

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00254

DANIEL ALAN BRADY

APPELLANT

VERSUS

DEBORAH C. BRADY

APPELLEE

APPEAL FROM THE CHANCERY COURT
FIRST JUDICIAL DISTRICT
HARRISON COUNTY, MISSISSIPPI

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

SUBMITTED BY:

FRANK P. WITTMANN III
WITTMANN & WITTMANN
P. O. BOX 1648
1820 22ND Avenue
Gulfport, Mississippi 39502
Tel. 228-864-1600
Fax 228-868-1194
MSB [REDACTED]

ATTORNEY FOR THE APPELLANT,
DANIEL ALAN BRADY

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00254

DANIEL ALAN BRADY

APPELLANT

VERSUS

DEBORAH C. BRADY

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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

Daniel Alan Brady, Appellant

Frank P. Wittmann III, Attorney for Appellant

Blewett William Thomas, Attorney for Appellee

Honorable James B. Persons, Chancellor

RESPECTFULLY SUBMITTED this the 22 day of August, 2008.

DANIEL ALAN BRADY

BY: 
FRANK P. WITTMANN III
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

	<u>PAGE</u>
CERTIFICATE OF INTERESTED PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	4
SUMMARY OF THE ARGUMENT	7
ARGUMENT	8
I. WHETHER THE COURT COMMITTED MANIFEST ERROR AND ABUSED ITS DISCRETION IN AWARDING DEBORAH REHABILITATIVE ALIMONY FOR AN INDEFINITE PERIOD OF TIME AND LONG AFTER SHE HAD RETURNED TO THE WORK FORCE AND BECOME SELF-SUFFICIENT.	8
CONCLUSION	9
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

	<u>PAGE</u>
<i>Bowers Window & Door Co. v. Dearman</i> , 549 So. 2d 1309, 1313 (Miss. 1989)	8
<i>Harrison County v. City of Gulfport</i> , 557 So. 2d 780, 784 (Miss. 1990)	8
<i>Holley v. Holley</i> , 892 So.2d 183 (Miss. 2004)	8
<i>Lauro v. Lauro</i> , 847 So.2d 843, 849 (Miss. 2003)	9
<i>Tanner v. Roland</i> , 598 So. 2d 783, 786 (Miss. 1992)	8

STATEMENT OF THE ISSUES

WHETHER THE COURT COMMITTED MANIFEST ERROR AND ABUSED ITS DISCRETION IN AWARDING DEBORAH REHABILITATIVE ALIMONY FOR AN INDEFINITE PERIOD OF TIME AND LONG AFTER SHE HAD RETURNED TO THE WORK FORCE AND BECOME SELF-SUFFICIENT.

STATEMENT OF THE CASE

On July 24, 2004, Deborah Labeyrouse married Daniel Brady and the couple began residing in a home north of Gulfport, Mississippi which belonged to Deborah Labeyrouse prior to the marriage. The house needed a significant amount of repair. Due to Deborah's lack of credit, Daniel's name was put on the deed, and the couple borrowed \$158,000.00 using the house as collateral. At the time Daniel was employed as a Safety Engineer, with a salary at Stennis Space Center of approximately \$83,000.00 a year. Deborah was unemployed, having quit her job with the Sun Herald prior to the marriage. The couple maintained two accounts with two different banking institutions and divided the money between the accounts with both names on each account. In addition to beginning a remodeling process on the house, the couple utilized the money, both from the loan and from his salary, to pay for other expenses, including several trips to other parts of the country and their honeymoon. They soon ran short of money and refinanced the house for additional capital.

It did not take long for the couple to begin drifting apart and to start playing games with ex-girlfriends and ex-boy friends. On or about February 28, 2005, Daniel moved out of the home and into a rented house in Diamondhead, Mississippi. This was closer to his employment and about thirty-five minutes away from the marital home. Deborah filed suit for divorce in April 2006 and the parties entered into an agreed judgment in which Daniel payed for Deborah's insurance and the notes on the house.

Deborah alleged adultery and irreconcilable differences in her complaint. Daniel counter-claimed with habitual cruel and inhuman treatment and irreconcilable differences. The Trial lasted until March 2007. Daniel terminated his payments on insurance and the mortgage on the property,

which had been significantly damaged due to Hurricane Katrina at that time. The court issued its judgment in October of 2007 for the reason that subsequent to the completion of the trial, Deborah changed attorneys which caused the delay in the final judgment. Deborah then filed a motion for contempt against Daniel for not paying the expenses as agreed to in the temporary order. The court, although not holding Daniel in contempt, ordered him to pay \$7,000.00 in back taxes and other expenses for the home and rehabilitative alimony in the amount of \$1,500.00 per month to Deborah for three months after the marital home is sold. Also, Daniel objects to the payment of rehabilitative alimony to Deborah because she has return to work at a job similar to the one she had before they were married.

