

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PRENTISS E. SELLERS

APPELLANT

V.

CAUSE NO. 2007-CA-01459

NANCY BRIDGES SELLERS

APPELLEE

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BRIEF OF THE APPELLANT

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APPEAL FROM THE CHANCERY COURT OF NESHOPA COUNTY, MISSISSIPPI

CAUSE NUMBER 2005-0332

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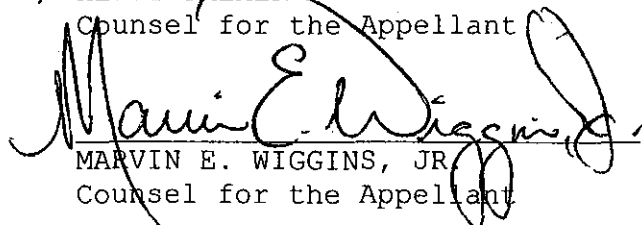
CERTIFICATE OF INTERESTED PERSONS

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 Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Prentiss E. "Eddie" Sellers ----- Appellant
2. Nancy Bridges Sellers ----- Appellee
3. J. Max Kilpatrick ----- Chancellor
4. Henry Palmer  
Robert D. Jones  
Lawyers, PLLC ----- Counsel for Appellant
5. Marvin E. Wiggins, Jr. ----- Counsel for Appellant
6. William B. Jacob  
Daniel P. Self, Jr.  
Joseph A. Kieronski, Jr.  
Self, Jacob & Kieronski ----- Counsel for Appellee

SUBMITTED on this, the 13th day of June, 2008.

  
HENRY PALMER  
Counsel for the Appellant

  
MARVIN E. WIGGINS, JR.  
Counsel for the Appellant

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### STATEMENT OF THE ISSUES

The Appellant herein, Prentiss E. Sellers, hereby designates his issues to be considered by this Court. These issues are stated hereinbelow.

ISSUE I: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN AWARDING TO THE APPELLEE "LUMP SUM REHABILITATIVE ALIMONY" AFTER THE DIVISION OF MARITAL ASSETS OF THE PARTIES.

ISSUE II: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN THE DIVISION OF MARITAL ASSETS.

ISSUE III: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN THE DIVISION OF MARITAL ASSETS IN CONJUNCTION WITH THE AWARD TO THE APPELLEE OF "LUMP SUM REHABILITATIVE ALIMONY."

ISSUE IV: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN THE DETERMINATION OF CHILD SUPPORT TO BE PAID BY THE PARTIES.

For convenience and economy of time in considering the said issues, the Appellant shall address Issues I, II, and III together, as the authorities and factors relative to those issues are similar. The Appellant shall address Issue IV separately.

### STATEMENT OF THE CASE

This action arose as a domestic proceeding in the Chancery Court of Neshoba County, Mississippi, in Cause Number 2005-0332 thereof. The said cause was assigned to Hon. J. Max Kilpatrick, Chancellor, Sixth Chancery Court District. The action was filed by Nancy Bridges Sellers [hereinafter cited as "Nancy", "Mrs. Sellers", "wife", and/or "the Appellee"] against her husband, Prentiss Edward Sellers [hereinafter cited as "Eddie", "Mr. Sellers", "husband", and/or "the Appellant"].

On October 18, 2005, Nancy filed in the above cause her Complaint for Divorce and/or Separate Maintenance and her Motion for Temporary Relief. (CP1-6; 7-10) In her Complaint, she alleged that the parties had married on November 22, 1986, in Neshoba County, Mississippi, and had finally separated in early 2003, albeit they still resided in the same house. (CP1) She alleged further that the parties had two (2) minor children, namely, Prentiss Austin Sellers [hereinafter cited as "Austin"], whose date of birth is October 27, 1989, and Isaac Lucas Sellers [hereinafter cited as "Isaac", whose date of birth is March 15, 1998. (CP2)

As grounds for divorce, Nancy alleged that her husband Eddie was guilty of habitual cruel and inhuman treatment toward her and that he was guilty of constructive desertion. (CP3) She alleged alternatively that irreconcilable differences had arisen between the parties. (CP3) As a result thereof, she sought a divorce and/or separate maintenance from Mr. Sellers. (CP3)

In addition thereto, Mrs. Sellers requested periodic, lump-sum, and rehabilitative alimony, custody of the two children, support for the two children, visitation to be awarded to their father, health insurance coverage for the children from her husband and payment from him for uncovered amounts, and the award of various assets of the parties. (CP3-4) Nancy further asked for the assessment to her husband of debts, taxes, and insurance on the marital residence, 1999 Dodge Caravan, and other marital debts. (CP4-5) She concluded by requesting the equitable division of the marital assets, a life insurance policy on her husband's life in the amount of \$250,000.00 payable to her, an injunction from harassment from her husband, suit fees, attorney's fees, and general relief. (CP5) In her Motion for Temporary Relief, Nancy essentially replicated her request for relief in her Complaint, but on a temporary basis pending the trial of the cause. (CP7-10) The said motion was set for hearing on November 17, 2005. (CP13)

On October 26, 2005, Eddie Sellers filed an Answer to Complaint for Divorce. (CP11-12) In essence, Mr. Sellers denied the salient accusations and requests made by his wife. (CP11-12) Also on that date, Eddie filed a motion to continue the hearing on the motion for temporary relief, stating a conflict in counsel's schedule. (CP13-14)

Also on that date, Eddie filed his Counter-motion for Temporary Relief, in which he generally requested the temporary custody of the children, the temporary exclusive use and possession of the marital assets, temporary alimony, temporary

- child support, injunctions against his wife to prohibit her harassment of him and her dissipation of assets, and similar related relief. (CP15-17)

A Counterclaim for Divorce, Custody, and Related Relief was filed by Eddie Sellers on October 31, 2005. (CP27-32) In his pleading, Eddie alleged that Nancy was guilty of habitual cruel and inhuman treatment of him and of uncondoned adultery. (CP29) He further alleged constructive desertion and irreconcilable differences. (CP29). For relief, he sought a divorce, child custody, child support, health insurance, school expenses, the marital residence, the karate school, certain vehicles, a board, four-wheeler, motorcycle, periodic, lump-sum, and rehabilitative alimony, the equitable division of marital assets, the assessment of marital debts to Mrs. Sellers, an injunction against harassment by Mrs. Sellers, suit fees, attorney's fees, and other general relief. (CP30-31)

The parties met in court for a hearing on the respective motions for temporary relief on February 21, 2006. (CP38) The parties announced to the Court a resolution of the issues on a temporary basis pending the outcome of this case, with said agreement having been dictated into the record and transcribed as an Order of the Court. (CP38-45) By the terms thereof, the custody of the older son of the parties, Prentiss Austin Sellers, was be placed in Mr. Sellers, while the custody of the younger son of the parties, Isaac Lucas Sellers, was placed in Mrs. Sellers. (CP41) Mr. Sellers was to pay to Mrs. Sellers support



for Isaac in the amount of \$350.00 per month during the pendency of the case, and Mr. Sellers was to have the temporary use and possession of the marital residence. (CP41)

Further, the parties agreed to present to the Court their consent for divorce on the ground of irreconcilable differences, stipulating certain issues for consideration by the Court. (CP41-42) The said Consent for Divorce was eventually filed on June 8, 2006. (CP83-89) The parties stipulated as to the date of their marriage, the dates of birth of the two minor children, and to basis jurisdictional matters. (CP83-84) The said Consent set forth twelve (12) areas of agreement between the parties, leaving for determination by the Court another twelve (12) matters. (CP84-89) The parties also agreed to the entry of a divorce on the sole ground of irreconcilable differences, with all adversarial grounds to be dismissed with prejudice. (CP84)

