

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2007-CA-01147

LAVERA N. BARKER

APPELLANT

V.

RAYMOND H. BARKER

APPELLEE

**APPEAL FROM THE DECISION OF THE
CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI**

BRIEF FOR APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

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Appellant

Raymond H. Barker

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Trial Judge




H.R. Garner, 
Attorney of Record for Appellee

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Statutes

None

STATEMENT OF THE ISSUES

1. **ISSUE I: The Trial Court did not err in awarding the Appellant Rehabilitative Alimony**
2. **ISSUE II: The Trial Court did not err in awarding Appellant Rehabilitative Alimony in the sum of \$200.00 per month for two years**

Only issues in this case: Whether the Chancellor committed manifest error when he awarded rehabilitative alimony to the Appellant, wife, for twenty-four (24) months at the rate of two hundred dollars (\$200.00) per month. Based upon the evidence adduced at trial by both parties .

Accordingly, the Brief of Appellee will address the two issues identified by the Appellant, the wife.

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

B. NATURE OF THE CASE:

This is a domestic relations case involving a divorce and the decision of the Chancellor awarding the Appellant, Wife, rehabilitative alimony for twenty four (24) months at two hundred dollars (\$200.00) per month. Both the parties being disabled at the time of the trial with the Appellant, Husband, receiving disability from the social security administration; and the Appellee, the wife, having a pending claim .

C. COURSE OF PROCEEDINGS

This case was filed by the Appellant, Lavera (Nelson) Barker, who was at that time represented by Leigh Ann Rutherford, attorney at law; an Answer and Counter-complaint for Divorce being filed by the Appellee, Raymond H. Barker, who was at that time represented by Malenda H. Meacham, attorney at law; and an Answer to Counter-complaint filed by the Appellant, Lavera (Nelson) Barker. This case was originally set for trial on September 1, 2006, in Grenada. At that time an agreement to the issues was submitted to the Court. The parties through their then attorneys announced to the Court that the case had been settled. Both the Appellant, Lavera (Nelson) Barker; and Appellee, Raymond H. Barker, acknowledge that there was an agreement whereby the real property would be sold and the proceeds divided equally; and

that the Appellant, Lavera (Nelson) Barker, was not to receive alimony of any kind. Appellant, Lavera (Nelson) Barker, testified at the subsequent trial that she had changed her mind that afternoon after she returned home, and withdrew the agreement. Appellee, Raymond H. Barker, testified at the trial that he was ready, willing and able to fulfill the agreement of the parties on September 1, 2006. Subsequently, both attorneys withdrew from representation of the parties and new attorneys were employed. David L. Walker was employed by the Appellant, Lavera (Nelson) Barker; and H.R. Garner was employed by the Appellee, Raymond H. Barker. This cause was rescheduled for trial in Hernando on Wednesday, April 11, 2007. The parties submitted a written stipulation on the ground of divorce, and announced to the Court that all matters involving the equitable division of marital assets were settled. (MRE 9, CP 10) The parties submitted Exhibit 1 as to the division of the real property, which was conveyed on the day of the trial. (MRE 8) Appellant, Lavera (Nelson) Barker, was to receive ownership of the house and lot located at 3765 Brights Road in Hernando, DeSoto County, Mississippi, having agreed that the equity in the property was \$82,616.60 and the assumption of the mortgage by her. Appellee, Raymond H. Barker, was to receive the rental houses located at 6240 Cornwall, 6305 Forest Gate, and 3520 Mayfair all located in Horn Lake, DeSoto County, Mississippi for an agreed equity of \$87,533.56 and the assumption of the indebtedness owed on the real property. All other marital property had been previously been divided between the parties. (TR 5-7)

The parties submitted an agreement for the Court to determine the issues (1) Alimony to the Plaintiff, Lavera (Nelson) Barker from the Defendant, Raymond Harold Barker, Vel Non; (2) Attorney's fees to the Plaintiff, Lavera (Nelson) Barker from the Defendant, Raymond Harold Barker, Vel Non. (MRE 9, CP 10)

Appellant Lavera (Nelson) Barker, called two witnesses in addition to herself. Raymond Harold Barker, Appellee, as an adverse witness; and Tonya Barker Bass, Raymond Harold Barker's daughter. Submitted into evidence in addition to the financial statements of both parties Exhibits 2 and 3, were Exhibits 4 and 5 which were records from the Regions Bank which show financial records of Lavera (Nelson) Barker jointly with her mother. (MRE 8)

Appellee, Raymond Harold Barker, went forward at the time but other than himself no other witnesses were presented with his case in chief.

