IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2008-CA-00471

WILLIE J. COMMON — APPELLANT

VERSUS

YOLANDA P. COMMON — APPELLEE

BRIEF OF APPELLEE

APPEAL FROM THE CHANCERY COURT OF HOLMES COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

KIMBERLY P. TURNER, ESQ
KIMBERLY P. TURNER, PLLC
774 Avery Boulevard North
Post Office Box 4681 (Jackson, 39296)
Ridgeland, Mississippi 39157
Telephone: 601.991.2231
Telecopier: 662.796.0215

MARC L. BOUTWELL, ESQ.
LAW OFFICE OF MARC BOUTWELL
Post Office Box 956
Lexington, Mississippi 39095-0956
Telephone: 662.834.9029
Telecopier: 662.834.3117

ATTORNEYS FOR APPELLEE

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2008-CA-00471

WILLIE J. COMMON — APPELLANT

VERSUS

YOLANDA P. COMMON — APPELLEE

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. Willie J. Common, Appellant;
2. Angela Givens Williams, Attorney of Record for Appellant, Willie J. Common;
3. Adrienne Hooper-Wooten, previous Attorney of Record for Defendant/Appellant, Willie J. Common;
4. Yolanda P. Common, Appellee;
5. Kimberly P. Turner, PLLC, inclusive of attorney Kimberly P. Turner, as Attorneys of Record for Appellee, Yolanda P. Common;
6. Law Office of Marc Boutwell, inclusive of attorney Marc L. Boutwell, as Attorneys of Record for Appellee, Yolanda P. Common;
7. Billy J. Gilmore, previous Attorney of Record for Plaintiff/Appellee, Yolanda P. Common;
8. John M. Gilmore, previous Attorney of Record for Plaintiff/Appellee, Yolanda P.

Common; and

9. Hon. Janace Harvey-Goree, Holmes County Chancery Judge.

Respectfully submitted,
YOLANDA P. COMMON

By: _____
Kimberly P. Turner (MBN 10079)

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases — *Page*

Statutes

Other Authorities

STATEMENT OF ISSUES

I. TEMPORARY ALIMONY WAS PROPERLY AWARDED TO YOLANDA P. COMMON.

II. THE LOWER COURT PROPERLY IDENTIFIED AND DISTRIBUTED MARITAL PROPERTY AS BETWEEN THE PARTIES.

III. THE RECORD CONTAINED SUFFICIENT EVIDENCE UPON WHICH THE LOWER COURT APPROPRIATELY AWARDED LUMP SUM ALIMONY TO YOLANDA P. COMMON.

STATEMENT OF THE CASE

Yolanda P. Common, Appellee herein (hereinafter "Yolanda"), filed her Complaint for Divorce and Other Relief on January 5, 2006[1], alleging therein habitual cruel and inhuman treatment and adultery, pursuant to § 93-5-1, Miss. Code Ann. (1972) as against Willie J. Common (hereinafter "Willie"), and, alternatively, irreconcilable differences pursuant to § 93-5-2, Miss. Code Ann. (1972). (R. at 3). Within her Complaint for Divorce and Other Relief, Yolanda included her Petition for Temporary Custody, Child Support and Other Relief, requesting an award of the temporary physical custody of the parties' four (4) minor children[2], together with reasonable support and maintenance for said minor children, exclusive use, control and possession of the parties' marital residence, with all household furnishings, furniture and appliances therein, and Willie's payment of the monthly indebtedness due thereon. (R. at 7).

---

[1] As stated at Paragraph 2 of the Complaint, the parties separated on August 12, 2004. ®. at 3).

[2] Four (4) children were born to the parties during their marriage, namely Justyn Common, a male child, age fourteen (14) years, born June 30, 1995; Dominique Common, a female child, age twelve (12) years, born February 3, 1997; Jalen Common, a male child, age nine (9) years, born July 1, 2000; and Kayln Common, a female child, age nine (9) years, born July 1, 2000. (R. at 3).