The parties agreed that Eddie would maintain health insurance coverage on the two children, with the parties to divide equally any amounts not so covered. (CP85) Nancy would get the 1999 Dodge Caravan, while Eddie would get the 2001 Ford Ranger, two (2) Ford Broncos, two (2) motorcycles, tractor, four-wheeler, riding lawnmower, boat, and trailer. (CP85) Eddie would also get the exclusive use and possession of certain rental property and farmland conveyed to him and his sister by their mother. (CP85) The furniture of the children would belong to the children. (CP85) The various guns would belong to Eddie, while the remaining furnishings and appliances would be divided between

the parties by means of the making of two lists of items by Eddie and the first selection therefrom by Nancy. (CP86)

As to the values of the farm land, rental house, marital residence, and karate school, the parties agreed to the appraisal thereof and the determination by the Court of the value thereof for purposes of effecting the equitable division of assets and liabilities. (CP86). Other issues to be determined by the Court was the custody and support of the children, the exclusive use of the marital home and karate school, the determination of marital assets and liabilities and the equitable division thereof, and the ownership of the camper on the farm land. (CP87) The Court was also requested to ascertain whether Eddie should maintain health insurance for Nancy, whether either party should be liable to the other for alimony, court costs, and attorney's fees, and which party should claim the children as dependents for tax purposes. (CP87) Lastly, the Court was to determine whether Eddie had been in contempt of court for preventing the appraisal of the property owned by Eddie and his sister. (CP88)

By Order entered by the Court on June 13, 2006, the parties were to complete discovery, to cooperate in making appraisals, and to conclude the preliminary matters prior to trial. (CP90-92) The trial was also set for August 7, 8, 10, and 11, 2006, in the Neshoba County Courthouse, in Philadelphia, Mississippi. (CP91)

Following a four-day trial, in which the Court considered twenty-seven (27) exhibits and fifteen (15) witnesses, the Court took the matter under advisement. (T742) However, both parties

moved to reopen the case, (CP176-180; 181-183) and the Court heard the motions on October 17, 2006. (T743-831) Additional proceedings were held on December 19, 2006, pursuant to Order entered December 1, 2006. (CP188)

On May 21, 2007, the Court entered its Opinion, in conformity with the Consent for Divorce, granting the divorce on grounds of irreconcilable differences, awarding custody of Isaac to Nancy and of Austin to Eddie, and directing Eddie to pay \$490.00 per month as child support and eighteen (18) installments of \$700.00 each as spousal support to Nancy. (CP189-225; RE5-41) The Court divided the marital assets and liabilities, leaving Eddie with all the debt and leaving each party with equal equity of \$142,990.00. (CP212-214; RE28-30) Eddie's share of the marital residence and his karate school was transferred to Nancy as part of the spousal support ordered by the Court as "lump sum rehabilitative alimony". (CP222-223; RE39-40) Nancy was denied her requests for attorney's fees and for Eddie to be held in contempt of court. (CP224; RE40)

A Judgment conforming to the Opinion was entered by this Court on June 15, 2007. (CP226-236; RE42-52) Eddie filed a motion for reconsideration or a new trial, (CP277-278) and Nancy filed another contempt proceeding. (CP279-283) In its hearing of the matters on July 6, 2007, the Court resolved the contempt issues and denied the motion to reconsider and for new trial, entering its Order on July 24, 2007. (CP284; T846-848; RE53; 54-56) Eddie filed a timely notice of appeal on August 20, 2007. (CP289-290)

### SUMMARY OF THE ARGUMENT

The lower court performed yeoman's work in shepherding this cause from initiation to conclusion. Several hearing dates, disputes over discovery, accusations of infidelity and unfitness, and, ultimately, allegations by the Court of possible perjury directed toward the parties were but several of the features of this action.

However, the Appellant, Eddie Sellers, would state unto this Court that the trial court committed manifest error in making its rulings on child support, property division, and the award of "lump sum rehabilitative alimony". Despite the efforts of the lower court to devise an equitable solution, those efforts instead wrought an inequitable situation for Eddie.

Under the usual "manifest error" standard of review, the appeals court will affirm the holding of the trial judge, unless the incorrect legal standard has been applied or there is no substantial evidence to support the holding. In the instant case, this has occurred, in part having a domino-like effect on the various awards by the trial court.

The marital assets of the parties were divided by the trial judge in a detailed manner, remarkably leaving both parties with exactly equal shares. Nothing else was left to be done, as this division conformed to the Chancellor's announced intention to divide the assets equally.

Where there is something left to be done, it is generally done via lump sum alimony. A cash disbursement from the party

— having an excess of asset value to the party having a deficit is the means by which the balancing of equities may be accomplished.

In the instant proceeding, the lower court determined to award "lump sum rehabilitative alimony" to cure a supposed deficit post-asset division. The court held, without any specific finding, that Nancy was entitled to an additional \$62,600.00 from Eddie. Of this amount, \$50,000.00 in already-divided marital assets was shifted from Eddie to Nancy, in the form of his equitable distribution of the marital residence and karate school. In addition, the lower court calculated a disposable adjustable gross income for Eddie by discounting wholesale his financial information and replacing that data with numbers of the court's own making and not supported by any substantial evidence.

The amount of this award was not based upon substantial evidence; no explanation for this amount was cited. Further, the relevant factors for neither lump sum alimony nor rehabilitative alimony were addressed. Thus, the correct legal standard was not followed by the lower court.

The award of lump sum rehabilitative alimony was not proper. Further, it impaired the division of marital assets and destroyed the equitable distribution crafted by the lower court. By so doing, the division itself was rendered improper by the use of means not necessary to achieve the desired effect-- equity.

Finally, the lower court committed manifest error in its holding that Eddie should pay to Nancy for Isaac \$490.00 per month in child support, while she pays nothing. The court, as

noted above, revised the financial figures offered by Eddie, while not considering Nancy's minimum of three (3) part-time jobs during the pendency of the trial below. Further, the lower court gave some credit for insurance payments, gave no credit to Eddie for also supporting Austin, and offered no specific finding for not following the proper procedures.

In light of the foregoing, this Court should reverse the decision below and should remand the cause for further proceedings below.

### STATEMENT OF THE FACTS

Notwithstanding wrangling up to the week prior to trial, the parties met for trial on August 7, 2006. (T1) The parties presented to the Court ten (10) general exhibits, including the aforementioned Consent for Divorce, (T12; Ex. GE1), the respective financial reports required of the parties by Rule 8.05, Uniform Rules of Chancery Court Practice, (T12; Ex. GE2, GE3) deeds to the real property to be considered by the Court, (T12; GE4, GE5, GE6, GE7), and appraisals of the marital residence and karate school (T12; GE8), the rental house (T12; GE9), and the farm land (T12; GE10).

Seventeen (17) other exhibits were offered during the trial. (T25; 27; 59; 62; 201; 204; 236; 246; 284; 321; 323; 443; 450; 480; 658; 659; 662; Ex. 11-27) Pertinent to this appeal were exhibits concerning Eddie's bank accounts and checks, (T59, 62; Ex. 13, 14), the title to the camper on the farm land, (T246; Ex. 18), photographs of the real property at issue, (T284; 658; 659; Ex. 19, 25, 26), and the statement regarding Nancy's finances made by Forrest Bridges, her father. (T443; Ex. 22)

Each party testified during the trial. Eddie was called adversely by Nancy (T12-100), and he was called to testify as part of his case. (T626-738) Nancy also testified during her case in chief. (T192-442) Nancy testified in detail as to the marital assets of the parties (T326-331; 347-416) and her then-current work situation (T322-326; 422-424). Nancy called her father, Forrest Bridges, (T442-478) who provided information regarding

— Nancy's breast-implant settlement and trust funds. (T442-445; Ex. 22) Others testifying for Nancy included her sister, Cindy Deaton (T136-192), her brother-in-law, Phil Deaton (T100-123), a fellow home-school friend, Tiffany Quick (T123-135), and her counsel as to her legal fees of more than \$11,000.00. (T478-482) Counsel also provided an itemization of his charges. (T480; Ex. 24)

At the close of Nancy's case, Eddie moved to dismiss the contempt of court motion based upon his alleged prevention of appraisals of the rental property and farm land. (T483-486) The Court sustained the motion. (T486-488)

