intent. Furthermore, "[e]scalation clauses in property settlement agreements are enforceable absent fraud, overreaching, or mistake, even though one party may, in the future, find that he or she entered into the agreement imprudently." *West*, 891 So. 2d at 214 (¶29) (citing *Speed v. Speed*, 757 So. 2d 221, 227 (¶18) (Miss. 2000)). Thus, we find that the chancellor's decision is supported by substantial evidence. This issue is without merit.

¶31. **THE JUDGMENT OF THE CHANCERY COURT OF HARRISON COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

KING, C.J., MYERS, P.J., IRVING, CHANDLER, AND GRIFFIS, JJ., CONCUR. SOUTHWICK, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY LEE, P.J., BARNES, AND ROBERTS, JJ.

SOUTHWICK, J., DISSENTING:

¶32. With respect for the majority, I nonetheless am compelled to dissent. In my view, the chancellor failed properly to analyze some of the unique issues that arise from the long-ago divorce decree affecting what was then an active duty airman and his wife.

1. Ending Alimony.

¶33. The parties were divorced in 1981. At that time, Louis D'Avignon was serving in the United States Air Force and was earning considerably more than his wife. Because the parties agreed on an irreconcilable differences divorce, neither was declared to be the cause of the break-up of the marriage. The latest evidence is that Karen D'Avignon's income is significant and larger than that of her former husband, and that her estate also is larger. Mr. D'Avignon argues that it is time for alimony to end. Not only was it not ended, the chancellor granted a retroactive increase not requested by the former wife.

¶34. The majority finds that alimony should continue despite the precedent of *Beacham v. Beacham*, 383 So. 2d 146 (Miss. 1980). The majority concludes that *Beacham* "is clearly

distinguishable." Alimony was ended in *Beacham* for reasons much like the circumstances of the present case. The distinction made by the majority is the supreme court's mention that Mrs. Beacham had been the at-fault party. *Id.* at 148. The recipient of alimony here, Mrs. D'Avignon, was not at fault. It is insignificant, the majority here concludes, that Mrs. D'Avignon has more income than her ex-husband, that she like Mrs. Beacham is apparently in good health and with every prospect of continuing to receive her present income, and has a reasonable retirement. In their view, alimony should continue despite no present need solely due to the fact that Mrs. D'Avignon was initially awarded alimony and she was not the spouse who defaulted on her marital obligations.

¶35. I have a different view. Alimony is neither a gift nor a penalty. It arises from circumstances and can end when circumstances change. What was unusual about *Beacham* is that the wife's adultery that precipitated the divorce usually would have debarred her from receiving any alimony. *Id.* at 147. Her necessitous circumstances at the time of the divorce justified the exception. Thirteen years later it was shown that the need no longer existed:

> At the time of the decrees appealed from, in addition to her substantial income, she had in prospect retirement pay and social security. At the time the divorce decree was entered in 1967, when custody and supervision of the children was left with Mrs. Beacham, apparently so as not to disturb their existing circumstances, it cannot be said at this date that it was unreasonable for the court, in allowing them to remain with their mother, and directing Beacham to make payments for their support, also to award to Mrs. Beacham a sum as alimony in connection with her duties in supervising and looking after the children. It was a matter which can reasonably be considered to have been in the mutual best interest of the parties as well as of the children.

Id. at 147. Not an issue but probably as much a reality in *Beacham* as here, is that the prospect that Mrs. Beacham would at some stage after the children were grown and before she retired start to earn a sufficient income to support herself in comfort. The Supreme Court concluded that the former wife was not in any way dependent for a livelihood upon receiving alimony from Beacham. The divorce effectively and finally dissolved and ended their relationship with each other and with it their

reciprocal responsibilities. Unless some reason, based upon public policy, could be pointed out that, in good conscience, there is a compelling need to require support from her former husband, he should be relieved of the burden of making contributions to her. *Id.*

¶36. The most helpful commentator on Mississippi domestic relations law has stated that in *Beacham* the Supreme Court "laid down the rule that alimony is not to be considered a bounty to which the recipient is entitled indefinitely . . . . [A]limony may be terminated upon a significant change of circumstances, and this might include independent wealth or income of the recipient party along with the lack of any continuing need for the payments . . . ." HAND, MISSISSIPPI DIVORCE, ALIMONY AND CHILD CUSTODY, § 11:3 (6th ed. 2003), at 398.

