IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SANDRA MELISSA HULTS	APPELLANT
VERSUS	NO. 2007-CA-02186
JAMES ALAN HULTS	APPELLEE

APPEAL FROM THE CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant, SANDRA MELISSA HULTS, hereby certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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Respectfully submitted, on this the 21st day of July, 2008.

GARY L. ROBERTS

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STATEMENT OF THE ISSUES ON APPEAL

A.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DETERMINING THE AMOUNT OF CHILD SUPPORT TO BE PAID FOR THE TWO MINOR CHILDREN

B.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING PERIODIC ALIMONY

C.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE DIVISION OF THE MARITAL ESTATE

D.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING MELISSA HULTS' ATTORNEY'S FEES

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This civil action was initiated on August 3, 2006 by the filing of a Complaint for Divorce by the trial court Plaintiff, Alan Hults (CP 1-9). He requested a divorce on the statutory ground of adultery or habitual cruel and inhuman treatment, or in the further alternative, on the ground of irreconcilable differences. He sought custody of the parties' two (2) minor children (David Hults, a male born November 29, 1989 and Dylan Hults, a male born June 16, 1995), child support, a division of the marital estate, and other equitable relief (CP 1-9).

Issue was joined by the filing of Melissa's August 28, 2006 Answer, which asserted, inter alia, that the breakup of the marital relationship was directly and proximately caused by the conduct of Alan. Melissa sought a dismissal of Alan's Complaint (CP 13-17). She simultaneously filed her Counterclaim (CP 18-26), requesting a divorce on the ground of uncondoned adultery, in the alternative on the ground of habitual cruel and inhuman treatment, and in the further alternative on the ground of irreconcilable differences. She too asked for custody of the two (2) children, reasonable child support, health and hospitalization insurance for the minor children, the exclusive use, possession and ownership of the marital home, an equitable division of the marital estate, lump sum and permanent periodic alimony, attorney's fees and other equitable relief.

Alan filed a timely Answer or reply. (CP 34-36), essentially denying the claims Melissa made.

A Temporary Order was entered on September 29, 2006 which governed the relationship of the parties pendente lite. Melissa was awarded the temporary physical custody of the two boys and various support provisions were ordered (CP 27-33).

The matter came on for trial, beginning on June 5, 2007. At that time the parties signed and filed a Consent to Adjudicate on Irreconcilable Differences pursuant to the provisions of Section 93-5-2(3) of the Mississippi Code of 1972, as amended (CP 39). The Consent designated the issues to be decided by the Court following trial. These issues included custody, child support, health care, life insurance, visitation, the division of marital assets and liabilities, alimony and attorney's fees. At the conclusion of the trial, the Court entered its Findings of Fact and Conclusions of Law and Ruling and Judgment of the Court on June 19, 2007 (CP 40-55). In that Judgment, the Court granted a divorce on the ground of irreconcilable differences and awarded physical custody to Melissa, consistent with the wishes of both children. The Court noted that Alan had testified at trial about his plans to marry his lover, Sandy Vecchio, as soon as his divorce was entered (CP 43). Accordingly, and because of certain issues that Dylan had concerning the relationship of his father with Ms. Vecchio, visitation was set on a graduated schedule for him.

The Court noted in its Judgment, that, in the year 2005, Alan reported his income as being $123,538.00, with a reported loss of

$10,394.00 from his hobby, commercial fishing (CP 46). The Chancellor also noted Alan's 2006 tax return, which reported wages and salary of $113,066.00 with a loss of $14,997.00 for commercial fishing. The Court concluded that Alan's Financial Declaration "understates" his gross and net pay. The Court opined that it is difficult to predict the accuracy of Alan's anticipated 2007 income and simply concluded ... "Therefore, the Court sets child support in this case at $1,000.00 per month" (CP 46). This is in spite of the evidence at the June trial showing Alan's estimated 2007 total income (based on year-to-date figures) being well in excess of $100,000.00 (Ex 2).

The Chancellor ordered Alan to maintain health insurance on the children, and ordered the parties to share equally any medical costs of the children not covered by insurance. Alan was directed to carry life insurance in the amount of $150,000.00 naming the children as beneficiaries, and it permitted Alan to reduce the coverage to $75,000.00 once the oldest child reaches the age of twenty-one.

Following the guidelines set forth in Hemsley v. Hemsley, 639 So.2d 909 (Miss. 1994) and Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994), the Court then proceeded to divide the marital estate. Of the $517,404.84 of Alan's vested interest in the Chevron Employees Savings Investment Plan (ESIP), he was awarded $402,404.84, while Melissa was awarded $115,000.00. Melissa was awarded the ownership of the marital home at 516 Bayou Pierre in Gautier, a property which appraised for $184,000.00 and with a net equity of $151,148.60 (CP 49). Alan was ordered to be solely

responsible for the debt, and was permitted to pay the mortgage either monthly or in a lump sum. The personal property of the parties was divided by the Chancellor, including an award to Melissa of a fractional interest in the Chevron Corporation Defined Benefit Plan in which Alan participates. The Court noted that the total marital assets awarded to Melissa was $414,413.04 (CP 53).