In his case in chief, Eddie called the parties' older son, Austin Sellers. (T488-545) Eddie also called his mother, Roma Sellers, who testified concerning the farm land and rental property conveyed by her to Eddie and his sister. (T545-556) He also called April Reynolds and Michael Reynolds, (T559-580; 617-625), who were friends of Nancy. They testified concerning Nancy's involvement with another man, Lee Salers. (T561-564, 576; 623-625) April specifically stated that Nancy had admitted a sexual relationship with the man. (T561-564; 576)

Linda Green and Ava Nell Coleman described parenting skills of Eddie in the context of the family's attendance at New Vision Church. (T580-588; 589-594). Kasey Sellers, Eddie's daughter-in-law, discussed the relationship between Nancy and Austin and the lack of contact between Nancy and the rental house in Philadelphia, in which Kasey lived with her husband, Andy Sellers. (T556-559) Andy Sellers, Eddie's son from a prior



marriage, also testified concerning the relative parenting skills of Nancy and Eddie, the relationships between Eddie, Nancy, and the children, and Eddie and Nancy, and the lack of contact between Nancy and the said rental property. (T594-617)

Eddie was the final witness during his case in chief. Eddie had been questioned earlier regarding his parenting skills, and also provided details regarding his finances relative to the karate school operated by him in a building on the same parcel as the marital residence (T49-62) and his retirement fund. (T78-80) On direct examination, he made detailed explanations regarding the marital assets and liabilities. (T695-707) He also discussed the other issues before the Court. (T626-738)

After the close of the case (T739-742), counsel submitted to the Court proposed findings of fact and conclusions of law, with rebuttals thereto, (CP119-132; 133-151; 152-163; 164-175) the last of which having been filed on October 3, 2006. Prior to the ruling of the Court, Eddie filed a motion to reopen the case on October 9, 2006. (CP176-180) Nancy countered with her own motion to reopen, filed on October 17, 2006. (CP181-183)

In his motion, Eddie alleged that Nancy had moved near Collinsville and was living with another man and that her father, who was to be living near the marital residence, had moved. (CP176) In her motion, Nancy alleged that Austin, while in Eddie's custody and control, had committed several serious acts of delinquency. (CP181) At the October 17, 2006, hearing, a guardian *ad litem* was appointed for Austin. (CP185)

— Counsel for the parties announced to the Court that they had resolved the custody issue, with Eddie to have custody of Austin and Nancy to have custody of Isaac, with a review thereof in six (6) months. (T746-747) However, the Court rejected the agreement, over concerns that both parties had misrepresented material matters to the Court. (T748-750) The Court then heard testimony regarding the allegations contained in the motions and concerning Austin's absences from school and illnesses, and the Court received exhibits related to Isaac and Austin's schooling and a website ad allegedly placed by Eddie. (T756-831) The Court reset the matter for another motion day for the delivery by counsel of medical records and school records of the children and of material regarding the website. (CP186-187)

The Court, by Order entered December 1, 2006, set December 19, 2006, as the date for the matters to be presented. (CP188) No record thereof was apparently made. However, the Court noted in its Opinion that the parties and counsel met in court on December 19, 2006, stipulated that Eddie would have custody of Austin, that Nancy would have custody of Isaac, and that they agreed to modify the Consent for Divorce to allow the Court to determine child support and tax deductions for each child. (CP194; RE10)

The Court issued its thirty-seven (37) page Opinion on May 21, 2007. (CP189-225; RE5-41) In his ruling, the Chancellor cited the matters to which the parties had agreed and those to be considered by consent. (CP189-193; RE5-9) A Judgment conforming to the Opinion was entered June 15, 2007. ((CP226-236; RE42-52)

— The Court discounted the financial information provided by Eddie via his Rule 8.05 form and his income tax return. (CP194; 215-217; RE10; 31-33) The Court determined that the monthly adjusted gross income of Mr. Sellers was \$3,500.00, subject to the statutory guidelines for child support at the rate of fourteen percent (14%), or \$490.00 per month. (CP194; RE10)

After determining the marital assets, (CP197-201; RE13-17), the Court then divided the assets equally, (CP210; RE26) assigning assets to the respective parties. (CP210-213; RE26-29) The Court set forth its conclusion that the total marital assets were valued at \$304,230.00 and that the total marital liabilities were assessed at \$18,250.00, for a net equity of \$285,980.00. (CP213-214; RE29-30) The Court divided the net sum equally, leaving each party with \$142,990.00, with Eddie having been assessed the entire marital debt. (CP213-214; RE29-30)

Among the assets divided were the marital residence and the karate school building, all of which are located upon the same tract of land. The Court valued the tract and buildings at \$100,000.00, assigning \$50,000.00 to each party. (CP210; RE26)

Subsequently, the Court directed the division of Eddie's retirement fund equally, leaving each party with \$81,000.00. (CP215; RE31) The Court also considered Eddie to have a separate estate valued at \$137,500.00 and Nancy to have a separate estate valued at \$13,620.00. (CP215; RE31)

In considering alimony, the Court again discounted the information provided by Eddie on his Rule 8.05 form and his

— income tax records and crafted a disposable adjusted gross monthly income of \$3,950.00, with a revised monthly expenditure level of \$2,869.00. (CP216-217; RE 32-33) These amounts included an estimated income from the karate school of \$200.00 per month. (CP194; RE10) However, the building and land upon which the school building stands were divested from Eddie by the Court, (CP210; RE26) despite both parties' having asked the Court to award the school building to Eddie. (T241-242; Ex. GE1)

The Court then considered the merits of awarding alimony to Nancy. The Chancellor addressed the various Armstrong factors applicable to alimony awards and held that Nancy needed help in getting reestablished. (CP215-222; RE31-38) The Court declared that Nancy was entitled to an award of "lump sum rehabilitative alimony" in the amount of \$62,600.00. (CP222; RE38) Of this sum, the Court awarded to Nancy the \$50,000.00 assignment to Eddie in the tract including the residence and the karate building, thus granting the entirety of the tract and both buildings to Nancy. (CP210; RE26) Eddie was then directed to pay the balance of the "lump sum rehabilitative alimony", being \$12,600.00, in eighteen (18) increments of \$700.00 each. (CP223; RE39)

Notwithstanding testimony that she was working as a dental hygienist part-time, as a secretary to an air conditioning company, and as an assistant in a construction business, (T218-219; 323-326; 422; 810-812) and that she had trust funds available, (T442-445; Ex. 22) the Court found that Nancy had no income whatever and should not pay child support for Austin.

(CP195; RE11) However, the Court denied Nancy's request for attorney's fees, finding in part that Nancy had a separate estate of \$13,620.00. (CP224; RE40) Further, the Court found that Nancy "has the financial ability to pay her own attorney's fees having received assets through equitable division and a lump sum alimony award in excess of \$180,000.00 without any debt whatsoever." (CP224; RE40)

Despite Nancy's employment, the lower court accepted as true her Rule 8.05 report which declared that her only income was \$650.00 from Eddie, as per the temporary order. (CP217; RE33; Ex. GE2) The court found that her expenses were all reasonable, notwithstanding the contradictions of her testimony from that of her father and her denial of having any funds. (CP217-219; RE33-35; Ex. GE2, 22; T218-219; 323-326; 422; 442-445; 810-812) She also she had trust funds available, (T442-445; Ex. 22) and had started working with her father's business of purchasing realty at tax sales. (T252-253)

The award of child support and the determination of alimony hereinbelow were based upon the revision by the trial judge of the financial figures submitted by Eddie. Part of the revision was made in regard to a projected income from the "Eddie Sellers Karate School", the building and grounds of which were ceded to Nancy Sellers. The lower court added to Eddie's figures amounts reflecting a monthly voluntary retirement deduction, giving a credit for hospitalization insurance of an unknown amount, and giving no credit for the child placed in Eddie's custody. Eddie's

— revised monthly adjusted gross income of \$3,500.00 (CP194; RE10) was not supported by substantial evidence, and the deviation from the statutory guidelines was not fully supported by findings and evidence. Rather, the loss of the school points to the contrary.