¶37. The following precedents which refused to terminate alimony are distinguishable for reasons that support termination here. *Austin v. Austin,* 557 So. 2d 509, 510 (Miss. 1990) (paying spouse was affluent; though recipient spouse obtained full-time employment, her income was not able to sustain her in the lifestyle that existed at the time of divorce); *Spradling v. Spradling,* 362 So. 2d 620, 624 (Miss. 1978) (alimony is not to penalize a party for "being industrious and endeavoring to accomplish something rather than depend on [another] regardless of future circumstances"); *James v. James*, 724 So. 2d 1098, 1104 (Miss. Ct. App.1998) (former wife had an increase in income and a reduction in alimony was justified, but she still needed alimony and outright termination refused). The chancellor and the majority have let the fact that Mrs. D'Avignon was not the spouse who caused the divorce to prevent a fair consideration of whether there is a continuing need.

¶38. The majority mentions as well that Mrs. D'Avignon's greatly increased income was anticipated at the time of divorce. Therefore no unexpected material change in circumstances occurred. There may be some technical correctness in the majority's use of language in precedents that focuses on whether a change was unexpected. This divorce decree may have been written with

the knowledge that the recipient of alimony would in the years ahead improve her financial situation. Yet it could not have reasonably predicted how much income the former spouse would start earning and what the relative financial needs and status of the parties would be twenty-five years later. What might also have been expected is that alimony would end due to a remarriage, and the rules governing alimony "anticipate" that eventuality by requiring the end of alimony at that time. *Box v. Box*, 622 So. 2d 284 (Miss. 1993). With all that has happened, and not happened, I find it an overly fine line being drawn by the majority between what was at least possible and what would be an unanticipated change in circumstances.

¶39. The evidence is strong that Mr. D'Avignon is entitled to have alimony end. I would remand and require the chancellor to take such additional evidence as might be considered appropriate and make findings on whether the purposes of alimony are at an end.

Issues 2 and 3: Chancellor's idiosyncratic interpretation

¶40. The chancellor took Mrs. D'Avignon's request for a modification in alimony, interpreted the property settlement agreement in a manner different than urged by either party, and ordered a retroactive increase in alimony and payment of the resulting arrearage. I accept the majority's citation of the general power of trial judges to grant such relief as is appropriate regardless of the request made by a party. That power, though, requires judiciousness in its exercise. I find that the chancellor overreached, or to use the terminology relevant to judges, abused his discretion.

¶41. At times, a case simply cannot be decided based on the arguments advanced by the parties without distorting legal principles. My colleagues might well find me an unexpected objector to a judge's going beyond the requests of the parties, as some might remember occasions when I did the same. *E.g.*, *Anderson v. Kimbrough*, 741 So. 2d 1041, 1046 (Miss. Ct. App. 1999) (legal principles of deed in lieu of mortgage not raised by either party, but facts invoking that doctrine were admitted).

Where I find discretion properly exercised, though, is when a reasonable decision cannot be made within the confines of the legal principles offered or relief requested. In the present case, Mrs. D'Avignon and her attorney were satisfied with the manner in which the escalation of alimony payments had historically been made. The case could easily have been decided applying the unchallenged view of what income was relevant for the increase in alimony. For the chancellor boldly to go where no party had gone before in its argument, when the parties' interpretation was facially reasonable and the chancellor's was questionable, was not a proper exercise of discretion on these facts. Importantly, I believe the chancellor actually misinterpreted the provision.

¶42. Once the chancellor arrived at a novel view, he applied it without notice to the parties and without an opportunity for Mr. D'Avignon first to address the interpretation. A chance came on motion for clarification, but that may have been too late to affect the chancellor's settled view. The majority here states that Mr. D'Avignon has no basis to complain as to the surprising action by the chancellor since he was on notice of the property settlement agreement attached to the complaint for modification. Obviously, all litigants knew that the agreement was central to the issues, but no one but the chancellor knew of the interpretation that he would apply. Again, I am not disputing the existence of the power to do what the chancellor did. I disagree with the validity of the exercise of the discretion here.