Next, in determining the kind, amount and duration of alimony to be awarded, the Court declared that Alan has a "substantially higher ability to earn income" than Melissa (CP 53). Melissa's income was limited at trial to unemployment compensation in the amount of $744.00 per month. When coupled with the child support and alimony under the Temporary Order, her gross monthly income was $2,574.00. The Court refused to award permanent alimony to Melissa, and instead awarded her rehabilitative alimony in the amount of $750.00 per month for five (5) years while "... she completes her education or receives appropriate vocational training" (CP 54).

Finally, the Court reviewed Melissa's request for attorney's fees and concluded that she had the ability to pay her own fees when considering the division of the marital assets and the award of rehabilitative alimony (CP 54).

Being aggrieved by that Judgment, Melissa filed a timely M.R.C.P. Rule 59 Motion on June 29, 2007 (CP 56-58, alleging among other things, that the child support award was inadequate, that the Court erred in failing to award periodic alimony and that the rehabilitative alimony award was too low as to amount. She also

claimed that, since all financial matters must be considered together, the division of the marital estate was not equitable. Finally, she alleged that the Court committed error in failing to award her reasonable attorney's fees for her representation in the divorce.

Following a hearing thereon, the Court entered a Ruling on October 12, 2007 (CP 59), and a subsequent Order in November 5, 2007 (CP 60-61). In its Order, the Court amended its earlier decision, only as to rehabilitative alimony, increasing it a mere $150.00 per month. In all other respects, Melissa's post trial motion was denied.

Being aggrieved thereby, Melissa brings her appeal to this Court.

B. FACTUAL HISTORY

The case came on for trial on June 5 and 6, 2007. Alan called each of the minor children as his first two witnesses. David, who was 17 at the time (T 10), testified that he wanted to live with his mother (T 8). He also testified that his father planned to marry Sandy Vecchio, and that his dad and Sandy are clearing a lot and building a house just down the street from the marital home (T 17-18). Dylan, who was just shy of his 12th birthday and was going into the 7th grade, also testified that he wants to live with his mother (T 21-23). He, too, acknowledged that his father is building a new house "about 200 yards" away (T 27).

After the presentation of this testimony, Alan withdrew his request for the custody of the Hults children (T 32).

Alan then testified. He and Melissa were married on July 26, 1986. Alan was 38 years of age at the time of the separation, July 3, 2006, when Alan voluntarily left the marital home (T 34-35). At the time of trial, Alan had worked at the Chevron Refinery for 17½ years (T 38). He is currently a fire specialist with a base pay of $31.65 per hour, but also acknowledged that his normal work week is 45 to 50 hours (T 40-42).

The parties own a home at 516 Bayou Pierre in Gautier which was purchased in February of 1992 for $56,000.00 (T 47). The home is presently appraised for $184,000.00 (Ex 4, T 48). There is marital equity of $151,148.60 (T 53).

Since the separation, Alan has been living with his mother and father (T 53). When he and Melissa were married back in the summer of 1986, Alan was a junior college student (T 53). He worked on a shrimp boat until November of 1988, when he was hired at the First Chemical Company, where he worked until January of 1990 (T 54).

Alan introduced his Chancery Court Financial Declaration (Ex 3, T 44-46). He acknowledged that the information was not accurate, as it had been filled out almost a year earlier (T 84). Moreover, he admitted that it contained no information about his overtime income (T 123), that he might have had a raise in pay (T 126), and that the income portion of his Financial Declaration was inconsistent with the figures shown on his 2006 income tax return

(T 155-156). Alan's gross income from his fire specialist position at Chevron for the later years of the marriage was as follows:

Year	Gross Income	
2002	$112,094.00	
2003	$110,367.00	
2004	$111,298.00	
2005	$136,607.00	(T 124,125)
2006	$113,066.00	(Ex 11)

Alan's Financial Declaration (Ex 3, pgs 3,4) reflects total expenses of $5,460.00 per month, but more than half of that figure ($2,746.00) is attributable to the child support and the monthly note on the marital residence (including taxes and insurance) that Alan was paying under the Temporary Order.

Alan also testified about numerous "commercial fishing" trips he had taken with his fiancée, including Manning, South Carolina, Lake Eufala and Decatur, Alabama, Natchitoches, Louisiana, and Destin, Florida (T 182). He would stay with Ms. Vecchio at hotels, typically anywhere from 2 to 6 days, and buy meals. In addition, he purchased his fiancée jewelry (T 184), and had provided her with $5,000.00 in cash to make a down payment on the property that she purchased. He gave her another $5,000.00 to begin building a bulkhead (T 185-187).

