


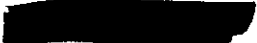
I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant hereby certifies that the following 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. Lavera Nelson Barker, Hernando, Ms.
2. Raymond H. Barker, Horn Lake, Ms.
3. David L. Walker, Southaven, Ms.
4. H.R. Garner, Hernando, Ms.

Respectfully submitted,

This the 28 day of December 2007.


David L. Walker 
Counsel for Appellant

COA - T
2007-CA-01147

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IV. STATEMENT OF ISSUES

A. Whether the trial court erred in failing to award the Appellant permanent, temporary and lump sum alimony.

B. Whether the trial court erred in awarding the Appellant rehabilitative alimony of only \$200.00 per month for two years.

V. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Appellant, Lavera Nelson Barker, filed a complaint for divorce in the Chancery Court of Desoto County, Ms. on April 20th, 2005. Clerk's p.6-8. The complaint alleged that she was entitled to a divorce based upon irreconcilable differences and in the alternative habitual cruel and inhuman treatment from the Appellant, Raymond H. Barker. Id. at 7.

The parties executed a voluntary consent to divorce based upon irreconcilable differences with the court to determine issues of alimony and legal fees. Id. at 10. A judgment of divorce was filed on June 13, 2007 awarding the Appellant rehabilitative alimony from the Appellee for twenty four months at the rate of \$200.00 per month. Id. at 13. No attorney fees were awarded to the Appellant. Id. The Appellant filed a notice of appeal of the aforesaid judgment of divorce on July 5th, 2007. Id. at 15.

B. APPELLANT'S TRIAL WITNESSES LAVERA NELSON BARKER

Lavera Nelson Barker was born on September 21, 1953 and received a GED in 1978. R. at 8. She did not have any college education. Id. She has worked as a clerk, school bus driver, delivery driver, product distributor and restaurant worker. R. at 9-10. She and the Appellant did not have any children born during the marriage.

At the time of the marriage to the Appellee, the Appellant lived at 3765 Brights Rd, Hernando, Ms. She had acquired this house via the property settlement in her first divorce. R. at 10. The Appellee convinced her to refinance this house in the names of the parties so that the monthly mortgage payment could be lowered. Id. The Appellee made the monthly mortgage payment on this house. R. at 11. The money that she made during the marriage went to pay such bills as utility, grocery, clothing and house maintenance. Id. The parties had a good lifestyle. Id. They went out to eat, had nice clothes to wear and good food to eat. Id. They drove fairly new vehicles. Id.

At the time of the trial her step-father was paying her utility bill and her mother was paying her house note. R. at 12. Her mother and step father were paying her food and ordinary daily living expenses. Id. She lived with her mother. Id. She had been diagnosed with Hepatitis C. Id. She lasted worked in July 2005. Id. She had filed for disability, but had not been awarded benefits by the administrative judge. R. at 13-14.

During the marriage the Appellant developed the idea of purchasing rental houses and the parties acquired four rental properties during the marriage, one of which they sold. R. at 13. The Appellant took an active role in the management of the property by collecting rents and making sure

repairs were made. R. at 14. Prior to the trial, the Appellee executed a deed to Brights Road property to the Appellant and the Appellant executed deeds to the rental properties to the Appellee. Id. The only income that the Appellant had was a court ordered payment of \$200.00 per month from the rental properties income. R. at 15.

During the marriage the Appellee worked as a delivery driver and in quality control for a truck manufacturing company. R. at 20-21. He also worked as a dump truck driver. R. at 21.

On cross examination the Appellant testified that at the time of the marriage to the Appellee she owned a vehicle, a house and had money in the bank. R. at 22. The Brights Road property had equity of \$82,616.60. R. at 25. The Appellant did not desire the rental properties. Id. Since the separation of the parties, the Appellee lived in one of the rental houses. R. at 26. The Appellee suffered breathing problems during the marriage as a result of driving a dump truck. R. at 26.

The Appellant received \$350.00 per month from Mid-State Opportunity and food stamps for payment of some of her bills and food expenses. R. at 27-28. She became disabled in July 2005 due to Hepatitis C. R. at 28. At times, she paid some of her household bills out of her mother's account when she did not have any funds. R. at 32.

The Appellant lived with her mother, who paid a portion of the expenses of operating the Bright Road house. R. at 35. She received \$250.00 on a bi-weekly basis for about eleven months in private disability payments after she became unable to work. R. at 37. At one point in time her sister lived with her also. She contributed to the payment of the household bills. Id. This sister had died by the time of the trial. Id. She incurred a debt of \$5500 for a new air conditioning and heating unit for her home after the separation of the parties. R. at 43. She owed a debt of \$10000 to her mother's boyfriend Id.