Deborah had failed to tell the court that she had collected \$30,000.00 in insurance payments. She had taken Daniel's name off of the home insurance policy and collected \$30,000.00 in living expenses after Hurricane Katrina and an additional \$95,000.00 for damages to the marital home.

The court ordered Deborah to put the home up for sale, which at this time, she has failed to do. Daniel subsequently filed a motion to reconsider prior to filing this appeal.

Feeling aggrieved at the court's decision granting Deborah rehabilitative alimony for an indefinite time and long after she had returned to work at a job similar to her old job, Daniel filed this appeal.

STATEMENT OF THE FACTS

Daniel and Deborah met in April 2004 and were married on July 24, 2004. (Tr.6) Daniel worked at Stennis Space Center as a Safety Engineer. (Tr.13) At the time of their marriage, Deborah was without a job, having quit her job with the Sun Herald newspaper before their marriage. (R.E. 4, p.3) Daniel was renting an apartment in Picayune, Mississippi. Deborah lived in a home she owned in Saucier, Mississippi. (Tr. 6) Subsequent to the marriage, the couple moved into Deborah's house which she had owned since 1995. (Tr.7) Deborah further claimed that Dan bought repair items from Lowes and Home Depot, but could not name them.

The home was in much need of repair, but Deborah was without credit to borrow the funds to make repairs. (Tr. 35) Dan was without real property to use as collateral to make a loan to fix the home. Deborah then transferred her home by deed to Daniel and Deborah as joint tenants. (R.E. 4, p. 12) They made a loan, which after expenses netted the couple \$91,000 in September 2004. (Tr. 31)

In addition to repairs on the house the couple spent the money on their honeymoon to Branson, Missouri, a trip to see Deborah's son who lived in San Antonio, Texas, and a fishing trip to Canada for Dan. They also used some of the money to pay debts and living expenses. (Tr. 50; Tr. 167; Tr. 43) Deborah had no income, but Dan's total income as a safety engineer for NASA was \$83,000.00 per year, plus \$30,000.00 per year from Navy retirement. (Tr.52) The money from the loan was deposited into the Hancock Bank for Dan and Keesler Federal Credit Union for Deborah. (R.E. 4, p. 7) Deborah had no income after they were married except \$4,000.00 from a retirement fund from the "Sun Herald" which she used at her discretion. Most of the income from the loans and Dan's pay went into Dan's account. (R.E. 4, p. 6) Dan paid all expenses of the marriage from his

account. (Tr. 165) The couple refinanced the home to obtain more money for expenses in November 2005 for \$35,947.92 after expenses and to finance additions to the home. (R.E. 4, p. 6)

The marital life between the parties began to deteriorate in the early 2005 and Dan moved out of the home on February 28, 2005 to Diamondhead, Mississippi, which was closer to his work. (R.E. 4, p. 9) The couple began sparing between each other, such as telling each other about boyfriends and girlfriends with Deborah talking about Charlie and Dan talking about Susan. (R.E. 4, p. 9)

On March 24, 2005, Deborah filed suit for divorce against Dan on the grounds of Adultery and Irreconcilable Difference. (R.E. 3, p. 1) Dan counterclaimed alleging Habitual Cruel and Inhuman Treatment and Irreconcilable Difference. Dan owned no real property except what real property Deborah had transferred to him. (R.E. 4, p. 5) He took only his clothes and a few tools and equipment when he moved out so there was not much to divide. (Tr. 157; Ex. 12) He had contributed approximately \$60,000.00 of his Stennis salary and retirement income to the marriage. (Tr. 148) He also paid the sum of \$14,298.00 toward the loan and insurance prior to the divorce trial, the first part being December 13, 2005 and the remainder on April 12 and 13 of 2006.

Deborah changed lawyers from Mr. Tisdale to Mr. Blewitt Thomas after August 2006. The judgment of divorce was rendered by the court on October 26, 2007. (R.E. 4)

Dan filed a 2004 income tax return and declared \$33,000.00 in losses from the animal sales business. (R.E. 4, p. 12) This was a legitimate deduction and a smart business move since Deborah filed no return at all. (R.E. 4, p. 12)

The home was damaged by Hurricane Katrina. (R.E. 4, p. 11) However, the home was occupied by Angel Witt and her boyfriend who had lived there at least a year. The marital home

was appraised on September 4, 2007 by "The Appraisal Shop" for a value of \$262,000.00.

After Hurricane Katrina, Deborah moved to San Antonio, Texas. There she soon found a job similar to the job she had before the marriage. Her salary was nearly the same as before.

SUMMARY OF THE ARGUMENT

On October 26, 2007, the Chancery Court of Harrison County, First Judicial District, entered a judgment awarding Deborah Brady rehabilitative alimony and other relief.