The Court then rested and took this matter under advisement requesting that both attorneys for the parties submitted proposed memorandums within two weeks of the trial. (TR 102-103)

The Chancellor rendered his opinion from the bench on June 11, 2007. (TR 105-107, MRE 11-17) Awarding to the Appellant, Lavera (Nelson) Barker, rehabilitative alimony for twenty-four (24) months at two hundred dollars (\$200.00) per month from the Appellee, Raymond H. Barker; and denying her request for attorneys fees. (TR 107)

D . DISPOSITION IN THE COURT BELOW:

A Judgment of Divorce was entered by the Court on June 11, 2007 entered nunc pro tunc on the 13th day of June, 2007, granting both parties a divorce on the grounds of Irreconcilable Differences and the other relief awarded under the Court's Opinion. (CP 12-14, MRE 18-20)

The Appellant, Lavera (Nelson) Barker, has appealed the Chancellor's decision to this Court. (CP 15)

STATEMENT OF THE FACTS

Lavera (Nelson) Barker and Raymond H. Barker were married on January 23, 1997, and separated on April 6, 2005 in DeSoto County, Mississippi. (CP 6) Raymond H. Barker was a widower with two grown daughters by his first marriage. Lavera (Nelson) Barker had been previously married, which ended in divorce. She had no children. Nor were there born any children out of the marriage to Raymond H. Barker. (TR 10)

At the time of the marriage, the evidence showed as follows:

Raymond H. Barker was in good health, gainfully employed. (TR 86) He had an eighth grade education but had never gotten a GED. (TR 70) He was Vietnam Veteran . (TR70, 89) His first wife had died in 1989. (TR 84) He received fifty thousand dollars (\$50,000.00) from her life insurance proceeds. (TR 84) He owned his own home and had \$30,000.00 equity in it: an S10 Chevrolet truck that was paid for; \$24,000.00 in a savings account; and \$20,000.00 + in the girls' accounts which he had given them. (TR 85)

Lavera (Nelson) Barker was in good health, and gainfully employed. She had a house and furniture located at 3765 Brights Road, Hernando, DeSoto County, Mississippi which had a mortgage which she had received from her first marriage and furniture, an automobile which was paid for. (TR 10, 22)

During their marriage they combined their various assets, took out loans, bought, jointly titled all real property and sold rental property. (TR 13, 24)

At the time of the separation, April 6, 2005, Raymond H. Barker was asked to leave the home by Lavera (Nelson) Barker, which he did and moved into one of the parties' rental houses. (TR 26)

At the time of the separation, Lavera (Nelson) Barker, had contracted Hepatitis but continued to work full time. (TR 36) Raymond H. Barker had lost his job but was working driving a dump truck, but was starting to experience problems which ultimately developed into Emphysema and disabled him from work. (TR 87-88)

The parties had agreed upon a settlement on September 1, 2006, which Lavera (Nelson) Barker on cross examination agreed that she had agreed to sell all the property and divide the net proceeds. (TR 40) She admitted that under the original settlement that she was to receive no alimony. (TR 49-50) That afternoon after returning from Court that morning she changed her mind and rescinded the agreement. (TR 45, 48-49) Both attorneys were discharged, and the parties employed other attorneys, and this cause was set for trial on April 11, 2007. Raymond H.

Barker testified that he was ready, willing and able to go through with the terms of the agreement. (TR 92)

Immediately prior to the trial, on April 11, 2007, the parties settled all property issues and so informed the Court. (CP 10, MRE 9, TR 14) Lavera (Nelson) Barker received the parties home located at 3765 Brights Road in Hernando, DeSoto County, Mississippi, having agreed that the equity in the property was \$82,616.60 and the assumption of the mortgage by her. Appellee, Raymond H. Barker, was to receive the rental houses located at 6240 Cornwall, 6305 Forest Gate, and 3520 Mayfair all located in Horn Lake, DeSoto County, Mississippi for an agreed equity of \$87,533.56 and the assumption of the indebtedness owed on the real property. (TR 25)

The parties entered into a consent agreement as to grounds, and the Court was requested to rule on the remaining issues of : (1) Alimony to the Plaintiff, Lavera (Nelson) Barker from the Defendant, Raymond Harold Barker, Vel Non; (2) Attorney's fees to the Plaintiff, Lavera (Nelson) Barker from the Defendant, Raymond Harold Barker, Vel Non. (CP 10, MRE 9)

The parties testimony will be forthwith summarized, with four Exhibits being submitted by agreement to the Court:

