

IN THE SUPREME COURT OF MISSISSIPPI

COPY

NO. 2006-^{CM}TS-01613

DOUGLAS G. COSENTINO

VS.

PHYLLIS L. COSENTINO

FILED

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COURT OF APPEALS

APPELLEE

APPELLANT'S REBUTTAL BRIEF

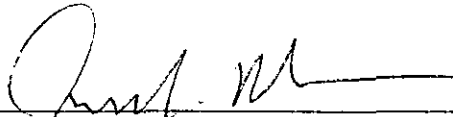
JOSEPH R. MEADOWS, ESQ.
MEADOWS LAW FIRM
P.O. BOX 1076
GULFPORT, MS 39502
Phone: (228) 868-7717
Fax: (228) 868-7715
Email: jmeadows@datasync.com

CERTIFICATE OF INTERESTED PERSONS

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

1. Douglas G. Cosentino, Appellant.
2. Joseph R. Meadows, Esq., P.O. Box 1076, Gulfport, Mississippi 39502, attorney for Appellant.
3. Phyllis L. Cosentino, Appellee.
4. Earl L. Denham, Esq., P.O. Box 580, Ocean Springs, MS 39566-0580, attorney for Appellee.
5. Honorable Jaye Bradley, Chancery Court Judge, P.O. Box 998, Pascagoula, MS 39568-0998.

RESPECTFULLY SUBMITTED, this the ^{26th} day of October, 2007.



JOSEPH R. MEADOWS
BAR NUMBER 2826

JOSEPH R. MEADOWS, ESQ.
MEADOWS RILEY LAW FIRM
P.O. BOX 1076
GULFPORT, MS 39502
Phone: (228)868-7717
Fax: (228)868-7715
Email: jmeadows@datasync.com

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ARGUMENT

A. STANDARD OF REVIEW

Appellant agrees that the standard of review in domestic matters is limited by its substantial evidence/manifest error rule. Brennan v. Brennan, 638 So. 2d 1320 (Miss.1994).

However, Appellant's position is that the Chancellor's decision, and in particular the Chancellor's Findings of Fact and Conclusions of Law, are not supported by the evidence in the record and was therefore error.

In its Findings of Fact, the Chancellor failed to factually analyze Ferguson factor(6). In so doing, the Trial Court wholly failed to address the pivotal issue as to whether or not the marital property Phyllis received was sufficient to eliminate the need and award of alimony.

The Court compounded its error in the amount of the award. The uncontradicted proof showed that Phyllis' needs per month were approximately \$3,415.81, yet the Chancellor awarded \$7,000 per month.

The Chancellor's ruling was manifestly wrong, clearly erroneous, abuse of discretion, and the Court misapprehended and/or misapplied the legal standard provided in Ferguson v. Ferguson, 639 So. 2d 921 (Miss.1994), and should therefore be reversed.

B. THE LOWER COURT'S ALIMONY AWARD TO THE PLAINTIFF IS SUPPORTED BY THE FACTS AND EVIDENCE IN THIS CASE AND IS MANIFESTLY CORRECT.

Appellee states in her Brief that, "The general rule under which the amount of alimony is to be calculated provides that the recipient should be entitled to a reasonable allowance that is commensurate with the standard of living to which they (the parties) had become accustomed to, measured against the ability to pay on the part of the party subjected to the payment." Johnson v. Johnson, 877 So. 2d 485, 495-496(Miss.App.2003).

Assuming that when the Ferguson factors were analyzed, and the award of periodic alimony was appropriate, this begs the question, what amount should the Court award Phyllis?

Appellee concedes that her Financial Declaration revealed monthly expenses of approximately \$3,415.81, which included an estimate of \$325.81 for medical expenses (Ex. 4 and 5) (T-46-47).

Appellee then goes on to contend that this figure for monthly expenses was "artificially low since she does not list expenses for rent or a monthly house note."

What reason would Phyllis have to list expenses for "rent" or "monthly house note," when she owned a \$250,000 home in Ocean Springs valued at \$250,000, free and clear of debt? (Appellee's Brief p. 19)

Appellee further asserts that "Phyllis testified during trial that her vehicle would soon need to be replaced, but her monthly

expenses do not include this anticipated cost, therefore, again reducing monthly expenses that would normally contain this expense." (Appellee's Brief p. 12)

The Appellee and the Trial Court, relied on speculation as to what Phyllis' needs would be.

On the one hand, Appellee asserts that, "Phyllis testified during trial that her vehicle would soon need to be replaced,..." but gave no indication when it would need to be replaced nor what it would cost. (Appellee's Brief p. 12)

On the other hand, the Trial Court engaged in speculation when it found "Phyllis could easily outlive her share of the financial settlement received from the division of marital property considering her age (55 years at the time of the trial), her health expenses for the duration of her life, health problems that come with age, and the lack of learning capacity."