It is respectfully submitted that the learned chancellor committed manifest and reversible error awarding the relief granted in the judgment of divorce, particularly the award of rehabilitative alimony for an indefinite time. Daniel Brady respectfully submits that award of rehabilitative alimony for an indefinite period of time is contradictory to the overwhelming weight of the evidence and the case law of the State of Mississippi. Daniel further submits that the Chancellor erred in awarding rehabilitative alimony to Deborah when she had already returned to the work force at a job similar to the job he held prior to the marriage.

ARGUMENT

I. WHETHER THE COURT COMMITTED MANIFEST ERROR AND ABUSED ITS DISCRETION IN AWARDING DEBORAH REHABILITATIVE ALIMONY FOR AN INDEFINITE PERIOD OF TIME AND LONG AFTER SHE HAD RETURNED TO THE WORK FORCE AND BECOME SELF-SUFFICIENT.

Daniel Brady, as Appellant in this case, accepts the well-established law concerning this court's role in reviewing a decision of a Chancellor. In cases involving alimony, the court will afford the chancellor considerable discretion. "The chancellor's findings will not be reversed unless manifestly in error or an abuse of discretion." *Tanner v. Roland*, 598 So. 2d 783, 786 (Miss. 1992). "Our familiar rule of deference prohibits us from disturbing the factual finding of a chancellor unless it is manifestly wrong or clearly erroneous." *Bowers Window & Door Co. v. Dearman*, 549 So. 2d 1309, 1313 (Miss. 1989). "For questions of law, our standard of review is de novo." *Harrison County v. City of Gulfport*, 557 So. 2d 780, 784 (Miss. 1990).

The law in Mississippi as it relates to rehabilitative alimony is clear. "Rehabilitative periodic alimony is meant not to be an equalizer between the parties, but instead, is to allow the party with lesser financial ability to start a new without being destitute in the interim." *Holley v. Holley*, 892 So.2d 183 (Miss. 2004). "Rehabilitative alimony is awarded to parties who have put their career on hold while taking care of the marital home. Rehabilitative alimony allows the party to get back into the working world in order to become self sufficient. Therefore, rehabilitative alimony is not considered during equitable distribution. 'Rehabilitative periodic alimony' is an equitable mechanism which allows a party needing assistance to become self-supporting without becoming destitute in the interim. 'Periodic alimony' is for an indefinite period vesting as it come due and modifiable. 'Rehabilitative periodic alimony' is modifiable as well, but is for a fixed period of time

vesting as it accrues.” *Lauro v. Lauro*, 847 So.2d 843, 849 (Miss. 2003).

The judgment of divorce is contrary to this Court’s ruling in *Lauro* for two reasons. (R.E. 1) First, by the very wording of the judgment, the rehabilitative alimony is not for a fixed period of time. *See Id.* The rehabilitative alimony does not end until thirty-six (36) months after the marital home is sold. (R.E. 1) The date for the sale of the home is unknown. Therefore, the rehabilitative alimony granted in this judgment is for an indefinite period of time.

The Court should recognize that there is no incentive for Deborah to sell the home because of the terms of the order. The longer the home stays on the market, the more rehabilitative alimony she receives. Conceivably, Daniel could pay rehabilitative alimony for the rest of his or Deborah’s lives. The rehabilitative alimony would in essence become permanent periodic alimony.

Second, soon after Hurricane Katrina on August 29, 2005, Deborah had reentered the workforce and become self-sufficient. There is no testimony that Deborah suffered because her income is less than she made before the marriage. She has reentered the workforce in a job and at a level compatible to what she enjoyed prior to the marriage over two (2) years before the judgment of divorce.

Since the separation of the parties, Deborah has received considerable money from her insurance carrier for living expenses. She returned to a job similar to what she had prior to the marriage, became self-supporting, and is not entitled to rehabilitative alimony. *See Id.*

CONCLUSION

Daniel respectfully submits that the Chancellor’s ruling fails to follow the prior rulings of this Court and for the reasons stated above, this court should reverse the judgment of divorce in this case as a matter of law.

Daniel realizes that the judgment of divorce in this case may not be a final judgment because of its wording. However, out of an abundance of caution, he feels that he must file this appeal to protect his right to appeal.

RESPECTFULLY SUBMITTED this the 22nd day of August, 2008.

DANIEL ALAN BRADY

BY: 
FRANK P. WITTMANN III
FOR APPELLANT

CERTIFICATE OF SERVICE

I, Frank P. Wittmann III, do hereby certify that I have this day mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Blewett W. Thomas, Esq.
Attorney at Law
P. O. Box 7706
Gulfport, MS 39502

Honorable James B. Persons
Chancellor, Harrison County, Mississippi
P. O. Box 457
Gulfport, MS 39502

SO CERTIFIED this the 22 day of August, 2008.

A handwritten signature in black ink, reading "Frank P. Wittmann III", is written over a horizontal line.

FRANK P. WITTMANN III
Attorney for the Appellant