Melissa is 40 years of age and at the time of trial was unemployed (T 198-199). She has completed approximately a year and a half of junior college and has limited work experience outside

the marital home. After the couple was married, they spent the first two years living in a home owned by Alan's grandmother while they both went to school and Alan did part-time work (T 201). Melissa's first job during the marriage was for minimum wage at Hood's Florist in Pascagoula, primarily as a clerk. She quit that job because of difficulties carrying her first born to full term (T 202-203). David was born in November of 1989, and Melissa went back to work about 2½ years thereafter (T 204). She worked for her parents as a receptionist at a business selling emergency generators up until their second child, Dylan, was born in June of 1995 (T 204-205). She stated that Alan wanted her to be a stay-at-home mom (T 205). After Dylan had begun school, Melissa went back to the community college to finish the requirements for her Associate's Degree in marketing management/advertising, finishing in May of 2005 (T 206). Two weeks prior to her graduation from community college, she was hired as the Marketing Manager for the LaFont Inn in Pascagoula, a position netting her $860.00 every two weeks (T 207-208). In August of 2006, approximately a year after Hurricane Katrina, she was laid off (T 208). She was out of work until December, when she found employment with Mississippi Media in Gulfport selling radio advertising time spots (T 209-212). This new position was primarily as a commission sales agent and generated an average of about $1,500.00 per month in gross income (T 212).

Melissa is in good health, is 40 years of age (T 199), but does have a heart condition which requires multiple medications (T 214-215).

Melissa has been the primary care provider for the children, and handled virtually all domestic responsibilities (T 216-218).

Melissa had an extra-marital affair several years earlier, but it was over before 2004, and she and Alan elected to stay together (223-225).

In June of 2006, Alan asked Melissa for a divorce, when she first learned of her husband's relationship with Sandy Vecchio (T 225). According to Melissa, only two days earlier, she and Alan had marital relations and Alan had told her that he loved her (T 229). At the time, Sandy Vecchio, the mother of three children, was still married (T 228).

Alan moved out on July 3, 2006, which created great upset for both children and necessitated counseling (T 231-232). To make ends meet during the separation, Melissa testified that she received "a lot" of help from her family (T 265).

SUMMARY OF THE ARGUMENT

Upon the entry of a Judgment of Divorce, a Chancellor is faced with multiple decision-making responsibilities. In the present case, the award of custody to the mother of the minor children, Sandra Melissa Hults (hereafter Melissa), Appellant herein, is not in issue. However, she asserts that the amount of child support awarded by the Court is, under the circumstances, inadequate and constitutes an abuse of the Chancellor's discretion. She contends further that the Chancellor, in determining the amount of support, failed to fulfill the duties imposed upon him by statute. Here, Melissa was awarded $500.00 per month in child support for each of the two children born to the parties, a seventeen year old and a twelve year old at the time of the Court's Ruling. The evidence demonstrated that Alan Hults, the father, (hereafter Alan) consistently had annual income well in excess of $100,000.00, and was well able to provide much more than required by the trial court. Moreover, Melissa clearly established that the needs of the minor children, even when considering her own limited financial abilities, are well in excess of what their father has been required to pay.

An additional function for the trial court to fulfill in many divorces, including the instant one, is a determination whether alimony is appropriate, and if so, the kind, the amount and the duration thereof. In the instant case the parties were married in excess of twenty (20) years, which is universally considered to be

a long marriage. The disparity at the time of trial between Alan's income and Melissa's was dramatic. The disparity between their potential income producing capability is equally great. Alan has regularly generated more than $10,000.00 per month, sometimes significantly more. Melissa, on the other hand, was unemployed at the time of trial, and has a history primarily as a stay-at-home mom. The Chancellor nonetheless, awarded no permanent alimony, electing instead to award only rehabilitative alimony for a period of five (5) years. Melissa asserts that this adjudication also constitutes an abuse of the Chancellor's discretion.

Next, inasmuch as all financial awards must be considered collectively, the trial court committed reversible error in dividing the marital estate essentially in half. It is not equitable for Alan to walk away with the parties' biggest asset, i.e., the ability to return to a job that will provide him with a generous six figure income for the rest of his working life, while Melissa will be forced to deplete the portion of marital assets provided to her in the divorce in order to maintain a reasonable standard of living. That standard, unless remedied by this Court, will be much less comfortable than the one she is accustomed to, and one significantly lower than the standard Alan will enjoy with his hew home and his new wife. Fairness requires reconsideration of these issues.

Finally, the Chancellor committed reversible error in denying Melissa's request for attorney's fees.