The "lump sum rehabilitative alimony" award was likewise based upon revised figures. In addition to the above revisions, the Court discounted the information contained in both Eddie's Rule 8.05 financial report and the income tax return, (T12; Ex. GE3) and revised his monthly expenses and the deductions taken on the tax return to what the Court described as more "realistic" or "reasonable". (CP215-218; RE31-34) The lower court rounded off the 401-K and total net income numbers upward, (C)215; RE31; Ex. GE3) and elected to use the projected, pre-divestiture income figure for the karate school rather than the income tax return loss. (CP216; RE32; Ex. GE3) Lastly, the lower court unilaterally reduced several expense figures and replaced them with arbitrary figures devised by the court. (CP216-217; RE32-33; Ex. GE3)

After the entry of the June 15, 2007, Judgment, the Court conducted a hearing on the motion of Mr. Sellers for a new trial or to reconsider the ruling. Following the July 6, 2007, hearing, the Court denied the motion (T846-848; RE54-56) and entered an Order accordingly on July 24, 2007. (CP284; RE53) This appeal ensued.

## ARGUMENT

**ISSUE I: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN AWARDING TO THE APPELLEE "LUMP SUM REHABILITATIVE ALIMONY" AFTER THE DIVISION OF MARITAL ASSETS OF THE PARTIES.**

**ISSUE II: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN THE DIVISION OF MARITAL ASSETS.**

**ISSUE III: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN THE DIVISION OF MARITAL ASSETS IN CONJUNCTION WITH THE AWARD TO THE APPELLEE OF "LUMP SUM REHABILITATIVE ALIMONY."**

As noted in the Statement of the Issues, the Appellant will present to this Court Issues I, II, and III for joint consideration. Due to the similarity in factors to be considered, economy will be served in this manner.

### **A. Standard of Review**

"The standard of review for domestic cases is abundantly clear. This Court will not disturb the findings of a chancellor unless we find an abuse of discretion, an erroneous application of law, or a manifest error." Ellzey v. White, 922 So. 2d 40, 41 ¶3 (Miss. App. 2006). "Thus, if we find substantial evidence in the record to support the chancellor's findings, we will not reverse." Id. "This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his or her discretion, was manifestly wrong, clearly erroneous, or applied an erroneous legal standard." Long v. Long, 928 So. 2d 1001, 1002 ¶6 (Miss. App. 2006).

### **B. Dividing Marital Assets and "Lump Sum Rehabilitative Alimony"**

The chancellor below determined that an equal division of marital assets and liabilities would best balance the equities between the parties. Following that determination, the chancellor

considered the award of alimony, and, as a result, granted to Nancy "lump sum rehabilitative alimony" in the amount of \$62,600.00, with \$50,000.00 thereof to be provided by the transfer of Eddie's equitable division interest in the marital residence and karate school building and property. The balance was to be paid in eighteen months at a rate of \$700.00 per month.

The lower court did not rely upon the financial figures provided by Eddie on the stand or in his Rule 8.05 form and income tax return. The court revised the numbers and crafted new figures, from which it then made the aforesaid awards.

#### **C. Initially Determine Marital Assets and then Division**

Mississippi case law in the area of divorce, child custody and support, alimony, and division of property has evolved over the last three decades. Among the evolutionary course has been the requirement that a chancellor must first distinguish between marital assets and nonmarital assets, Hemsley v. Hemsley, 639 So. 2d 9009, 915 (Miss. 1994), and must then consider the various factors in the equitable division of marital property and debt. Ferguson v. Ferguson, 639 So. 2d 921, 928 (Miss. 1994). Failure to cite the Ferguson factors and to make findings of fact and conclusions of law relative thereto is reversible error. Yelverton v. Yelverton, 961 So. 2d 19, 26 ¶11 (Miss. 2007).

Equitable division does not mean that each party will continue to have an interest in an asset. However, one being divested of an interest in one asset will be compensated for the divestiture by receiving other assets or a monetary award.



Fogarty v. Fogarty, 922 So. 2d 836, 840 ¶19 (Miss. App. 2006). Lump sum alimony is often used as a property transfer mechanism, providing support, but also providing "an unalterable distribution of property". Miller v. Miller, 874 So. 2d 469, 472 ¶9 (Miss. App. 2004). "When lump sum alimony is paid as an 'equalizer', it is because the property distribution has left one spouse's assets out of balance to the other in such a way as to be inequitable." Id. at ¶10.

Once that course has been completed, it is necessary to consider whether a party is left with a deficit. If so, alimony is to be considered. See Armstrong v. Armstrong, 618 So. 2d 1278, 1281-82 (Miss. 1993) (various awards related to divorce, including periodic and lump sum alimony and property division); Hammonds v. Hammonds, 597 So. 2d 653, 655 Miss. 1992) (factors to be reviewed in periodic alimony cases); Cheatham v. Cheatham, 537 So. 2d 435, 438 (Miss. 1988) (factors to be considered in lump sum alimony cases). The absence of an on-the-record analysis of the Armstrong factors will not necessarily result in reversible error. Thompson v. Thompson, 816 So. 2d 417, 420 ¶9 (Miss. App. 2002).

#### **D. Consider Whether Alimony Is Appropriate**

The division of marital assets pursuant to Hemsley and Ferguson is the first tool in the resolution of marital issues.

If there are sufficient assets which, when equitably divided and considered with each spouse's non-marital assets, will adequately provide for both parties, no more need be done. If the situation is such that an equitable division of marital property, considered with each party's non-marital assets, leaves a deficit for one party, then alimony based on the value of the non-marital assets should be considered.

Johnson v. Johnson, 650 So. 2d 1281, 1287 (Miss. 1994). The analysis goes farther:

All property division, lump sum or periodic alimony payment, and mutual obligations for child support should be considered together. "Alimony and equitable distribution are distinct concepts, but together they command the entire field of financial settlement of divorce. Therefore, when one expands, the other must recede."

Lauro v. Lauro, 847 So. 2d 843, 848-49 ¶13 (Miss. 2003).

Regarding the concept of alimony, Mississippi jurisprudence currently recognizes four (4) types of alimony. These are periodic, lump sum, rehabilitative, and reimbursement. Smith v. Little, 834 So. 2d 54, 57 ¶9 (Miss. App. 2002). Each category has its unique characteristics and purposes.

The Smith decision distinguished between the four categories of alimony. It first discussed periodic alimony.

Periodic alimony is the traditional monthly alimony awarded on the basis of need. [cit. om.] This form of alimony generally has no fixed termination date except it automatically terminates at the death of the obligor or the remarriage of the obligee. [cit. om.] Periodic alimony can also be modified or even terminated in the event of a material change of circumstances subsequent to the decree awarding alimony. The alimony becomes vested only when the payment becomes due. [cit. om.]

Id. The Smith case then moved on to discuss lump sum alimony.

According to the Court of Appeals,

It is a fixed and irrevocable amount, used either as alimony or as a part of property division. [cit. om.] It may be payable in a single lump sum or in fixed periodic installments. [cit. om.] At the time of the decree, lump sum alimony is vested in the obligee and becomes an obligation of the estate of the obligor if he or she dies before payment. [cit. om.]

Id. at 58 ¶10. The Court then concluded by discussing the other two types of alimony. The Court observed:

The third and fourth types of alimony have only recently been recognized by the courts. Rehabilitative alimony, recognized in 1995, is a monthly payment that is modifiable, but has a fixed termination date, and is designed to help the recipient reenter the workforce. [cit. om.] The fourth type, reimbursement alimony, recognized in 1999, is available to one who has supported a spouse in obtaining training or education which carries the possibility of future earnings, but which has not yet produced substantial property for division. [cit. om.]

Id. at ¶11.

This analysis was the prelude to the Court's addressing of a dispute concerning the transfer of a leased Jaguar automobile and a townhouse residence and a regular, fixed-term payment. The husband considered the award to be modifiable and argued that, where an award is unclear, the courts should construe it to be periodic alimony. Part of the parties' settlement agreement referred to the real estate transfer as "a lump sum marital settlement between the parties as is intended as readjustment support for the wife and is not subject to modification." Id. at 60 ¶22. The husband claimed that the phrase "readjustment support for the wife" constituted periodic rehabilitative alimony, subject to modification. Id.