Summons was issued on January 9, 2006 pursuant to Rule 81(d) of the Mississippi Rules of Civil Procedure, and thereafter personally served upon Willie on January 24, 2006 in accordance with Rule 4 of the Mississippi Rules of Civil Procedure. (R at 14-15).

A hearing was held upon Yolanda's Petition for Temporary Custody, Child Support and Other Relief on March 2, 2006, at which time the parties' entered into an agreement presented to the Court at that time upon the record; however, no Order was entered by the Court nor transcript of this March 2, 2006 hearing produced as a part of the record on appeal. On June 7, 2006, Willie filed his Answer and Affirmative Defenses to the Complaint for Divorce and Other Relief asserting no counterclaim for divorce, either within his Answer or by separate pleading. (R. at 24).

On June 13, 2006, Yolanda filed a Motion to Compel and for Other Relief, seeking to enforce the agreement of the parties as presented to the Court at the previous March 2, 2006 hearing upon her Petition for Temporary Custody, Child Support and Other Relief. (R at 29). Following a second hearing held by the lower court on August 31, 2006, an Order was entered, pursuant to which Yolanda was awarded temporary physical custody of the parties' four (4) minor children, Seven Hundred and No/100 Dollars ($700.00) per month as temporary child support for said minor children, temporary exclusive use and possession of the parties' marital residence from which Willie had voluntarily moved as of the date of the parties' separation, together with the temporary exclusive use of all household furniture, furnishings and appliances therein, and an additional Three Hundred Five and No/100 Dollars ($305.00) per month, representing one-half of the monthly payment due upon the mobile home which comprised the parties' marital residence. (R. at 48).

By Order[3] entered August 23, 2007, Yolanda withdrew those fault grounds set forth at Paragraphs 4 and 5 of her Complaint for Divorce and Other Relief, and agreed to proceed upon irreconcilable differences as plead alternatively at Paragraph 6 of the Complaint. In addition, the parties agreed upon joint legal custody of the minor children, with Yolanda to have primary physical care, custody and control of said minor children of the parties, subject Willie's rights of visitation as specifically set forth therein. (R. at 66).

Within the Order of August 23, 2007, the parties further consented to the court's determination of child support, alimony and the equitable distribution of the marital assets. ®. at 67). Trial was held, beginning on August 23, 2007 and continuing for a second day on June 17, 2008, after which Willie submitted his Notice of Authority, proffering Mississippi case law pertaining to the issue of alimony. (R at 83). It is significant to note, given Willie's argument herein, that the case of *Cheatham v. Cheatham*, 537 So. 2d 435, 438 (Miss. 1988), and those factors as considered by the Court within that case, are neither cited nor mentioned within his Notice of Authority provided to the lower court subsequent to trial, yet previous to the court's Final Judgment of Divorce. Final Judgment of Divorce, based upon irreconcilable differences, was entered by the lower court on February 29, 2008, in which findings of fact, inclusive of the court's identification and valuation of all marital assets, and conclusions of law are clearly set forth and discussed by the court in support of its final distribution of marital assets and award of lump sum alimony to Yolanda in the amount of Twenty-Eight Thousand and No/100 Dollars ($28,000.00), payable in ninety (90) monthly installments of Three Hundred Twelve and No/100

---

[3] A separate Joint Motion to Withdraw Fault Grounds of Divorce and for Judgment of Divorce on the Grounds of Irreconcilable Differences was later filed by the parties on February 29, 2998 (R at 90).

Dollars ($312.00). (R. at 92).

Seeking review of the lower court's distribution of the marital assets and award of lump sum alimony to Yolanda, Willie filed his Notice of Appeal on March 6, 2008.

STATEMENT OF FACTS

Yolanda refers solely to those relevant facts as set forth hereinbelow within her Argument, as well as those established by the evidence and trial testimony and stated within the lower court's Findings of Fact and Conclusions at Law.