ARGUMENT

Standard of Review

When an Appellate Court reviews a Chancellor's decision in cases involving divorce and all related issues, the scope of the Appellate Court's review is limited by the substantial evidence/manifest error rule. R.K. v. J.K., 946 So.2d 764, 772 (Miss. 2007); (citing Mizell v. Mizell, 708 So.2d 55, 59 (Miss. 1998)). Put differently, the Appellate Court will not reverse the findings of a Chancellor unless the Chancellor was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. Id. Manifest error in a trial Court's decision is deemed to have occurred if, based upon the evidence, the reviewing Court is left with a definite and firm conviction that the trial Court made a mistake. McCoy v. McCoy, 611 So.2d 957 (Miss. 1992); Carter v. Taylor, 611 So.2d 874 (Miss. 1992); UHS-Qualicare v. Gulf Coast Community Hospital, 525 So.2d (Miss. 1987). Manifest, as in manifest error, means unmistakable, clear, plain or indisputable. Magee v. Magee, 661 So.2d 1117 (Miss. 1995); Bell v. Parker, 563 So.2d 594 (Miss. 1990).

Furthermore, following well-established precedent, this Court in Brooks v. Brooks, 652 So.2d 1113, 1124 (Miss. 1995), held that, in order to achieve equitable and fair results incident to a divorce, the award of alimony and the division of property must be considered together by a Chancellor. The Brooks Court, citing Ferguson v. Ferguson, 639 So.2d 929 (Miss. 1994) explained more

fully that "...all property division, lump sum or periodic alimony payment, and mutual obligations for child support should be considered together...", to ensure that they are equitable and fair. The application of these principles has more recently been extended again, this time to include attorney's fees, since the granting or denial thereof is part of the overall financial picture. See Yelverton v. Yelverton, 961 So.2d 19, 28 (Miss. 2007).

A.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DETERMINING THE AMOUNT OF CHILD SUPPORT TO BE PAID FOR THE TWO MINOR CHILDREN

The Court's analysis of this issue is contained on pages 6 and 7 of the June 19, 2007 Findings of Fact and Conclusions of Law and Ruling and Judgment of the Court (CP 45-46). There, the Chancellor states that he has reviewed the Financial Statements of the parties, the tax returns for 2006 and 2005, and testimony of the parties. He concludes that the guidelines set out in Section 43-19-101 of the Mississippi Code of 1972, as amended, are "not appropriate and reasonable in this cause". The Chancellor goes on to state "It is quite evident to the court that Mr. Hults' financial declaration understates his gross monthly income and his net monthly pay" (CP 46). Without further explanation, however, or without further analysis of why the statutory guidelines are not appropriate or reasonable, the Court states

> "The Court finds it difficult to predict with accuracy the amount of adjusted gross income Mr. Hults will

receive from his employment in 2007. Therefore, the Court sets child support in this case at $1,000.00 per month."

The Chancellor failed to make findings to support his deviation from the child support guidelines required by Section 43-19-101 of the Mississippi Code of 1972, as amended. Also see Chesney v. Chesney, 910 So.2d 1057 (Miss. 2005).

According to Section 43-19-101 of the Mississippi Code of 1972, as amended, specifically sub-section (1), there is a rebuttable presumption that twenty percent of a payor's adjusted gross income is due for support of two children.

Sub-section (2) goes on to state that the guidelines apply unless the Court 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.

Sub-section (4) provides that, in cases where the adjusted gross income is more than $50,000.00, the Court is required to make a written finding in the record as to whether or not the application of the guidelines is reasonable.

It is readily apparent that sub-section (4) above applies, since Alan's adjusted gross income is well above $50,000.00 annually. However, sub-section (4) above must be read in conjunction with sub-section (2) above. Yelverton v. Yelverton, Id. Therefore, when making a determination that the guideline does not apply in the instant case, the Chancellor must also make a specific finding on the record that the application of the guideline would

be unjust or inappropriate as determined under the criteria specified in Section 43-19-103. The Chancellor failed to do so.

Section 43-19-103 of the Mississippi Code of 1972, as amended, provides that, if a Chancellor deviates from the statutory guidelines, he must make a specific finding on the record that the guideline is unjust or inappropriate as determined by the criteria below:

A. Extraordinary medical, psychological, education or dental expenses;

B. Independent income of the child;

C. The payment of both child support and spousal support to the obligee;

D. Seasonal variations in one or both parents' incomes or expenses;

E. The age of the child, taking into account the greater needs of older children;

F. Special needs that have traditionally been met within the family budget even though the foregoing of those needs will cause the support to exceed the proposed guidelines;

G. The particular shared parental arrangement, such as where the non-custodial parent spends a great deal of time with the children thereby reducing the financial expenditures incurred by the custodial parent, or the refusal of the non-custodial parent to become involved in the activities of the child, or giving due consideration to the custodial parent's homemaking services;

H. Total available assets of the obligee, obligor and the child;

I. Any other adjustment which is needed to achieve an equitable result which may include but not be limited to, a reasonable and necessary existing expense or debt.