The fact is, based upon the record in this case, there can be no rationale justification for the award of periodic alimony, and certainly not in the amount of \$7,000 per month.

When the facts and circumstances of this case are applied to the Armstrong factors, the Trial Court's award of periodic alimony, and in particular, when it was done so in addition to a fifty percent (50%) share of the martial estate, valued at \$2,645,390, was manifest error. Armstrong v. Armstrong, 618 So. 2d 1278 (miss.1993).

This error was manifest, and to the extent that it was unmistakable, clear, plain and indisputable. Brennan v. Brennan, 638 So. 2d 1320 (Miss.1994).

It is conceded that Doug has the ability to pay the award of periodic alimony to Phyllis. However, Doug's ability to pay must be measured against Phyllis' needs.

In addressing the "needs of each party," Phyllis contends that "without an award of alimony, Phyllis, unemployed, will be forced to regularly withdraw funds from her portion of the marital estate in order to meet her every day expenses, thus depleting her share of the marital estate and her future income, a situation clearly not in keeping the way the parties lived while married, and the way Doug continues to live." (Appellee's Brief p. 18)

Again, pure speculation.

There is absolutely nothing in the record to indicate Phyllis' needs would not be met from the income she would receive from her share of the martial estate, which was valued at \$2,645,300.

Mindful, this total represented an increase in the value of Phyllis' share of the martial estate of \$181,473 between March 1, 2003 hearing, and the June 19, 2003 hearing. (Ex. 6)

With regard to Phyllis' share of the marital estate meeting her needs, Appellee cites Davis v. Davis, 832 So. 2d 492,498-499, p. 21-22 (Miss.2002).

Interestingly, in Davis, the total value of the marital estate was \$2,444,078.90, which did not amount to the one-half ($\frac{1}{2}$) of the marital estate received by Phyllis. Further, the husband was making \$25,918 per month "after alimony and child support payments," and the Court only awarded \$4,000 per month to the wife.

Appellee then cites Waring v. Waring, 747 So. 2d 252 (Miss.1999), which upheld a \$4,200 per month periodic alimony award to wife. In Waring, the marital estate totaled \$4 Million. The husband's adjusted yearly gross income was \$409,396. The total value of the marital estate in Waring was approximately \$600,000 more than Phyllis' share of the marital estate. The Court upheld a \$4,200 per month award of periodic alimony.

Clearly, the Trial Court's award of \$7,000 per month in periodic alimony has no basis in fact or law. Further, it is so contrary to awards of periodic alimony previously approved by this Court, (e.g. Davis and Waring) that it was manifest error, and to the extent that it was unmistakable, clear, plain and indisputable. Brennan, supra.

CONCLUSION

In reviewing the facts and circumstances of this case, and the applicable law in this jurisdiction, in the first instance, the Trial Court's award of periodic alimony to Phyllis was manifest error.

Based upon the facts and circumstances of this case, and the applicable law in this jurisdiction, in the second instance, the amount of the award of periodic alimony to Phyllis was manifest error.

RESPECTFULLY SUBMITTED, this the 26th day of October 2007.

APPELLANT, DOUGLAS G. COSENTINO

BY AND THROUGH MEADOWS RILEY
HIS ATTORNEY OF RECORD

BY:


JOSEPH R. MEADOWS

JOSEPH R. MEADOWS, ESQ.
MS BAR NO. 2826
MEADOWS RILEY LAW FIRM
P.O. BOX 1076
GULFPORT, MS 39502
Phone: (228) 868-7717
Fax: (228) 868-7715
Email: jmeadows@datasync.com

CERTIFICATE OF SERVICE

I, Joseph R. Meadows, of Meadows Riley Law Firm, do hereby certify that a true and correct copy of the foregoing Appellant's Rebuttal Brief was mailed, postage prepaid, via United States mail, to: Earl L. Denham, Esq., P.O. Box 580, Ocean Springs, MS 39566-0580; and Honorable Jaye A. Bradley, P.O. Box 998, Pascagoula, MS 39568-0998.

SO CERTIFIED this the ^{26th} day of October, 2007.



JOSEPH R. MEADOWS

JOSEPH R. MEADOWS, ESQ., MS BAR NO. [REDACTED]
MEADOWS RILEY LAW FIRM
P.O. BOX 1076
GULFPORT, MS 39502
Phone: (228) 868-7717
Fax: (228) 868-7715
Email: jmeadows@datasync.com