SUMMARY OF THE ARGUMENT

The lower court herein did not err, in any way whatsoever, in its distribution of marital assets or award of alimony to Yolanda, such that all matters are within the sole discretion of the chancellor, and may not be disturbed by this Court absent an abuse of discretion, manifest error or application of the wrong legal standards. The lower court did not abuse its discretion, commit manifest error or apply an incorrect legal standard and, as such, the Final Judgment of Divorce must be affirmed.

The record of the hearing conducted upon Yolanda's Petition for Temporary Order, Child Support and Other Relief does not support Willie contention that temporary alimony was awarded to Yolanda based upon a previous agreement between the parties and/or their counsel. The court, without dispute, disregarded the existence of an alleged agreement, and required the parties to make a record at that time upon which a temporary order could be entered providing for the immediate needs of Yolanda and the parties' four (4) minor children. This assignment of error is therefore without merit.

The 2003 GMC Envoy was marital property in that it was an asset accumulated during

the court of the parties marriage; however, even if said asset was not included among the marital property of the parties, the distribution of marital assets and award of alimony remains supported by the evidence given the absence of equity in the vehicle and award of the same to Yolanda, together with all related indebtedness. Furthermore, the court valued the parties' marital property based upon the evidence presented at trial. It was the parties' responsibility to proffer expert testimony or introduce into evidence appraisals so as to establish the fair market value of the marital property. To the contrary, the parties solely relied upon their respective Rule 8.05 Financial Disclosure and trial testimony to value the marital assets. Willie has only himself to blame if he is now dissatisfied with the court's valuation since it was incumbent upon him to present reliable evidence to the court. Neither the inclusion of the 2003 GMC Envoy nor the court's valuation of the marital assets comprise reversible error.

Whether by reference to those factors enumerated in *Cheatham v. Cheatham* or *Hemsley v. Hemsley*, the lower court's award of alimony to Yolanda is amply supported by the record, as is Willie's clear ability to pay such an award based upon his Rule 8.05 Financial Disclosure and trial testimony which established an average monthly payment of approximately $470.00 to his church in charitable contribution(s). Though the issue of fault was presented to the court, and was certainly considered by the court, adultery is not a proper consideration in making an award of alimony pursuant to either *Cheatham* or *Hemsley*. The chancellor's award of alimony to Yolanda, representing one-half of the monthly payment owed on the family residence, is supported by the record and does not comprise reversible error. The Final Judgment of Divorce must be affirmed by this Court.

ARGUMENT

STANDARD OF REVIEW.

When reviewing the decision of a chancellor, this Court is to apply a limited standard of review. The chancellor sits as trier of fact, and in so doing also makes a determination as to the credibility of the witnesses. *Wideman v. Wideman*, 909 So. 2d 140, 144 (¶ 17)(Miss. Ct. App. 2006)(citing, *In re Estate of Grubbs*, 753 So. 2d 1043, 1056 (Miss. 2000)). Where the chancellor's finding of fact enjoys substantial support in the record, and properly applies the law, the Court is bound by such finding of fact. *Wideman*, 909 So. 2d at 144 (¶ 17)(citing, *Carrow v. Carrow*, 642 So. 2d 901, 904 (Miss. 1994); *Parsons v. Parsons*, 741 So. 2d 302, 306 (Miss. Ct. App. 1999)).

The appellate court cannot disturb the factual findings of said chancellor when supported by substantial evidence, or the division of marital assets or award of alimony, unless the Court can say, with reasonable certainty, that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied the wrong legal standard. *Fogarty v. Fogarty*, 922 So. 2d 836, 840 (¶ 23)(Miss. Ct. App. 2006), citing *Cummings v. Benderman*, 681 So. 2d 97, 100 (Miss. 1996); *McKnight v. McKnight*, 951 So. 2d 594, 596 (¶ 5)(Miss. Ct. App. 2007); *Striebeck v. Striebeck*, 911 So. 2d 628, 631 (¶ 4)(Miss. Ct. App. 2005)(the appellate court is required to respect the findings of fact made by a chancellor, in a divorce proceeding, supported by credible evidence and not manifestly wrong).