Put differently, before this Court could affirm the Chancellor's award in the case sub judice, it must somehow conclude that the Chancellor overcame the rebuttable presumption that the statutory award is the appropriate measure of child support in this case, and that the Chancellor did so by the making of an on-the-record finding by utilizing the Section 43-19-103 criteria. In fact, the Chancellor failed to do so. Chesney v. Chesney, Id.

Here, as already noted, Alan's gross annual income has been consistently in excess of $100,000.00. In 2005, it was $136,607.00. In 2007, the year during which the June trial was conducted, Alan's most recent check stub, for the pay period ending May 27, 2007 (Ex 2), shows the following:

1. For federal and state withholding purposes, he had a taxable base of $54,189.60;

2. For Social Security and Medicare purposes, he had a taxable base of $56,106.76;

3. He had paid $9,409.79 in federal withholding tax and $2,285.00 in state withholding;

4. He had paid $3,478.62 in Social Security and $813.55 in Medicare tax.

Although it is not a perfect measure, the best available income information would be, by definition, the most recent information. Using either the federal and state withholding tax

base or the Social Security and Medicare tax base, and extrapolating the actual income figures over a twelve month period, once again yields annual gross income in excess of $130,000.00. Extrapolating the year-to-date deductions on an annualized basis, and subtracting them as legally mandated deductions from the gross annualized income figures, still produces adjusted gross income of between $90,000.00 and $100,000.00 annually. Yet the Court, without consideration of the criteria mandated by Section 43-19-103, ordered Alan to pay the exact amount of child support, $500.00 per month per child, that an obligor under the guidelines would be required to pay if he had an adjusted gross annual income of only $50,000.00. Unless this Court grants a reversal of this travesty, Alan's children will be the victims of this inequity, while Alan himself will be the beneficiary.

These discrepancies are even more obvious when considering the following:

1. Even though Alan claims a net operating loss each year on line 12 and Schedule C of his personal return (Business Income), what he is really doing is effectively reducing his gross income by merely deducting the expenses of his hobby, fishing, as a business loss. In other words, Alan argues that he has less income because he spent more money on fishing, his personal hobby.

2. Alan has significantly inflated deductions from his pay check for state and federal income tax. For instance, even though Alan filed his own return for 2006 (not joint)(Ex 11), he got refunds from both the state and federal government. On the joint 2005 returns, the couple got refunds of nearly $29,000.00 (Ex 14).

3. In 2007, the maximum amount of earned income subject to Social Security tax is $97,500.00. Once Alan reached that threshold, which would have been in late August or early September, he would no longer be required to pay any Social Security tax, thereby increasing his adjusted gross income even more.

Finally, the trial Court did not take into account the financial needs of the two Hults children. At the time of trial, David was just a few months shy of his 18th birthday, and Dylan was just a few days away from his 12th birthday. Melissa's Financial Declaration (Ex 13) shows nearly $1,900.00 a month worth of expenses for the children, excluding housing and utilities. Both boys were active in sports, Dylan had just gotten braces, was active in the band and attended band camp, and had been accepted to attend a Youth Leadership Conference in Boston (T 246-250). Moreover, both children had attended counseling for issues related to their father's adulterous affair (T 232). While all of these expenses were being incurred, Melissa's income was limited to her unemployment compensation.

For these reasons, Melissa respectfully asserts that the Chancellor abused his discretion.

B.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING PERIODIC ALIMONY

The trial Court enumerated the factors to be reviewed when making a ruling on periodic alimony. They are:

1. The income and expenses of the parties;

2. The health and earning capacity of the parties;

3. The needs of each party;

4. The obligations and assets of each party;

5. The length of the marriage;

6. The presence or absence of the minor children in the home which may require that one or both of the parties either pay or personally provide child care;

7. The age of the parties;

8. The standard of living of the parties both during the marriage and at the time of the support determination;

9. The tax consequences of the spousal support order;

10. Fault or misconduct;

11. Wasteful dissipation of assets by either party;

12. Any other factor deemed by the Court to be just and equitable.

Hemsley v. Hemsley, 639 So.2d 900, 912-913 (Miss. 1994); Armstrong v. Armstrong, 618 So.2d 1278, 1280 (Miss. 1993); Brabham v. Brabham, 84 So.2d 147, 153 (Miss. 1955).

The trial Court's actual analysis of this issue merits little attention, less than one full page (CP 53-54). The Chancellor concluded that Alan has a "substantially higher ability" to earn income than Melissa. As already noted, at the time of trial, Melissa was on unemployment compensation while Alan was generating income at a $130,000.00-plus per year pace. Melissa was primarily a stay-at-home mom who most recently had made about $1,500.00 per month gross (T 212), and who had never made more than $30,000.00 per year (T 213).