Lavera (Nelson) Barker testified that she was currently disabled and had applied for a Social Security Disability ruling. (TR 28) She admitted that she was employed at the time of the separation, and had Hepatitis. (TR 28, 36) She testified that she was receiving as income a small

check from the state, food stamps, Medicaid, financial help from her mother who lived with her, and her mother's boyfriend whom she referred to as her stepfather. (TR 12, 27-28) She testified that she did not want the income producing property which consisted of the three rental houses, one of which Raymond H. Barker lived in since the separation. (TR 25) That she had an automobile that was paid for. (TR 22) She testified from her financial statement marked Exhibit 3, as to her expenses. (TR 41-48, MRE 8) She admitted being on her mothers and deceased sisters bank accounts. (TR 30) She admitted signing almost \$26,000.00 in checks on her mother and her account , but stated it was to pay their living expenses, in addition to the alimony that she had received from Raymond H. Barker, up and until he became disabled. (TR 30-32) She admitted knowing that he was disabled and had Emphysema. (TR 52) She alleged that she had no earning capacity due to her condition, which she is hoping she would be found disabled and permit her to draw Social Security. (TR 16) She admitted that she had never tried to get on Raymond H. Barker disability Social Security payments. (TR 27, 29) She had admitted that the parties were married eight years before the separation some two years before, and had been married ten years to Raymond H. Barker. (TR 10-11) She testified that the main bill that she had each month was her house note of five hundred eighty-five dollars (\$585.00) per month, and her other living expenses which her mother helped her with since she was living in the house with her. (TR 12, 34-35) She testified that she was fifty-three (53) years old. (TR 17) She testified at the time she had no medical income. (TR 17) She admitted that both parties had used credit

cards and ran up charges on them. She admitted that she lived in the marital home, which she now owned and got all of the furniture. (TR 25) She admitted that she was aware that when she married Raymond H. Barker that he was a widower and had some money and other assets from his first wife's estate. (TR 22) She admitted that he sold him home, and they refinanced the marital home to use the money to purchase rental houses. (TR 24) She admitted that she got the equity in the marital home as she was what she wanted, that she did not want the rental income producing property. (TR 25) She testified she received \$350.00 per month, also food stamps. (TR 28) She testified that she became disabled in July 2005, after the parties had separated. (TR 12) She admitted in the year 2006 that she wrote over twenty-six thousand dollars (\$26,000.00) on hers and her mothers accounts. (TR 30-31) She admitted paying the bills on her house from her mother's account, in addition to receiving temporary alimony of six hundred dollars (\$600.00) per month. She testified that her mother was still paying her house note of five hundred eighty-five dollars (\$585.00) per month. (TR 33) That her mother who lived with her was still paying a portion of the expenses each month. (TR 35) She admitted that she was on three separate bank accounts, one of which was with her mother's boyfriend, Douglas Woods. (TR 39-40) She under cross examination admitted that she had put six thousand five hundred dollars (\$6,500.00) on same of which five thousand five hundred dollars (\$5,500.00) was used to purchase a new heating and air system for the house after the parties separated. (TR 42) She testified that her mother's boyfriend, Douglas Woods, was paying her credit cards. (TR 43, 47)

She testified under cross examination that she had incurred additional attorneys fees brought about by her rescinding of the agreement to settle on September 1, 2006. (TR 44) That she had incurred additional attorneys fees with her present attorney of three thousand dollars (\$3,000.00) admitting under oath that it was because to "Keep her word." (TR 48, 49) She admitted that on September 1, 2006, she did not want alimony, but she had changed her mind. (TR 49-51) She admitted on cross examination that she still had the same standard of living had not changed a great deal. (TR 52)

Tonya Bass, who is the daughter of Raymond H. Barker, was called by Lavera (Nelson) Barker, as an adverse witness. (TR 57) She testified that she did not help her father with his bills, nor he with hers. (TR 59, 69) She testified that her father, Raymond H. Barker, had emphysema, arthritis, shoulder problems, COPD which is a pulmonary disorder disease. (TR 60) That he also suffers from depression. (TR 60) That he had been hospitalized since September 2006. (TR 60) That he was on medication, and she and her sister had to check on their father, Raymond H. Barker. (TR 60) She testified that she and her sister help her father, Raymond H. Barker, take care of his business with paying bills, etc. (TR 61) That he was living in one of the rental houses at Forrest Gate in Horn Lake. (TR 61) That he was drawing Social Security Disability payments. (TR 62) That she and her sister had to give him towels things of that natures after he was put out of the house by Lavera (Nelson) Barker. (TR 64) She testified that her younger sister was with her dad on an account left from her mother's estate. (TR 65) She

knew about Lavera (Nelson) Barker hepatitis, before the parties' separation, and that she continued to work after the parties' separation. (TR 68)