I. Temporary Alimony was Properly Awarded to Plaintiff, Yolanda P. Common.

Contrary to the assertion of Appellant, the chancellor did not award temporary alimony to

Yolanda in reliance upon a prior agreement, entered into between the parties, or their counsel, at a previous hearing held on March 2, 2006. The transcript of the (second) hearing held upon Yolanda's Petition for Temporary Custody, Child Support and Other Relief on August 31, 2006 clearly refutes the basis of Willie's argument to this Court.

Following the sixth question asked of Willie by Yolanda's counsel at said hearing, the court intervened and stated, with regard to the previous agreement between the parties and/or their counsel,

> **THE COURT: Mr. Gilmore, we are going to pretend that that one does not exist. Just establish for me the income today.**

(Tr., Vol. 2 of 4, at page 4). Later, when Willie's own counsel, upon cross-examination, asked him to advise the court of the previous agreement, the court again intervened and stated,

> **THE COURT: Okay. Now, I said, we're going to pretend that order doesn't exist.**

(Tr., Vol. 2 of 4, at page 22). Finally, following the direct examination, cross examination and re-direct examination of Willie, and the direct examination and partial cross examination of Yolanda, the chancellor indicated her ability to render a decision upon the Petition for Temporary Custody, Child Support and Other Relief, specifically stating,

> **THE COURT: Y'all know what, I have really heard enough. I don't need to hear no more. If she's working all them hours she needs to be at home. How many children have you got?**
>
> **THE WITNESS: Four.**
>
> **THE COURT: Four babies and she's working two jobs. And she needs to be at home. She don't need to be working overtime. Based on Mr. Common's 8.05 he ought to [be] paying child support in the amount of $700 a month.**

MS. WOOTEN: We're not disputing that.

THE COURT: And I'm ordering child support in the amount of $700 a month. I'm ordering him to pay half of that house note until further notice, until this court has finally resolved this matter. But this woman is working full-time and she's got three small – four small kids. She needs to be at home. She doesn't need to be working two jobs. And so, as a result, somebody has got to sacrifice something to take care of these kids. So prepare me an order. [directed to Mr. Gilmore, counsel for Yolanda].

At no time during the August 31, 2006 was the court advised as to the substance of the previous agreement[4]; thus, the court could not, and did not, base its decision, in any part upon such an agreement. The proof upon which the lower court awarded relief to Yolanda, which included child support, temporary use and possession of the marital residence, and payment of one-half the monthly indebtedness owed upon the marital residence, was based solely upon the parties Rule 8.05 Financial Disclosure(s) and their respective testimony provided at the August 31, 2006 hearing.

The evidence, which was comprised of the parties' respective Rule 8.05 Financial Disclosure and testimony was sufficient to substantiate an award of one-half of the monthly payment upon the marital residence given the disparity in the parties' adjusted gross income, and Willie's accumulation of savings within various accounts and approximately $8,000.00 to $9,000.00 in retirement. Neither party offered proof or other evidence in contradiction of the income, savings and expenses of the other; therefore, Yolanda's income and expenses, as represented by her Rule 8.05 Financial Disclosure and testimony regarding the same, were legitimate, accurate and not subject to question. The award of temporary alimony by the chancellor was neither manifestly wrong or clearly

---

[4] Though Willie maintains that the Order upon the Petition for Temporary Custody, Child Support and Other Relief was based solely upon the prior agreement, he admits within his Appellant's Brief that there was no proof of such an agreement nor testimony provided regarding the same at the August 31, 2006 hearing.

erroneous, and must be affirmed as proper by this Court.