The Court noted that both parties are healthy, although Melissa has high blood pressure. It does not limit her employment possibilities or cause physical restrictions. But the Court did not even address the expense of her own medical care, nor the cost of her prescription medications, nor her own health insurance after the divorce.

The Court determined that the parties have a "medium to high" standard of living and that the Hults' marriage was a long one. The marriage was on July 26, 1986, while the separation was on July 3, 2006, when Alan elected to leave the marital home, his wife and his children in favor of Sandy Vecchio. The Temporary Order was entered on September 29, 2006, after more than twenty years of marriage. Certainly this must be considered a long marriage by any reasonable yard stick.

The Court next noted that Melissa will have the two minor children living in the home with her, that she was forty years of age at the time of trial and that Mr. Hults was 39.

When considering the issue of fault, or misconduct, the Court summarized that Melissa had had a "previous extra-marital affair", while Alan was involved in a current relationship. While Melissa did not deny a relationship a number of years earlier, her undisputed testimony established that it ended before 2004 and that both she and Alan wanted to be together and make their marriage work (T 223-225). On the other hand, it is apparent to even a casual observer that the Hults' marriage effectively ended when

Alan made a decision in July of 2006 to leave his wife for another woman, a woman that he planned to marry as soon as his divorce from Melissa was final (T 114). In fact, he and Sandy Vecchio were clearing a lot (purchased by both of them but in her name only) just down the street from the marital residence, where they were also finalizing plans to build a home together (T 112-115).

The Court also concluded that "...neither party has wasted any assets of the marriage." (CP 53). Such a judicial determination is, at best, inconsistent with the uncontroverted facts. It was Alan himself who admitted that he had taken numerous trips with Mrs. Vecchio, paying for their hotel and meal expenses, that he had bought her jewelry, and that he given her $10,000.00 in cash in connection with the land purchase and the erection of a bulkhead (T 182-187).

The Court next noted that Melissa had been awarded a total of $414,413.04 in marital assets, and, without further comment simply stated that Melissa would receive rehabilitative alimony in the amount of $750.00 per month for five years. Following post trial motion, this rehabilitative alimony was increased $150.00 per month. No comment was made by the Court on the issue of permanent alimony, except to deny it.

Although the question of whether to award periodic alimony is a discretionary one, the discretion is subject to the manifest error/abuse of discretion standard. In her treatise on Mississippi Family Law, Professor Deborah H. Bell of the University of

Mississippi Law School notes that, between the years of 1994 through 2004, a "...substantial (financial) disparity in long marriages usually resulted in an award of permanent alimony." Mississippi Family Law, Bell, D., Section 9.06 [1][b]. In fact, she notes that permanent alimony was denied in only four of the twenty-seven cases found where there was a significant disparity in income in a marriage of twenty or more years. [1]

No assertion is made here that statistical probability should be factored into this Court's judgment. To the contrary, this Court should simply make a determination whether, under the record made at trial, the Chancellor stepped outside the scope of what is fair and equitable. The Chancellor noted that, during a five year period of rehabilitative alimony, Melissa could complete her education or receive vocational training. Regardless, at the conclusion of the rehabilitative period, Melissa will be forty-five years of age, and she will never begin to even remotely approach

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Those four cases are Hensarling v. Hensarling, 824 So.2d 583 (Miss. 2002); Wesson v. Wesson, 818 So.2d 1272 (Miss.Ct.App.2002); Bumpous v. Bumpous, 770 So.2d 558 (Miss.Ct.App.2000); and Osborn v. Osborn, 724 So.2d 1121 (Miss.Ct.App. 1998). The facts in each of these four cases are significantly different from the case-at-bar. In Hensarling, the husband was awarded a divorce on the basis of his wife's adultery. Even though he was ordered to pay $2,500.00 per month in child support for three children and $1,500.00 per month in rehabilitative alimony, the case was remanded following appeal based upon the wife's contention that the marital estate was neither properly evaluated nor properly distributed. In Wesson, the Husband was disabled at the time of trial and his income was limited to workers' compensation payments in the amount of $1,257.00 per month. In Bumpous, the husband's annual income was adjudicated to be $48,650.00, dramatically less than Alan Hults' annual income. Moreover, the wife, in Bumpous, worked as the manager in the family business and could not accurately report her own income due, at least in part to many cash sales. Finally, in Osborn, at the time of trial the husband's income was limited to $180.00 per week in unemployment compensation. The Court there noted that, when Mr. Bumpous returned to full-time employment, he would be expected to generate approximately $2,400.00 per month. None of these cases can be accurately compared to the case sub judice.

the income producing capability of her husband of twenty-plus years. While the legal standard for the award of permanent alimony is not to maintain the standard of living that previously existed, the general rule nonetheless provides that the recipient should be entitled to a reasonable allowance that is commensurate with the standard of living to which that person had become accustomed, measured against the ability to pay. Bridges v. McCracken, 724 So.2d 1086, 1088 (Miss.Ct.App. 1998); Klauser v. Klauser, 865 So.2d 363, 366 (Miss. Ct. App. 2003).