The Court of Appeals stated that, in determining the type of award, a court "must look past labels and into the substance of the agreement." Id. The Court held that, except for the wording, all other indicators exhibited signs of lump sum alimony. The payments and transfers were nonmodifiable and were terminable at a set date. Id. at ¶23. According to the Court, the

appeals court of Mississippi have, on many occasions, held alimony awards to be lump sum alimony, even when those words were absent. Id. at 58 ¶14.

The contrast has been made between lump sum alimony and rehabilitative alimony.

While both rehabilitative alimony and lump sum alimony which is not paid all at once share the same characteristics of being a certain amount of money paid over a definite period of time, they are distinguishable in their modifiability, respective purposes, and by the intent for which the chancellor grants them.

Miller v. Miller, 874 So. 2d 469, 473 ¶13 (Miss. App. 2004). In Miller, the Court of Appeals considered the Cheatham factors in assessing lump sum alimony, noting that, jointly or separately, the factors help little unless the reviewer keeps in focus the fundamental consideration -- whether after equitable distribution, an "equalizer" is needed. Id. at 472 ¶8. The Court also noted that lump sum alimony is "a hybrid divorce concept, providing support as does other alimony, but also making an unalterable distribution of property as does equitable distribution." Id. at ¶9.

The Miller Court was sympathetic to the chancellor, who had to work with inadequate information from the parties to make a decision. However, the Court held that, even with the limited evidence, there had been error:

Lump sum alimony was ostensibly used here to equalize equitable distribution, but the distribution was already in favor of the recipient spouse. It is not modifiable, which is part of the danger of it. No equalizer was appropriate in this case[.]

Id. at 474 ¶¶14-15.

Another observation in the Miller decision was the concept of fault. While fault is a consideration in periodic alimony determinations, it plays no role in determining lump sum alimony. Id. at 472 ¶10.

In determining whether to award lump sum alimony, certain factors are to be considered. These include:

- (1) substantial contribution to accumulation of total wealth of the payor either by quitting a job to become a housewife, or by assisting in the spouse's business;
- (2) a long marriage;
- (3) where recipient spouse has no separate income or the separate estate is meager by comparison;
- (4) without the lump sum award the receiving spouse would lack any financial security.

Cheatham v. Cheatham, 537 So. 2d 435, 438 (Miss. 1988). The single most important factor in the cases leading to the Cheatham recitation was the disparity in the separate estates. Id. Another significant issue was in setting an appropriate amount of an award. Id. at 439.

In Cheatham, the lower court awarded a lump sum amount to the recipient wife. The Supreme Court upheld the determination that an award was proper. However, the Court then noted that the amount awarded was not supported by substantial evidence and could not be paid, due to the limited interest of the payor in the only remaining asset, his business. The award was held to be manifestly wrong and reversible error. Id. at 440.

In Haney v. Haney, 907 So. 2d 948, 952 ¶15 (Miss. 2005), the Supreme Court reviewed the status of lump sum alimony, as it

relates to equitable distribution. The Court found that, in light of Ferguson, "lump sum alimony is nothing more than a tool to assist a chancellor in equitable distribution." Id. It was further described as "a method of dividing property under the guise of alimony." Id. at ¶16. The Court added that "lump sum alimony is a tool to assist a chancellor in transferring assets to a spouse who has no legal title, but who contributed to the accumulation of property in the marriage." Id. at ¶17. This was the means by which distribution occurred before Ferguson.

Since Ferguson, chancellors use their authority to divide the assets directly, rather than use lump sum alimony. This has diminished, but not ended, the need for lump sum alimony. Id. at ¶23. Recognizing the concept as part of equitable distribution, the Haney opinions noted that the Cheatham factors regarding lump sum alimony are merely earlier version of the Ferguson factors. As such, lump sum alimony now is "no more than equitable distribution in for form of lump sum cash, rather than an equitable portion of certain property which cannot be divided equitably." Haney, 907 So. 2d at 955 ¶26.

Moreover, Haney cautioned against the use of either concept simply to reach non-marital assets. "We find no case, however, which authorizes the award of lump sum alimony or an equitable distribution of non-marital assets based upon nothing more than one spouse's need and the other's ability to pay. More justification is needed." Id. at ¶28. Nothing remained to be divided, making the award unnecessary. Id. at 957 ¶40.

Since the Ferguson factors have subsumed the Cheatham factors, the Supreme Court has now indicated that the Ferguson factors are mandated as a prerequisite to the determination of an award of lump sum alimony. Yelverton v. Yelverton, 961 So. 2d 19, 25 ¶8 (Miss. 2007). Thus, ***"the chancery court was obligated to apply the appropriate factors necessary to determine whether Rhonda was entitled to lump sum alimony, i.e., the Cheatham-Ferguson factors."*** Id. (emphasis added)

The Supreme Court reversed for the failure of the chancellor to apply either of the Cheatham or Ferguson factors to the determination of lump sum alimony and to make findings of fact and conclusions of law consistent with Ferguson. Id. at 26 ¶¶10-11. See Thompson v. Thompson, 894 So. 2d 603 (Miss. App. 2004) (chancellor required on remand to consider each of Cheatham factors in determining lump sum alimony award).

In considering any award of alimony, the amount should be reasonable, in an amount commensurate with the payee's standard of living, in light of the payor's ability to pay. Johnson v. Johnson, 877 So. 2d 485, 495 ¶43 (Miss. App. 2003).

#### **E. Rehabilitative Alimony**

Rehabilitative alimony was pronounced by the Supreme Court in Hubbard v. Hubbard, 656 So. 2d 124, 130 (Miss. 1995). In Hubbard, the Court correlated "periodic transitional alimony" and "rehabilitative periodic alimony" and labeled them as synonymous. Further, the Court distinguished between lump sum alimony, being nonmodifiable and for a distinct purpose, from rehabilitative

alimony, which is modifiable, of limited duration, and intended to aid in making the recipient self-supporting without becoming destitute in the interim. Id. at 129-30.

Rehabilitative alimony is not considered during equitable distribution, but, rather, is awarded to those who have put on hold their careers. Lauro v. Laura, 847 So. 2d 843, 849 ¶15 (Miss. 2003). Unlike lump sum alimony, it is not intended as an equalizer of equitable distribution. Id.

#### **F. Application of Factors**

The chancellor below considered the Ferguson and Armstrong factors, in the contexts of equitable distribution and periodic alimony. However, he failed to consider the Cheatham/Ferguson factors in light of a lump sum alimony award.

The award by the chancellor to Nancy Sellers of "lump sum rehabilitative alimony is not recognized by state law. The two concepts, as noted above, are clearly distinguishable. Lump sum alimony is not modifiable and is not intended to smooth one's transition back into the work force. Rehabilitative alimony is just the opposite -- modifiable and designed to ease one back to work. The award cannot be both simultaneously.

The appellate courts look to the substance, not the label. In one case involving an agreement settlement, the Court noted that it was being invited to a "tyrannical exercise in labeling". Elliott v. Rogers, 775 So. 2d 1285, 1288 ¶14 (Miss. App. 2000). In the instant case, this new label appears to be a post-equitable distribution transfer of assets from Eddie to Nancy.



The purpose -- ostensibly to even out the disparate estates of the parties. However, that is not the function of lump sum alimony. It is to be used to assist in equitably dividing marital assets, not total estates.

Even if the award were to be considered rehabilitative, there is a \$50,000.00 component which is not modifiable. The transfer of the marital residence, the five acres of land, and the karate school and building, are irreversible. The loss of the school building and lot will require relocation or closing, a irrevocable situation. Neither is contemplated by a modifiable, transitory concept.

The award of "lump sum rehabilitative alimony" was manifest error. Its result was to equalize the parties, but, inequitably, it left Nancy with a far more significant division of marital assets than Eddie. Such a result is not within the ambit of the Ferguson progeny.