Furthermore, Willie did not object to the payment of "temporary alimony" to Yolanda, representative of one-half of the monthly payment upon the marital residence or otherwise raise this issue as an alleged error, or as a basis upon which to seek a credit from the court in its distribution of marital property at the trial held on August 23, 2007 and June 17, 2008. This assignment of error, raised for the first time herein, without preservation at the lower court, must be deemed waived.

II. The Lower Court Properly Identified and Distributed Marital Property.

This Court employs a limited standard of review of the division and distribution of property in divorces. *McLaurin v. McLaurin*, 853 So. 2d 1279, 1283 (¶ 10) (Miss. Ct. App. 2003), citing *Reddell v. Reddell*, 696 So. 2d 287, 288 (Miss. 1997). The chancellor's division and distribution of property "will be upheld if it is supported by substantial credible evidence." *McLaurin*, 853 So. 2d at 1283 (¶ 10), quoting *Carrow,* 642 So. 2d at 904; *Studdard v. Studdard*, 894 So. 2d 615 (Miss. 2005).

The chancellor is this case neither erred in including Yolanda's 2003 GMC Envoy as marital property, subject to equitable distribution, nor in assigning value to the parties' marital property based upon the evidence presented at trial, absent appraisal or expert testimony.

Marital property is defined as any and all property acquired or accumulated during marriage. *McKnight*, 951 So. 2d at 596 (¶ 6) (quoting, *A & L, Inc. v. Grantham*, 747 So. 2d 832, 838 (¶ 18)(Miss. 1999), citing *Hemsley v. Hemsley*, 639 So. 2d 909, 915 (Miss. 1994)); *McLaurin*, 853 So. 2d at 1285 (¶ 24); *Wideman*, 909 So. 2d at 144 (¶ 15)([t]here is a presumption that all property acquired or accumulated during the marriage is in fact marital property). Assets so acquired or accumulated during the course of the marriage are marital assets and are subject to

an equitable distribution by the chancellor. For the purpose of calculating whether or not assets are marital or non-marital, the "course of the marriage" runs until the date of the divorce judgment, and an otherwise marital asset may be classified as separate if an order for separate maintenance is entered. *Striebeck*, 911 So. 2d at 632 (¶ 6); *McLaurin*, 853 So. 2d at 1285 (¶ 24); *McIlwain v. McIlwain*, 815 So. 2d 476, 479 (¶ 7)(Miss. Ct. App. 2002). The burden is upon one claiming assets to be non-marital to demonstrate to the court their non-marital character in a divorce action. *Striebeck*, 911 So. 2d at 633 (¶10); *Wideman*, 909 So. 2d at 144 (¶ 15); *A & L, Inc.*, 747 So. 2d at 839 (¶ 23).

In this case, no order for separate maintenance was entered by the lower court[5]. A temporary order, as was entered by the lower court in this case, is not a separate maintenance order. By definition, "separate maintenance is a judicial command to the husband to resume cohabitation with his wife, or in default thereof, to provide suitable maintenance of her until such time as they may be reconciled to each other." *Wilbourne v. Wilbourne*, 748 So. 2d 184 (¶ 9)(Miss. Ct. App. 1999). To the contrary, a temporary support order may expressly include alimony, child custody or child support, and is granted in the interim between the separation and the judgment of divorce. *See* N. Shelton Hand, Jr., *Mississippi Divorce, Alimony, and Child Custody* § 8-3 (5th ed. 2000). Citing this distinction, the dissent to *Pittman v. Pittman*, 791 So. 2d 857, 872 (¶ 60)(Miss. Ct. App. 2001) opined that assets acquired while litigation is pending, subsequent to entry of a temporary order, remained marital assets subject to equitable

---

[5] Though an Order was entered upon Yolanda's Petition for Temporary Custody, Child Support and Other Relief on August 31, 2006, said order was temporary in nature, did not distribute marital property, and did not make any provision whatsoever for any motor vehicle of either party.

distribution. Thus, the 2003 GMC Envoy purchased by Yolanda subsequent to the date of separation of the parties yet previous to entry of the Final Judgment of Divorce did comprise marital property, subject to equitable distribution by the chancellor at trial.