Raymond H. Barker testified that at the time of the divorce he was sixty-two years of age (62). (TR 75) That had gone to school through the 8th grade, but did not have a GED. (TR 70) That because he was a veteran , his medical was covered through the Veterans Administration. (TR 90) That he received from the Social Security Disability the sum of one thousand seven hundred twenty-eight dollars (\$1,728.00) per month. (TR 70) That he was disabled and unable to work having emphysema. (TR 75) He received a little income on the rental property. (TR 72, 73) He testified what he paid on the bills while the parties were together. (TR 95) He testified that he was living in one of the rental houses, but he had notes on all three, taxes, maintenance and insurance on them. (TR 72, 73) He testified that they had a good marriage until she asked him to leave in April 2005. He referred to Exhibit 2, which was his financial disclosure statement, which showed his financial needs. (TR 75, MRE 8) He testified as to what he received from his first wife's estate, and that fourteen thousand dollar account (\$14,000.00) in his and his daughter's names were from his first wife's estate and had never been commingled or used for family purposes during the marriage. (TR 76)

He testified as to his being declared disabled by the Social Security Administration in January 2007. (TR 89) That his medical expenses are paid through the Veterans Administration.

(TR 89) That he had co-pays and prescriptions that were not covered with the VA which he had to pay himself. (TR 90)

He testified about the settlement in Grenada on September 1, 2006, in Grenada which Lavera (Nelson) Barker rescinded. (TR 90-91) That it had cost him more attorneys fees, but that he had been and still was ready, willing and able to go through with the September 1, 2006 Agreement, that as a result of her actions he had incurred an additional three thousand seven hundred dollars (\$3,700.00) attorneys fees and expenses. (TR 92)

He testified that they had divided the real property on the day of the trial. (TR 94) He testified as to what he paid on the home house during the marriage, paid notes, etc. which Lavera (Nelson) Barker wanted as opposed to the rental property, which was income producing. (TR 73, 79, 95, 96)

He testified that he did not know the reason that Lavera (Nelson) Barker had not tried to apply for Social Security Disability benefits through him. (TR 97)

Then was introduced into Evidence Exhibit 6 which was the attorneys fees affidavit of Lavera (Nelson) Barker . (TR 101, MRE 8)

Both sides then rested their respective cases and the Chancellor rendered his opinion on June 11, 2007, denying Lavera (Nelson) Barker attorneys fees, and awarding her from Raymond H. Barker twenty-four months (24) of Rehabilitative Alimony at two hundred dollars (\$200.00) per month. (TR 102, 106, 107, MRE 11-17)

SUMMARY OF ARGUMENT

That the Chancellor reasonably awarded rehabilitative alimony to the Appellant, Lavera (Nelson) Barker, based on the evidence that both were disabled. One was receiving disability payments and the other had a claim pending, which would permit the Court to modify same either way, if there was an award of disability or not. That each of the parties had substantially agreed on equal marital assets.

That based upon the net income from the rental property the Chancellor established the amount of two hundred dollars (\$200.00) per month as a reasonable amount of Rehabilitative Alimony.

ARGUMENT

A. STANDARD OF REVIEW.

The standard of review in domestic relations cases is well settled and is limited:

“... this Court will not disturb the findings of a Chancellor unless the Chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.”

Crow v Crow, 622 So2d 1226 (Miss. 1993); Dell v. Parker, 563 So2d 594 (Miss. 1990).

In other words , the Court has stated:

“ ... on appeal , we are required to respect the findings of fact made by a Chancellor, supported by credible evidence and not manifestly wrong.”

In Fisher v Fisher, 771 So2d 364-367 (Miss.2000), the Supreme Court has stated that it views the facts of the divorce decree in a light most favorable to the Appellee. It may not disturb

the Chancellor's decision unless the Court finds it is manifestly wrong, and unsupported substantial evidence. It is the position of the Appellee, Raymond H. Barker , that the Chancellor was correct in his ruling.

B. ISSUE I: The Trial Court did not err in awarding the Appellant Rehabilitative Alimony

The evidence at trial revealed that Raymond H. Barker was disabled and Drawing Social Security Disability. That Lavera (Nelson) Barker was disabled and had applied for Social Security Disability at the time of the trial and was awaiting a ruling. That each of the parties divided their marital assets with each receiving similar or like equity in the parcels of real property that was conveyed prior to trial. That Lavera (Nelson) Barker had chosen the home house in Hernando over the rental houses, which were income producing. She was not agreeable to selling all the property and dividing equally the net equities.