4. Alimony escalation clause

¶43. Finally, I review the escalation clause itself. The 1981 agreement said this:

> The child support obligations and the alimony obligations of the Husband are to be adjusted annually beginning with those payments becoming due in January of 1983. The parties agree that the child support obligations and the alimony obligations will increase annually commensurate with any percentage increase in the net earnings (gross earnings minus federal tax, state tax and social security) of the Husband. [Alimony increases will exclude pay increases by rank or longevity.] That is, the net earnings of the Husband for the year 1981 will be compared with the net earnings for the year 1982. If the Husband's net earnings for the year 1982 are more than his net

> earnings for the year 1981, then by whatever percentage his net earnings have increased, it will become the obligation of the Husband to increase his monthly child support and alimony payments by a similar percentage. . . .

I added brackets to identify a hand-written interlineation in the typed agreement. The interpretation that the chancellor initiated was that this agreement required that all income be considered in the annual adjustment and not just the former husband's military income. Mr. D'Avignon retired from the Air Force in 1996. He continued to make alimony payments through 2003, which increased when he retired from $220 per month to $550 a month. That larger amount was paid from 1996 until 2003, at least for the majority of the period when he was employed in Saudi Arabia.

¶44. A side issue will first be addressed. Mr. D'Avignon stated that he left his fairly substantial-paying job in Saudi Arabia because of the dangers. The majority finds that to be a voluntary reduction in income for which he deserves no consideration. I disagree. The premium income received by contractors and their employees for assisting the military in dangerous regions of the world, or income that is received for enduring other forms of hardships, does not in my view grant an entitlement to a recipient spouse for alimony based on that hardship income. Such jobs are often temporary, in part because the hardships are so great. Once the spouse has endured the dangers for the time that he or she is willing to do so, I believe that all a chancellor should examine is what that spouse can otherwise reasonably earn. A court abuses its discretion to insist that a former spouse either be subjected to significant dangers and deprivations in order to maintain income or to bear a financial cost for refusing to continue in that capacity by paying a higher alimony.

¶45. The majority says that the 1981 language is unambiguous and that all income that the paying spouse earns should be considered. Respectfully, I agree with neither position, either as to ambiguity or the best interpretation of the provision. The alimony escalation clause specifically exempts certain income increases from affecting the adjustment. The key provision for interpretation is the hand-

written addition to the agreement which I bracketed in the quotation: "Alimony increases will exclude pay increases by rank or longevity." That is an odd provision. Airmen and other members of the military are paid based on rank and time in service. This means that a captain with ten years of military service is paid more than a lower-ranked individual with ten years, but less than a captain with twelve years in the service. Military members also receive occasional cost of living increases. I find the best interpretation of the provision to be that alimony would be adjusted for costs of living increases but not for the increases that resulted from each new year that the ex-husband served in a particular rank nor from any promotions. The interlineation made this limitation applicable to alimony but not to child support. That distinction suggests that the parties agreed that Mrs. D'Avignon would not receive substantial increases in alimony but the children would be benefitted by all the increased income that he received.

¶46. This interpretation causes me to disagree with the chancellor in several respects. The fairly limited alimony increases that would result from what proved to be fifteen more years of military service and promotions, convinces me that the chancellor's giving a large jump in alimony because of post-military earnings is inconsistent with the brake on increases that the handwritten and agreed addition to the property settlement provided. The focus on military earnings in the inserted language also makes doubtful to me that non-military earnings were anticipated. This agreement was written solely with military income as its premise. In effect, the chancellor modified the agreement at his own initiative, altering the balance that was struck and giving Mrs. D'Avignon an unanticipated windfall. Income from non-military sources was not anticipated in 1981. Whether such income should be considered would be a matter for a modification based on the argument of a material change in circumstances unanticipated by the parties. Based on this agreement, alimony if it continues should be computed based on military retirement income that is being received.

¶47. I would reverse and remand for further proceedings consistent with these observations.

LEE, P.J., BARNES AND ROBERTS, JJ., JOIN THIS OPINION.