Even assuming, however, that the Order entered upon Yolanda's Petition for Temporary Custody, Child Support and Other Relief is considered by this Court the equivalent of a separate maintenance order, or the marriage, though not legally terminated, is found to have ended months previous to entry of the Final Judgment of Divorce, characterizing the 2003 GMC Envoy as a marital asset was harmless error[6], having no effect upon the court's distribution of marital assets nor resulting in any adverse consequence to Willie, given the court's award of this asset, and its related indebtedness, to Yolanda.

Though Willie attributes error to the lower court by reason of its alleged failure to ascertain the fair market value of several marital assets, it was not incumbent upon the chancellor to independently obtain appraisals or elicit expert witness testimony to determine the fair market value, but the responsibility of the parties to present the chancellor with evidence sufficient to clearly make these findings of fact. In support of this argument, Willie relies upon *Ward v. Ward*, 825 So. 2d 713 (Miss. Ct. App. 2002), a case in which the chancellor wholly failed to value much of the marital property as required by Mississippi law[7], and *Drumright v. Drumright*, 812 So. 2d 1021, 1026 (¶ 17)(Miss. Ct. App. 2001), also a case in which the chancellor made no

---

[6] The 2003 GMC Envoy neither significantly contributed to the marital wealth nor debt such that the court determined there to be negative equity in the amount of $1,000.00.

[7] In *Ward*, the Court reversed and remanded to the chancery court for identification and valuation of all marital assets by reason of the chancery court's failure to assign a value to the ten horses owned by the parties, the saddles, tack and other equine related gear, the mobile home and the vehicles owned by the parties. 825 So. 2d at 718 (¶ 15).

evaluation of the assets, and further failed to make specific findings of fact. In this case, however, the lower court was diligent in its specific identification of marital assets and assignment of a value to each and every asset so identified as marital property, as set forth within the court's Findings of Fact as contained in the Final Judgment of Divorce. (R. at 4).

"The valuation of property is a question of fact." "Matters of fact are within the chancellor's discretion and will not be reversed absent a finding that the chancellor was manifestly wrong." Here, neither party offered an appraisal or expert testimony as to the value of any specific item of marital property, but relied solely upon their respective Rule 8.05 Financial Disclosure and trial testimony as the only evidence of the "fair market " value of the marital assets. As in *Ward v. Ward*, the chancellor herein, perhaps faced with proof from both parties that was something less than ideal, made valuation judgments that find evidentiary support in the record. ***"To the extent that further evidence would have aided the chancellor in [her] decision, the fault lies with the parties and not the chancellor."*** *Studdard*, 894 So. 2d at 619 (¶ 10), quoting *Messer*, 850 So. 2d 170 (¶ 43), quoting *Ward*, 825 So. 2d at 719 (¶ 21)(emphasis added). ***"When a chancellor makes a valuation judgment based on proof that is less than ideal, it will be upheld as long as there is some evidence to support the chancellor's conclusion."*** *Messer v. Messer*, 850 So. 2d 161, 170 (¶ 43)(Miss. Ct. App. 2003), citing *Dunaway v. Dunaway*, 749 So. 2d 1112, 1121 (¶ 29)(Miss. Ct. App. 1999)(emphasis added). Based upon the evidence produced by the parties at trial, specifically the parties' respective Rule 8.05 Financial Disclosure and trial testimony, the chancellor made valuation judgments based upon the evidence and record, and therefore did not abuse her discretion nor commit manifest error. The identification and valuation of the marital assets is substantiated by the record, and therefore must be affirmed by this Court.

III. The Record Contained Sufficient Evidence Upon Which the Lower Court Appropriately Awarded Lump Sum Alimony to Plaintiff, Yolanda P. Common.