The Chancellor was aware with her being disabled that she in all probability was going to receive some kind of Social Security Disability not only in a lump sum, but also a monthly rate and medical benefits.

The Chancellor, then based upon the evidence before him awarded her Rehabilitative Alimony.

"Rehabilitative alimony has been defined as modifiable, for a fixed period of time, and vesting as it accrues. While both rehabilitative periodic alimony and lump sum

alimony which is not paid all at once can share the same characteristics of being a certain amount of money paid over a certain amount of time, they are distinguishable in their modifiability, respective purposes, and by the intent for which the chancellor grants them." Hubbard v. Hubbard, 656 So.2d 124, 129 (Miss. 1995). **"Rehabilitative periodic alimony" is not intended as an equalizer between the parties but is for the purpose of allowing the less able party to start anew without being destitute in the interim. "** Hubbard v. Hubbard, 656 So.2d 124, 129 (Miss. 1995)

Now what the Chancellor did based upon the evidence and condition of both parties awarded rehabilitative alimony to Lavera (Nelson) Barker because she had pending her claim for social security disability for her disability. If she received the disability determination from the Social Security Administration then she would have a lump sum paid her, monthly amounts, and medical benefits. Since rehabilitative alimony is modifiable then the Chancellor could either terminate the alimony if she received the benefits, or if she did not he could modify same based upon the parties' situation at the time.

It should be remembered that the martial assets had been divided by the parties, and each received close to the same amount of equity. The Court was only asked to determine the alimony if any, that Lavera (Nelson) Barker was to receive from her equally disabled husband, Raymond H. Barker.

C. ISSUE II: The Trial Court did not err in awarding Appellant Rehabilitative Alimony in the sum of \$200.00 per month for two years

Both parties had the same amount essentially of marital assets that was accumulated or acquired during the marriage. Therefore, the Court was left to determine what amount if any should Lavera (Nelson) Barker be awarded in rehabilitative alimony. The Appellant cites as authority the case of Armstrong v Armstrong, 618 So2d 1278 (Miss. 1993) where the Supreme Court reversed an award of \$175.00 per month for two years' rehabilitative alimony. This case is distinguishable from the case at bar. Armstrong had the element of fault, children, a twenty-one year marriage, income of \$40,000 plus on the part of the husband, and a wife who was working. In this case, there was no fault basis for divorce, no children, an eight (8) year marriage before the separation and ten (10) at the time of the divorce, and both parties were disabled one of which was drawing Social Security Disability and the other had applied and was awaiting an award. In the case at bar, unlike the Armstrong decision each of the parties had an equal or near equal amount of marital assets awarded to each by agreement. Lavera (Nelson) Barker did not want the rental houses and the notes that went with them, although they were income producing assets. She chose instead the marital home. It is submitted that if Raymond H. Barker could sell the rental properties, he could have a home equivalent to Lavera (Nelson) Barker.

Cheatham v Cheatham, 537 So2d 435 (Miss. 1988) cited by the Appellant, Lavera (Nelson) Barker, in her brief, also involved a fault ground of adultery, an eleven year marriage,

marital assets, lump sum alimony, and both parties not disabled and earning good incomes. The case at bar is factually different .

How did the Chancellor arrive at the figures of two hundred dollars (\$200.00)? He simply looked at the income from the rental houses and awarded Lavera (Nelson) Barker a portion of the profits for a limited period of time, without the responsibility of the mortgages, tenants, taxes, maintenance and upkeep, all of which was the responsibility of Raymond H. Barker should he choose to continue to own the rental property.

The amount was reasonable based upon the assets of the parties, and their respective income or potential income of separate estates. The reason the estates are disparate is that equitable distribution, taking into account assets outside of the marriage, properly made them so. The purpose of lump sum alimony is not to eliminate any disparities that arise from the equitable distribution award. "Alimony and equitable distribution are distinct concepts, but together they command the entire field of financial settlement of divorce. Therefore where one expands, the other must recede." Gambrell v. Gambrell, 650 So.2d 517, 520 (Miss.1995) .


The Chancellor in his wisdom chose not to award lump sum alimony, although there was a slight disparity in the estates of the parties. He awarded an amount based on all sources of income of the parties, less actual living expenses to arrive at the amount so awarded .

CONCLUSION

That the Chancellor's opinion should be affirmed by this Court for the aforesaid reasons.

Respectfully submitted,

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CERTIFICATE OF SERVICE


I, H.R. Garner, attorney for Appellee, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Appellee's Brief to the following:

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Honorable Mitchell Lundy
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Supreme Court of Mississippi
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This the 13 day of February, 2008.



H.R. Garner, Certifying Attorney
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