In this case, there was no ebb and flow, and there was no advancement and receding. As for Eddie, it all receded.

Finally, the award, even if proper under the analyses above, was not proper in the finding of the amount. In Cheatham, the amount was not supported by evidence. Here, the amount in issue, \$62,600.00, materialized in the Opinion without any predicate facts or reasons. As in Cheatham, there is no practical or equitable manner in which Eddie can comply therewith.

The revisions resulted in the creation of numbers without any evidentiary basis. Whereas the tax returns are subject to

perjury and the Rule 8.05 forms are sworn, there was no testimony or documentary proof adduced at trial to substantiate the figures used by the lower court. The effect thereof was to establish amounts of disposable income not supported by credible evidence.

Further, the award of "lump sum rehabilitative alimony" in the amount of \$62,600.00 is not among the four (4) types of alimony awards recognized by the Supreme Court of Mississippi. Lump sum alimony has largely been subsumed by the doctrine of equitable distribution. Lump sum alimony has been used as a means to balance the equities where there is more to be done after the division of actual assets. It is not modifiable and is generally considered to consist of a cash payment to complete the distribution of assets.

Rehabilitative alimony is modifiable and is used to permit a recipient to ease back into the workforce after a long absence therefrom. The ameliorative impact thereof is designed to prevent the destitution of the recipient while in the process of returning to the workforce.

The lower court apparently intended for Nancy Sellers to ease back into the workforce. However, the lower court provided this aid in the form of a tangible, non-liquid asset. The result of this award was to divest from Eddie Sellers his entire interest in the marital residence and karate school, diminishing his income and the equitable division of assets.

The lower court announced the equal division of assets and liabilities, leaving each with \$142,990.00. However, with the

shift of the marital residence and school, the division favors Nancy by a margin of \$192,990.00 to \$92,990.00, and, if the \$12,600.00 balance is considered, the division is skewed by a margin of \$205,590.00 to \$30,390.00. Even the lower court, in denying attorney's fees to Nancy, noted that her financial clout is \$180,000.00, free and clear. (CP224; RE40) This also leaves Eddie with the \$18,250.00 of marital debt.

Also, the lower court determined that Eddie's adjusted monthly disposable income was \$3,950.00, and his adjusted monthly living expenses were set at \$2,869.00. (CP217; RE33) These figures would leave a net disposable monthly income of \$1,081.00, from which Eddie is to pay \$1,190.00 in child support and "lump sum rehabilitative alimony" for eighteen (18) months.

If the award to Nancy was "lump sum alimony", the lower court failed to apply properly the Cheatham and Ferguson factors enunciated by the Supreme Court for such awards. If the award was "rehabilitative", then the award of land and buildings does not provide the liquidity needed by someone in need of such alimony. In either event, the proper standard was not applied.

This Court should reverse the decision of the lower court in the division of assets, the award of "lump sum rehabilitative alimony", and the determination of child support. This Court should remand the cause for further consideration, in light of the proper standards and in light of the evidence presented as to the financial situation of the parties. At that time, the lower court may revisit all the mechanisms of resolving domestic cases.

**ISSUE IV: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN THE DETERMINATION OF CHILD SUPPORT TO BE PAID BY THE PARTIES.**

**A. Standard of Review**

As noted above, "[t]he standard of review for domestic cases is abundantly clear. This Court will not disturb the findings of a chancellor unless we find an abuse of discretion, an erroneous application of law, or a manifest error." Ellzey v. White, 922 So. 2d 40, 42 ¶3 (Miss. App. 2006). "Thus, if we find substantial evidence in the record to support the chancellor's findings, we will not reverse." Id. "Essentially, a chancellor's findings of fact will only be reversed when the record possesses no credible evidence to support them." Chesney v. Chesney, 910 So. 2d 1057, 1060 ¶5 (Miss. 2005).

**B. Determination of Child Support**

In this cause, the child support determination was based upon figures that were not traceable to the record. The award of child support was predicated upon the revision by the trial judge of Eddie's financial figures. His projected monthly income was increased by \$200.00 from the "Eddie Sellers Karate School", which was later awarded to Nancy. The lower court added to the monthly income a voluntary retirement deduction, gave a credit of an unstated amount for hospitalization insurance paid by Eddie, and allowed no credit for the Austin while in Eddie's custody.

Eddie's revised monthly adjusted gross income of \$3,500.00 (CP194; RE10) was not supported by substantial evidence. The court added a now-non-existent income from a self-owned devastated business. Also, if the figure were correct, the credit

for insurance in an undesignated amount would be (a) vague and (b) an unexplained deviation from the statutory guidelines. was not fully supported by findings and evidence. Further, the loss of the school would either reduce income or increase expenses, to the degree caused by the dispossession of the premises. Neither condition would be conducive to increasing income.

Similarly, the "lump sum rehabilitative alimony" award was based upon revised figures. In addition to the foregoing, the lower court disregarded the information contained in both Eddie's Rule 8.05 financial report and the income tax return. (T12; Ex. GE3) The lower court revised Eddie's monthly expenses and tax deductions to make them "realistic" (CP215-218; RE31-34) and rounded off the 401-K and total net income numbers upward, (C)215; RE31; Ex. GE3).

The court used the income projections for the karate school as it existed pre-transfer rather than the income tax return loss. (CP216; RE32; Ex. GE3) Lastly, the lower court unilaterally reduced several expense figures and replaced them with arbitrary figures devised by the court. (CP216-217; RE32-33; Ex. GE3)

Thus, there is no evidentiary basis for the revised numbers. Although tax returns are subject to penalties for perjury and the Rule 8.05 forms are certified, these revised numbers had no testimony or documentary proof adduced at trial to substantiate them. The effect thereof was to establish amounts of disposable income for Eddie which was not supported by credible evidence.

Regarding Nancy's pass from paying child support, the trial court noted in its May 21, 2007, Opinion that Nancy's testimony concerning her finances was contradicted by her own father. (CP200; RE16) Forrest Bridges testified that he was in control of her settlement funds and a trust fund, (T442-445; Ex. 22) whereas she denied having any such funds left. (T268-271)

Further, the trial court apparently ignored the three (3) jobs Nancy admitted in absolving her of any current obligation to pay child support. (T218-219; 323-326; 422; 810-812) She also she had trust funds available, (T442-445; Ex. 22) and had started working with her father's business of purchasing realty at tax sales. (T252-253)

Finally, after the various awards, the lower court declared that Nancy enjoyed substantial free and clear assets in excess of \$180,000.00, plus a separate estate of \$13,620.00. (CP222,224; RE38,40) The court thus denied her request for an award of an attorney's fee, due to the size and value of her estate.

### **C. Application of Child Support Standards**

"[W]here proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability of each." Mississippi Code Annotated §93-5-23 (1972), as amended and revised. **See Magruder v. Magruder**, 881 So. 2d 365, 368 ¶14 (Miss. App. 2004). In the instant case, the trial court had determined

that Nancy had a "debt free" estate in "excess of \$180,000.00" and a separate estate of at least \$10,000.00. (CP224; RE40)

From the evidence, Nancy had a supportive father, a home with her father if necessary, and, in the October, 2006, hearing, a home provided by an employer. Also, the marital residence awarded to her by the trial court had some value. See Fogarty v. Fogarty, 922 So. 2d 836, 841 ¶24 (Miss. App. 2006) (court considered value of rent-free living in marital residence for two years as part of equitable distribution).

Even if the court were to have found Eddie's information unreliable, there was nothing else to consider as to his income and expenses. Further, the tax records, if fabricated, could subject him to criminal liability, and, therefore, would tend to have some credibility attached thereto.

In Fountain v. Fountain, 877 So. 2d 474, 477-478 ¶¶11-14 (Miss. App. 2003), the Court of Appeals addressed a similar matter. The lower court did not trust the figures presented by the husband and relied upon a financial report prepared in conjunction with a housing loan. The report, while based upon the Schedule C tax form submitted by the husband, had adjusted some of the figures for depreciation, had extrapolated a nine-month income figure to a twelve-month income figure, and averaged the incomes for two years.