The Appellant incurred attorney fees of \$3000 to the attorney who represented her at the trial of this case. R. at 48. Her health was worse at the time of the trial as compared to the time that she married the Appellee. R. at 52. She did not have any retirement fund. Id. She had an outstanding balance of \$2000 to her prior attorney in this case. R. at 53.

On redirect examination the Appellant testified that she requested various types of alimony in her complaint for divorce filed on April 20th, 2005. R. at 54. Her mother lives with her due to necessity. Id. She would not have financial security without an award of alimony. R. at 55. Her only assets were the Bright Road house and her vehicle.

TONYA BASS

Tonya Bass is the daughter of the Appellee. R. at 57. He is on an account with her for an automobile. R. at 58. He suffers from emphysema. R. at 66. She and her sister have not had to help their father financially since he separated from his wife. R. at 67. He has made it on his own. R. at 68. The Appellant suffered from Hepatitis C prior to the separation of the parties. Id.

RAYMOND H. BARKER

The Appellee was born on October 12th, 1944 and has an eighth grade education. R. at 70. He served in the Army in Vietnam as a cook. Id. His social security payments are \$1728.00 on a monthly basis. Id. He applied retirement and disability benefits at the same time. R. at 71. He received back time benefits of \$9202.00. Id. He used these funds to repay his brother-in-law \$5000, made payments on credit cards and to live on. Id. He also received \$200 per month income from the rental properties. Id. He last worked in September 2005. R. at 72. He did not know whether he would sell the three rental properties that were titled in his name. Id. He could not estimate how much rental income that these rental houses would generate. R. at 73. When two of the rental houses were rented, net income of \$400.00 per month was generated. Id. He paid the monthly house note

on the Brights Road house until April 2005. Id. He did not know whether the Appellant was worse off or better off at the time of the trial compared to when the parties were married. Id.

During the marriage the parties went to casinos from Biloxi to St. Louis. They were to the Bahamas, Niagara Falls and Atlantic City. They had a good life, nice clothes and new cars. R. at 74. He admitted that he was not confined to his home all day. He uses a tank of gasoline per week. R. at 77. He admitted that a payment of \$575.00 per month for the Brights Road property should not have been listed on his financial statement. He felt that he did not owe the Appellant any alimony payment because he had given her plenty. R. at 78-79. That is, he had purchased her five new cars, paid all the house notes, all the car notes, all the insurance and all the cable bills. He paid all of the bills in 2000 when the Appellant was not working. R. at 79. He was married to a younger woman for ten years who made him happy until he got run off. R. at 79-80.

On redirect examination the Appellant testified that he paid a monthly mortgage payment of \$411.11 on the house that he lives in Horn Lake. R. at 82. He was out of work at one point in the marriage for approximately one year. R. at 86. He worked for Charles Jones Trucking for a while making \$500.00 per week. He had to quit this job because of the dust.

He then worked for a truck service delivering trucks on a part-time basis and made \$1100.00 per month. R. at 87. He receives his medical treatment and medication at the VA hospital. R. at 89.

The Appellee admitted that he was able to pay the Appellant to alimony of \$600.00 per month until the Court ordered this payment to be terminated. R. at 99. The two rental houses generated rental income of \$1375.00 per month when occupied. He has access to \$14000. R at 100.

VI. SUMMARY OF ARGUMENT

The trial court erred in failing to award the Appellant permanent, temporary and lump sum alimony. The trial court failed to render an opinion stating its findings of facts and conclusions of law on why the Appellant was not entitled to permanent, temporary and lump sum alimony from the Appellee. That the Appellant was entitled to an award of one or more these forms of alimony based upon a ten year marriage to the Appellee, his income from social security of \$1728 per month and net income of \$400 per month from rental properties as compared to her income from the same sources of zero.

The trial court erred in erred in awarding the Appellant rehabilitative alimony of only \$200.00 per month for two years. This award amounts to 10.64% of the Appellee's available income. The Appellant had no realistic prospect for employment in that she was seeking social security disability benefits based upon Hepatitis C.

VII. ARGUMENT

A. THE TRIAL COURT ERRED IN FAILING TO AWARD THE APPELLANT PERMANENT, TEMPORARY AND LUMP SUM ALIMONY

The trial court failed to award the Appellant any permanent, temporary and lump sum alimony. Judgment of the Court. Clerk's papers at 13. The Appellant had requested these forms of alimony in her complaint for divorce. Clerk's papers at 7.