Perhaps more of an explanation can be found in the Chancellor's reference to the award to Melissa of $414,413.04 in marital assets. Such an award, however, represents only her fair portion of the marital assets accumulated during the parties' twenty years together. In equity, Melissa should be rescued from the necessity of depleting her marital resources in order to meet her on-going needs and the needs of her children. Moreover, since the overwhelming portion of the marital assets awarded to her are equity in the marital home, a relatively modest retirement account, and personal property, she has no practical way to use those assets to meet those monthly expenses, at least not without encountering additional costs, i.e., moving the children out of their home, and all the expenses involved in selling; tax and penalties in prematurely cashing in retirement; etc.

When coupled with the fact that all financial determinations made by the Court incident to a divorce must be considered

together, the trial Court's refusal to award periodic alimony should clearly be reversed and remanded.

C.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE DIVISION OF THE MARITAL ESTATE

It is already abundantly clear that, if any one substantive financial issue (i.e., child support, alimony, etc.) is reversed, then all financial determinations and rulings by the Court must also be revisited. This is particularly true when considering the division of a substantial marital estate. Melissa's underlying premise here, therefore, is simply that, given the legal and factual errors made by the trial Court on the child support and the periodic alimony issues, it is also incumbent upon this Court to reverse the Chancellor's ruling on the division of the marital assets. Nonetheless, it is still a productive exercise to review the Court's analysis of the assets/liabilities issue, as it reveals additional errors that are worth noting.

In his ruling, the Chancellor correctly noted that under Hemsley, Id. and Ferguson, Id., the Court must first determine whether the assets of the parties are marital or non-marital in nature. Once that is done, the marital property should then be equitably divided employing the Ferguson guidelines (CP 47). The factors to be applied in the division process are:

1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contributions are as follows:

   a. Direct or indirect economic contribution to the acquisition of the property;

   b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage; and

   c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.

2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise;

3. The market value and the emotional value of the assets subject to distribution;

4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;

5. Tax and other economic consequence, and contractual or legal consequences to third parties, of the proposed distribution;

6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;

7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and

8. Any other factor which in equity should be considered.

Ferguson, Id., at 928.

The trial Court found that all of the assets owned by the parties are marital in nature (CP 48).

Melissa was awarded the following:

A. $115,000.00 from the Chevron Stock Investment Plan (ESIP);

B. $184,000.00 in equity in the marital home (the outstanding debt was $32,851.40, but Alan was ordered to be solely responsible for that liability)

C. The Toyota Sequoia valued at $35,500.00

D. Household furniture valued at $45,000.00

E. The mower and weedeater valued at $675.00

F. Various items of personal property valued at $12,700.00

G. Her checking account with a balance of $2,552.70

H. The mutual fund valued at $18,985.34

The grand total of the values of these combined marital assets is $414,413.04. Melissa was also ordered to pay the $10,000.00 balance on the Chase Bank Visa Card and the $100.00 balance owed to Kirklands. Oddly, the Court found those two debts to be non-marital in nature.

Alan was awarded the following:

A. $402,404.84 from the Chevron ESIP

B. The Toyota Tundra valued at $12,000.00

C. The Ford F-150 valued at $1,000.00

D. The 15' Express Boat valued at $3,500.00

E. The 18' white Ranger boat valued at $10,000.00

F. The 17' 2002 red Ranger boat valued at $7,500.00

G. A checking account with a value of $704.00

H. A savings account with a value of $4,597.00

All of these things combine for a total of $441,745.84. Alan was ordered to be responsible for the two debts secured by the

marital home (a total of $32,851.40), leaving him with net marital assets of $408,894.44.

It is difficult, if not impossible, to reconcile the above figures with the evidence. For instance, the Court valued the Toyota Tundra awarded to Alan at only $12,000.00. Alan, who had been the primary, if not the sole, operator of that vehicle, estimated on his own Financial Declaration that the Tundra was worth $26,000.00 (Ex 3). Additionally, the Court awarded all of the boats to Alan, but did not specifically mention the 19' Ranger boat and trailer that he won in March of 2007 in a fishing tournament. According to Alan, the boat has a value of $30,000.00 (T 73-74). If the Court's ruling is in fact taken as it states, then that new vessel must also be considered marital in nature.

Moreover, it is difficult to see how the Court determined the values on the boats awarded to Alan. For example, Alan was awarded the 18' white Ranger boat, a 2005 model, which he himself valued at $10,000.00. However he testified that he paid $25,000.00 for the boat (T 169), and with that vessel being a 2005 model, the purchase was made just one year prior to the marital separation.