The Court of Appeals found the reliance upon the adjusted figures to be manifest error. The Court wrote favorably of the tax returns submitted by the husband to the government, Id. at

479 ¶¶15-16. The Court stated that, while it was not requiring the chancellor to follow the income tax returns, it was requiring the chancellor to determine an accurate figure. Id. at 480 ¶22. If the lower court did not accept as accurate the amount of income shown on any filed tax returns, "the **chancellor shall make specific findings** as to why the amount was not deemed reliable." Id. at 479 ¶20. (emphasis added)

The Supreme Court recently considered the use of income tax returns as a basis for setting child support. The chancellor had subtracted the tax liability of the father from the adjusted gross taxable income and divided the difference by twelve to determine a monthly adjusted gross income for support purposes. Despite the mother's claim that the tax deductions were not proper, the use of the tax returns was upheld. Nix v. Nix, 790 So. 2d 198, 199-200 ¶¶3-6 (Miss. 2001).

Mississippi Code Annotated §43-19-101(3)(a)(1972), as amended and revised, describes components of "gross income from all potential sources", and includes, but not by way of limitation, income on any trust account or property, unemployment benefits, retirement benefits, any other payments made by any person, and alimony. Notwithstanding the lower court's reticence in ordering Nancy to pay support, her income from trust funds, alimony paid by Eddie, and her \$81,000.00 share of Eddie's 401-K retirement fund would qualify as "all potential sources". Id. Further, even if Nancy were unemployed, since she had been



working, there was no consideration of unemployment benefits, which also would have been a "potential source". Id.

Section 43-19-101(6)(b) provides for health insurance coverage for the children. If the court requires the custodial parent to obtain coverage, its cost shall be taken into account. Although Eddie was paying support on Isaac, he was supporting both children, as the lower court exempted Nancy therefrom. There should have been an accounting of the cost on Eddie's behalf. Id.

The chancellor stated that Eddie was given credit for this coverage. (CP194; RE10) No figure was cited for that credit. The lower court did state that it was adding to the gross income an amount of \$200.00 from the karate school. One may only assume that the lower court offset the credit and the karate school income, but this was not cited. Also, the divestiture of the school's building and lot would require new premises, thereby either increasing its costs or decreasing its income to Eddie. ,

The \$3,500.00 figure was higher than required, given the circumstances. It should have been reduced to reflect the insurance coverage via Eddie's employer and the loss of the karate school income. Further, by terms of the Opinion, Isaac was getting a debt-free home, a debt-free vehicle, and a mother with an estate of almost \$200,000.00.

On the other hand, Eddie was required to make substantial adjustments to his lifestyle. Assuming, *arguendo*, that the revisions of Eddie's information by the chancellor were proper, the adjusted living expenses of Eddie would be \$2,869.00,

compared to an adjusted disposable gross income of \$3,950.00, on a monthly basis. (CP217; RE33) This would leave a adjusted net monthly income of \$1,081.00.

From the \$1,081.00 above, for eighteen (18) months, Eddie would be required to pay \$490.00 per month in child support and \$700.00 in "lump sum rehabilitative alimony", for a total of \$1,190.00. This calculation would leave Eddie with a shortfall of \$109.00 per month.

From the foregoing, it is apparent that the lower court, in its desire to provide a workable solution to a knotty problem, did not clearly define the adjusted gross income of Eddie and improperly exempted Nancy from paying support. The amount that Eddie was required to pay, \$490.00, exceeds the guidelines for an amount less than \$3,500.00, which should have been used. The said support amount also did not account for an insurance credit, and the use of \$3,500.00 flew in the face of the income tax returns attached as part of the Rule 8.05 statement.

The excess payment directed from Eddie was not supported by a specific finding, as required by Mississippi Code Annotated §43-19-101(2) (1972), as amended and revised. Failure to do so renders the award inappropriate. Moses v. Moses, 879 So. 2d 1043, 1048 ¶14 (Miss. App. 2004). Likewise, the generic exemption of Nancy from paying support was inappropriate.

Finally, in a recent Court of Appeals case, an award of child support was reversed, due to the lack of substantial credible evidence in the record as to the monthly gross income of

the payor father. In that case, the father's Rule 8.05 form was not admitted into the record, but the chancellor referred to its declaration of \$1,720.00 per month as income from his manager's job at Babes Show Club. The mother testified that managers at the club can make \$150.00 to \$300.00 per night from tips. The lower court determined the applicable income to be over \$6,000.00 per month from this testimony from the recipient. The Court reversed, finding an abuse of discretion and no substantial evidence to explain how the chancellor arrived at the said figure as income. **Ellzey v. White**, 922 So. 2d 40, 42 ¶¶7-8 (Miss. App. 2006).

This Court should find manifest error in the lack of applying the proper standard in setting support from Eddie and in exempting Nancy from any payment. Further, this Court should hold that there is no substantial evidence to support the chancellor's determination of \$3,500.00 as the adjusted gross income, particularly in light of the tax return of Mr. Sellers. This Court should reverse this finding and remand for further proceedings before the trial court.

### CONCLUSION

This Court should rule that the lower court committed manifest error in awarding "lump sum rehabilitative alimony" against the Appellant. Further, this Court should find that the award, even if properly considered, was not supported by substantial evidence.

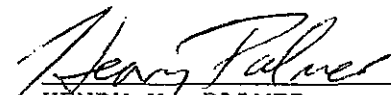
The use of such an award caused an inequitable result in the misalignment of assets after the division of marital assets. This disruption was also caused by both the improper award and the improper concept.

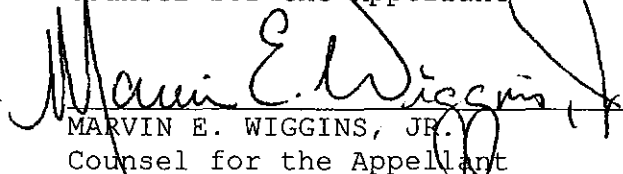
Finally, this Court should find that the application of the guidelines for child support was not proper and was manifestly wrong. Further, the determination of the income of the Appellant was not supported by substantial evidence and was reversible.

This Court should reverse the judgment below. Further, this Court should remand this cause for a new trial on all issues.

SUBMITTED on this, the 13<sup>th</sup> day of June, 2008.

Respectfully,

  
HENRY W. PALMER  
Counsel for the Appellant

  
MARVIN E. WIGGINS, JR.  
Counsel for the Appellant

CERTIFICATE OF SERVICE


This is to certify that true and correct copies of the above and foregoing document have been served upon each of the following:

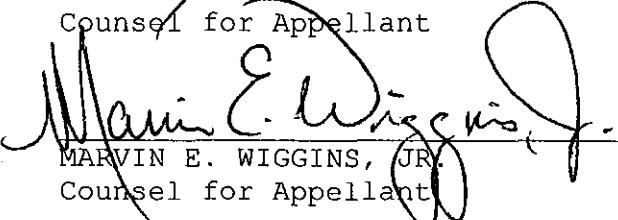
HON. J. MAX KILPATRICK  
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Certified on this, the 13th day of June, 2008.

  
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**\*26742 Miss. Code Ann. § 43-19-101**

**WEST'S ANNOTATED  
MISSISSIPPI CODE  
TITLE 43. PUBLIC WELFARE  
CHAPTER 19. SUPPORT OF  
NATURAL CHILDREN  
CHILD SUPPORT AWARD  
GUIDELINES**

*Current through End of the 2007 Regular  
Session and 1st Ex. Session*

**§ 43-19-101. Calculating support**

(1) The following child support award guidelines shall be a rebuttable presumption in all judicial or administrative proceedings regarding the awarding or modifying of child support awards in this state:

Number	Of Children	Due Support
	That	Should Be
1		14%
2		20%
3		22%
4		24%
5 or more		26%

(2) The guidelines provided for in subsection (1) of this section apply unless the judicial or administrative body awarding or modifying the child support award makes a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case as determined under the criteria specified in Section 43-19-103.