The trial court in determining whether the Appellant was entitled to an award of any type of alimony looked at the following factors:

1. Length of the marriage (ten years);
2. Non-marital assets of the parties (Appellant had none)
3. Income or income producing properties (Appellee had income and income producing properties).

Taking those factors into consideration the trial court awarded the Appellant rehabilitative alimony of \$200.00 per month for twenty four months. R. at 106-107. No other alimony was awarded by the trial court. R. at 107.

The standard of review of an award of alimony, or lack thereof, is that it is within the discretion of the chancellor and should not be reversed unless the chancellor was manifestly in error. Richard v. Richard, 711 So. 2d 884, 891 (Miss. 1998).

If an award of alimony is grossly inadequate, then the reviewing

may remand the case the chancellor for reconsideration of the award.

Creekmore v. Creekmore, 651 So. 2d 513, 520 (Miss. 1995). The Appellant would argue that an award of zero for permanent, temporary and or lump sum alimony is grossly inadequate. Equity requires more than an award of \$200.00 per month rehabilitative alimony for twenty four months. See **Armstrong v. Armstrong**, 618 So. 2d 1278, 1281 (Miss. 1993). All awards of alimony should be considered together to determine that they are equitable and fair. **Hubbard v. Hubbard**, 656 So. 2d 124 (Miss. 1995). A marriage of twelve years certainly favors an award of lump sum alimony. **Johnson v. Johnson**, No.2002-CA-01552 COA.

The standard for determining periodic alimony is set forth in **Armstrong**, *supra*. The standard for determining lump sum alimony is set forth in **Cheatham v. Cheatham**, 537 So. 2d 435 (Miss. 1988). The trial court did not enter a finding of facts and conclusions of law in this case in which an evaluation of the standards were considered and evaluated by it. A detailed finding of facts and conclusions of law should be made in determining an award of alimony. **Ferguson v. Ferguson**, 639 So. 2d 921 (Miss. 1994). MRCP 52 authorizes the trial court to make specific findings of fact and to state separately its conclusions of law. One of the principal rationales for this rule is to provide the appellate court

with guidance as to what the trial court actually did, that is, what facts it found and what law it applied. **Jeffrey Jackson, Miss. Civil Procedure**, section 13:51 (1997).

The Appellant counsel elicited testimony from the from the Appellant and the Appellee concerning the factors listed in **Armstrong**, supra, but the trial court did not comment on these factors in either its judgment of divorce nor its bench opinion. R. at 15-18 and 74-80. In considering an award of alimony the trial court should consider the factors articulated by the Supreme Court in **Armstrong**, supra. Unfortunately, there is no reflection in the trial record of the trial court's consideration of these factors.

The trial court should have awarded the Appellant lump sum alimony because it would as an equalizer between the parties to serve equity amongst them completely once and for all. **Hubbard v. Hubbard**, 656 So. 2d 124, 130 (Miss. 1995). Alimony, if allowed, should be reasonable in an amount commensurate with the wife's accustomed standard of living, minus her own resources, and the ability of the husband to pay same. **Gray v. Gray**, 562 So. 2d 79, 83 (Miss. 1990). The Appellee testified that he and the Appellant went to casinos from Biloxi to St. Louis; went to the Bahamas, Niagara Falls and Atlantic City. They had a good life, nice clothes and new cars. R. at 74. The Appellant's resources consisted of the

alimony the trial court should consider the factors articulated by the Supreme Court in Armstrong, supra. Unfortunately, there is no reflection in the trial record of the trial court's consideration of these factors.

The trial court should have awarded the Appellant lump sum alimony because it would as an equalizer between the parties to serve equity amongst them completely once and for all. Hubbard v. Hubbard, 656 So. 2d 124, 130 (Miss. 1995). Alimony, if allowed, should be reasonable in an amount commensurate with the wife's accustomed standard of living, minus her own resources, and the ability of the husband to pay same.

Gray v. Gray, 562 So. 2d 79, 83 (Miss. 1990). The Appellee testified that he and the Appellant went to casinos from Biloxi to St. Louis; went to the Bahamas, Niagara Falls and Atlantic City. They had a good life, nice clothes and new cars. R. at 74. The Appellant's resources consisted of the former martial house and a vehicle. She did not have any rental property income nor any funds from an award of social security disability benefits. The factors to be considered by a trial court in awarding or denying a request for lump sum alimony include the following:

1. the substantial contribution of a spouse to accumulation of total wealth;
2. length of the marriage;

3. the recipient spouse's separate estate or income level;

4. whether there would be financial security without an award of lump sum alimony. Cheatham v. Cheatham, 537 So. 2d 435 (Miss. 1988).