Further, the Court gave no explanation as to why the $10,000.00 Visa credit card liability is non-marital in nature, except to note that it was a debt "incurred after the Temporary Order" (CP 52). Even conceding the fact that Melissa incurred credit card debt after the Temporary Order, there is no evidence to establish that any of her expenditures were on anything other than legitimate, on-going daily expenses for herself and the minor

children. The fact that she could not make ends meet from the time of the Temporary Order on September 29, 2006 until the trial in June of 2007, is clearly supported by the testimony she provided, particularly that she had to have a lot of help from her family (T 265). It is not difficult at all to understand how Melissa utilized whatever avenues were available to her to meet her financial needs and the needs of her children when both her personal life and her financial life were suddenly pulled out from under her.

Finally, when dividing the marital assets, the Court did not even mention the many thousands of dollars spent by Alan on his girlfriend/lover. It is not surprising that he did not have any exact figures on those expenditures, since he could not even verify the accuracy of his own Financial Declaration (T 123-126). But at a bare minimum he acknowledged at least six out of town trips with Mrs. Vecchio, consisting of hotel stays anywhere from two to six days, and spending money on meals and gifts for her (T 182-184). More importantly, he gave her $10,000.00 in cash to purchase the lot down the street from his home with Melissa, and to build a bulkhead (T 185-187). At a bare minimum, the Court should have concluded that these expenditures were a dissipation of marital resources, and that Alan's own award should be diminished by such dissipation.

The Court's division of the marital estate should therefore also be reversed.

D.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING MELISSA HULTS' ATTORNEY'S FEES

A Chancellor has discretion to award attorney's fees in a divorce action. Smith v. Smith, 614 So.2d 394, 398 (Miss. 1993). Generally speaking, an award of attorney's fees requires proof that the requesting party is not able to pay his or her own fees, and that the financial disparity between the parties is justification for the award. Pacheco v. Pacheco, 770 So.2d 1007, 1012 (Miss. Ct. App. 2000); Bates v. Bates, 755 So.2d 478, 482 (Miss. Ct. App 1999). In the event the requesting spouse is capable of paying a portion of some of his or her own attorney's fees, then an award of a portion of the fee may be appropriate. Mixon v. Mixon, 724 So.2d 956, 964 (Miss. Ct. App. 1998).

The Court's discretion to award attorney's fees is not unlimited. Once the Court has determined that an award of fees may be appropriate, the Chancellor must consider certain guidelines that have been established to assist the Court in its determination. These guidelines include:

A. The relative financial ability of each party

B. The skill and standing of the attorney employed

C. The nature of the case and novelty and difficulty of the questions at issue

D. The degree of responsibility involved in the management of the cause

E. The time and labor required

F. The usual and customary charge in the community

G. The preclusion of other employment by the attorney due to the acceptance of the case. Suess v. Suess, 718 So.2d 1126 (Miss. 1998); McKee v. McKee, 418 So.2d 764, 767 (Miss. 1982).

The Yelverton case, Id. is dispositive of this issue on appeal. In that case, even though the Chancellor's award of $10,000.00 in attorney's fees was not appealed, the Mississippi Supreme Court remanded the entire case to the Chancellor, who, on remand, would be revisiting not only the property division, child support and alimony, but also attorney's fees, since all financial awards are linked, and when one is reversed, all should be reconsidered.

Accordingly, this issue should also be re-submitted to the Chancellor on remand.

CONCLUSION

Using any reasonable subjective standard, this is a case which should clearly be reversed. Although a Chancellor is given discretion to deal with all financial issues following the entry of a divorce, discretion is not unfettered, and is not free from appellate review. Where a clear injustice has been done, this Court should, indeed must, correct it. It is simply not equitable, when applying the facts here, to allow Alan Hults to return to his $130,000.00 plus per year job, while Melissa struggles to get by on her own - and with two growing boys - after more than twenty years of marriage. Even when Melissa finds work, she will make, at the very best, no more than $2,500.00 per month. Throw in the $1,000.00 per month in child support and the $900.00 per month in rehabilitative alimony awarded by the Chancellor (for only five years), and she will have $4,400.00 per month gross for the three of them to live on.

Alan, on the other hand, will make more than $10,000.00 per month. After he pays his present obligation of $1,900.00 per month, he will still have more than $8,000.00 gross for himself, and claim $900.00 per month as a tax deductible expense. He is obviously capable of paying significantly more, particularly considering his self-proclaimed intention of remarrying as soon as

his divorce was final. His children and his wife of twenty years deserve significantly more.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, GARY L. ROBERTS, do hereby certify that I have this day mailed by U.S. Mail, postage prepaid and properly addressed, a true and correct copy of the above and foregoing **Brief of Appellant** to Mark Watts, Esq., and hand delivered a copy of same to the Hon. Randy Pierce, Chancellor on this the 21 day of July, 2008.

_____
GARY L. ROBERTS