(3) The amount of "adjusted gross income" as that term is used in subsection (1) of this section shall be calculated as follows:

(a) Determine gross income from all potential sources that may reasonably be expected to be available to the absent parent including, but not limited to, the following: wages and salary income; income from self employment; income from commissions;

income from investments, including dividends, interest income and income on any trust account or property; absent parent's portion of any joint income of both parents; workers' compensation, disability, unemployment, annuity and retirement benefits, including an individual retirement account (IRA); any other payments made by any person, private entity, federal or state government or any unit of local government; alimony; any income earned from an interest in or from inherited property; any other form of earned income; and gross income shall exclude any monetary benefits derived from a second household, such as income of the absent parent's current spouse;

**\*26743** (b) Subtract the following legally mandated deductions:

(i) Federal, state and local taxes. Contributions to the payment of taxes over and beyond the actual liability for the taxable year shall not be considered a mandatory deduction;

(ii) Social security contributions;

(iii) Retirement and disability contributions except any voluntary retirement and disability contributions;

(c) If the absent parent is subject to an existing court order for another child or children, subtract the amount of that court-ordered support;

(d) If the absent parent is also the parent of another child or other children residing with him, then the court may subtract an amount that it deems appropriate to account for the needs of said child or children;

(e) Compute the total annual amount of adjusted gross income based on paragraphs (a) through (d), then divide this amount by twelve (12) to obtain the monthly amount of adjusted gross income.

Upon conclusion of the calculation of paragraphs (a) through (e), multiply the monthly amount of adjusted gross income by the appropriate percentage designated in subsection (1) to arrive at the amount of the monthly child support award.

(4) In cases in which the adjusted gross

income as defined in this section is more than Fifty Thousand Dollars (\$50,000.00) or less than Five Thousand Dollars (\$5,000.00), the court shall make a written finding in the record as to whether or not the application of the guidelines established in this section is reasonable.

(5) The Department of Human Services shall review the appropriateness of these guidelines beginning January 1, 1994, and every four (4) years thereafter and report its findings to the Legislature no later than the first day of the regular legislative session of that year. The Legislature shall thereafter amend these guidelines when it finds that amendment is necessary to ensure that equitable support is being awarded in all cases involving the support of minor children.

(6) All orders involving support of minor children, as a matter of law, shall include reasonable medical support. Notice to the noncustodial parent's employer that medical support has been ordered shall be on a form as prescribed by the Department of Human Services. In any case in which the support of any child is involved, the court shall make the following findings either on the record or in the judgment:

- \*26744 (a) The availability to all parties of health insurance coverage for the child(ren);
- (b) The cost of health insurance coverage to all parties.

The court shall then make appropriate provisions in the judgment for the provision of health insurance coverage for the child(ren) in the manner that is in the best interests of the child(ren). If the court requires the custodial parent to obtain the coverage then its cost shall be taken into account in establishing the child

support award. If the court determines that health insurance coverage is not available to any party or that it is not available to either party at a cost that is reasonable as compared to the income of the parties, then the court shall make specific findings as to such either on the record or in the judgment. In that event, the court shall make appropriate provisions in the judgment for the payment of medical expenses of the child(ren) in the absence of health insurance coverage.

### CREDIT(S)

*Laws 1989, Ch. 439, § 1; Laws 1990, Ch. 543, § 2, eff. from and after passage (approved April 4, 1990). Amended by Laws 2000, Ch. 530, § 3, eff. July 1, 2000; Laws 2004, Ch. 582, § 1, eff. July 1, 2004.*

<General Materials (GM) - References, Annotations, or Tables>

### HISTORICAL NOTES

#### HISTORICAL AND STATUTORY NOTES

At its May 20, 1998 meeting, pursuant to its authority under Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation ratified the correction of a typographical error in subsection (3)(e). The words "paragraphs (a) though (d)" was changed to "paragraphs (a) through (d)".

The 2000 amendment added subsec. (6), requiring reasonable medical support in all child support orders, and notice to the noncustodial parent's employer.

The 2004 amendment rewrote subsec. (6) as regards treatment of health insurance. Prior to the 2004 amendment, subsec. (6) read:

"(6) All orders involving support of minor children, as a matter of law, shall include reasonable medical support. Notice to the noncustodial parent's employer that medical support has been ordered shall be on a form as prescribed by the Department of Human Services."

**\*55973 Miss. Code Ann. § 93-5-23**

**WEST'S ANNOTATED  
MISSISSIPPI CODE  
TITLE 93. DOMESTIC  
RELATIONS  
CHAPTER 5. DIVORCE AND  
ALIMONY**

*Current through End of the 2007 Regular  
Session and 1st Ex. Session*

**§ 93-5-23. Children; spousal maintenance  
or alimony**

When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife or the husband, or any allowance to be made to her or him, and shall, if need be, require bond, sureties or other guarantee for the payment of the sum so allowed. Orders touching on the custody of the children of the marriage shall be made in accordance with the provisions of Section 93-5-24. The court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require. However, where proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability of each. In the event a legally responsible parent has health insurance available to him or her through an employer or organization that may extend benefits to the dependents of such parent, any order of support issued against such parent may require him or her to exercise the option of additional coverage in favor of such children as he or she is legally responsible to support.

Whenever the court has ordered a party to make periodic payments for the maintenance or support of a child, but no bond, sureties or other

guarantee has been required to secure such payments, and whenever such payments as have become due remain unpaid for a period of at least thirty (30) days, the court may, upon petition of the person to whom such payments are owing, or such person's legal representative, enter an order requiring that bond, sureties or other security be given by the person obligated to make such payments, the amount and sufficiency of which shall be approved by the court. The obligor shall, as in other civil actions, be served with process and shall be entitled to a hearing in such case.

**\*55974** Whenever in any proceeding in the chancery court concerning the custody of a child a party alleges that the child whose custody is at issue has been the victim of sexual or physical abuse by the other party, the court may, on its own motion, grant a continuance in the custody proceeding only until such allegation has been investigated by the Department of Human Services. At the time of ordering such continuance, the court may direct the party and his attorney making such allegation of child abuse to report in writing and provide all evidence touching on the allegation of abuse to the Department of Human Services. The Department of Human Services shall investigate such allegation and take such action as it deems appropriate and as provided in such cases under the Youth Court Law (being Chapter 21 of Title 43, Mississippi Code of 1972) or under the laws establishing family courts (being Chapter 23 of Title 43, Mississippi Code of 1972).

If after investigation by the Department of Human Services or final disposition by the youth court or family court allegations of child abuse are found to be without foundation, the chancery court shall order the alleging party to pay all court costs and reasonable attorney's fees incurred by the defending party in responding to such allegation.

The court may investigate, hear and make a determination in a custody action when a charge of abuse and/or neglect arises in the course of a custody action as provided in Section 43-21-151, and in such cases the court shall appoint a



guardian ad litem for the child as provided under Section 43-21-121, who shall be an attorney. Unless the chancery court's jurisdiction has been terminated, all disposition orders in such cases for placement with the Department of Human Services shall be reviewed by the court or designated authority at least annually to determine if continued placement with the department is in the best interest of the child or public.

The duty of support of a child terminates upon the emancipation of the child. The court may determine that emancipation has occurred pursuant to Section 93-11-65.

#### CREDIT(S)

*Laws 1954, Ch. 228, § 1; Laws 1979, Ch. 497, § 1; Laws 1983, Ch. 513, § 3; Laws 1985, Ch. 518, § 15; Laws 1989, Ch. 434, § 1; Laws 1993, Ch. 558, § 2; Laws 1994, Ch. 591, § 6; Laws 1996, Ch. 345, § 1, eff. from and after passage (approved March 17, 1996); Laws 2000, Ch. 453, § 2, eff. July 1, 2000; Laws 2006, Ch. 565, § 1, eff. July 1, 2006.*

#### HISTORICAL NOTES

#### HISTORICAL AND STATUTORY NOTES

The 1996 amendment added the last paragraph and subdivisions therein.

The 2000 amendment changed "may" to "shall" in the second sentence of the first paragraph, relating to orders being made in accordance with the provisions of Section 93-5-24.