These factors weight in favor of the Appellant. She testified that she developed the idea of purchasing the rental houses and took an active role in the management of the rental properties. R. at 13. Thus, she made a substantial contribution to the contribution to the accumulation of the Appellee's wealth. The net rental income from the rental properties represents 18.7% of the Appellee's monthly income of \$2128.00. The length of the marriage of the parties, approximately ten years, clearly favors an award of lump sum alimony. See Johnson , supra. The recipient spouse's separate estate or income consists of the former marital home and vehicle. The monthly mortgage payment on the aforesaid house is \$585.00 per month. R. at 33. The equity in the house was \$82,616.60 and the debt was \$40,383.40. R. at 25. No award of permanent alimony creates a lack of financial security for the Appellant.

The trial court should also have made an award of permanent alimony to the Appellant. The Appellant's counsel secured testimony from the parties concerning the twelve factors for an award of alimony listed in

Hammonds v. Hammonds, 597 So. 2d 653, 655 (Miss. 1992), but again the trial court did not make the requisite findings of facts concerning this issue as required by Supreme Court. See **Henderson v. Henderson**, 703 So. 2d 262 (Miss. 1997).

The outright denial by the trial court of permanent, temporary and lump sum alimony was oppressive, unjust and or grossly inadequate so as to indicate an abuse of discretion on the part of the chancellor. **Armstrong**, supra. at 1280. The decision of the trial court on this issue is against the overwhelming weight of the evidence requiring a reversal of the decision of the trial court and a remand to the trial court to articulate its reasons for denying the Appellant any of these types of alimony. **Monroe v. Monroe**, 745 So. 2d 249, 252 (Miss. 1999).

**B. THE TRIAL COURT ERRED IN AWARDING THE
APPELLANT REHABILITATIVE ALIMONY OF ONLY
\$200 FOR TWO YEARS**

The trial court looked at the length of the marriage (ten years), the fact the Appellant had additional non-marital assets that the Appellant did not have, money in the bank and other income or income producing money and income from rental houses that the Appellant did not have and awarded the Appellant rehabilitative alimony of \$200.00 per month for twenty four months. R. at 106-107. The trial evaluated these considerations under the

the court's "guidelines". R. at 106. The trial court did not state specifically the nature of these guidelines. Id.

The Appellant acknowledges that an award of alimony and the amount thereof is largely within the discretion of the trial court.

Monroe at 252. However, a reviewing court may reverse an award of alimony when the amount of the award is against the overwhelming weight of the evidence. Id.

Alimony is to be considered only after the marital property has been equitably divided and the trial court determines one spouse has suffered a deficit. Lauro v. Lauro, 847 So. 2d 843, 848 (Miss. 2003). The marital property of the parties basically consisted of the house on Brights Road in Hernando, Ms., the rental houses and vehicles which the parties were able to reach an agreement as to its division. The evidence is clear that the Appellant suffered a deficit in that the Appellee received rental income producing property and the use and benefit of his monthly social security benefits of \$1728.

The purpose of rehabilitative alimony is to assist the recipient in improving her condition without becoming destitute in the interim.

Hubbard v. Hubbard, 656 So. 2d 124, 130 (Miss. 1995). The amount of rehabilitative alimony awarded by the trial court is grossly inadequate,

oppressive and unjust to enable the Appellant to improve her condition.

This award amounts to 10.64% of the monthly funds available to the Appellee. The time limitation placed on this award by the trial court is inadequate, oppressive and unjust in that the Appellant's health condition will not permit her to secure employment and improve her condition.

Thus, this award of alimony was manifestly in error resulting in an abuse of the trial court's discretion requiring a reversal of the award.


Richard v. Richard, 711 So. 2d 884, 891 (Miss. 1998).

VIII. CONCLUSION

Based upon the foregoing authorities and analysis the Appellant urges the reviewing court to reverse and remand this case to the lower court to state its reasons for denying the alimony sought by the Appellant and to reconsider its award of rehabilitative alimony in the amount of \$200.00 per month for twenty four months.

Respectfully submitted,

This the 28th day of December 2007.


David L. Walker
Counsel for Appellant
POB 896
Southaven, Ms. 38671
662-280-3300

IX. CERTIFICATE OF SERVICE

I, David L. Walker, counsel for the Appellant, hereby certify that I have this day either mailed or hand-delivered a copy of the Appellant's brief to Hon. Mitchell H. Lundy, Jr., chancellor, and H.R. Garner, Esq. opposing counsel, at their usual business addresses.

This the 28th day of December 2007.


David L. Walker