In Mississippi, the award of alimony lies in the sound discretion of the chancery court because of "its peculiar opportunity to sense the equities of the situation before it." *Fogarty*, 922 So. 2d at 841 (¶ 23) quoting, in part, *Tilley v. Tilley*, 610 So. 2d 348 (Miss. 1992); *McLaurin*, 853 So. 2d at 1283 (¶ 10), citing *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993). The appellate court will not disturb a chancellor's findings of fact as to an alimony award if they are supported by credible evidence in the record. *Graham v. Graham*, 767 So. 2d 277, 280 (¶ 7) (Miss. Ct. App. 2000). A chancellor's decision regarding the amount and type of alimony will be upheld on appeal unless the decision is found to be manifestly in error either in fact or law, or otherwise an abuse of discretion. *Drumright*, 812 So. 2d at 1027 (¶ 21).

A. *An Award of Alimony to Yolanda was Within the Court's Discretion and Proper.*

There are three (3) different categories of alimony: periodic, rehabilitative and lump sum. When determining which type of alimony has been awarded, the court looks to the substance of what has been provided, and not the label. *Drumright v. Drumright*, 812 So. 2d 1021. Though labeled as lump sum alimony, the award to Yolanda by the lower court has a specific time limitation, and appears to be for the purpose of rehabilitating Yolanda, allowing her to remain in the family home for the benefit of her four (4) minor children while reducing the indebtedness to eventually provide either equity in the residence or at least an equal ratio of value to debt at the termination of Willie's ninety (90) months of payments to Yolanda. Furthermore, the court correctly set forth and examined those factors as set forth by *Hemsley v. Hemsley*, as required in

awarding rehabilitative alimony to Yolanda

Even if the award is that of lump sum alimony, as opposed to rehabilitative, the record before the lower court is sufficient to substantiate an award of alimony to Yolanda in accordance with the factors set forth in *Cheatham v. Cheatham*[8], 874 So. 2d 469, 472 (¶9)(Miss. 1988), and therefore affirm the same[9]. Though the marriage clearly did not result in an accumulation of total wealth for either party, Willie, as opposed to Yolanda, did accumulate substantial savings as evidenced by the record, offering testimony that, in addition to mandatory retirement savings, he also amassed approximately $12,000.00 in additional savings, which he was allowed to retain pursuant to the Final Judgment of Divorce. (Tr., Vol. 2 of 4, at p. 75) Contrary to Willie's assertion, a marriage of ten (10) years, is, indeed, a long marriage. Yolanda's gross monthly income of approximately $2,322.15, as compared to Willie's gross monthly income of approximately $4,151.00, is meager, especially when considered in relation to the parties' living expenses and Yolanda's obligation to care for the parties' four (4) minor children. (Defendant's Trial Ex.1, 9). Furthermore, Willie's earning capacity, as determined by the chancellor from the evidence presented by the parties, was almost double that of Yolanda, with Willie earning approximately $51,000.00 annually and Yolanda earning approximately $27,000.00 annually. (R.

---

[8] Authority also exists that, given the amount of the alimony awarded to Yolanda in this case, the factors enunciated in *Cheatham* are inapplicable. *Gray v. Gray*, 562 So. 2d 79, 83 (Miss. 1990). In such an instance, the amount of the alimony should be reasonable . . . commensurate with the wife's accustomed standard of living, minus her own resources, and considering the ability of the husband to pay. Both parties should be allowed to maintain a decent standard of living. *Id.*; *see also Monroe v. Monroe*, 612 So. 2d 353, 357 (Miss. 1992).

[9] Although the Final Judgment of Divorce and chancellor's opinion therein does not specifically cite to *Cheatham*, such is not reversible error if it appears that she relied, which she did, at least in part, upon the *Cheatham* factors in making the award of lump sum alimony. *Bland v. Bland*, 629 So. 2d 582, 587 (Miss. 1993).

at 101).

Lastly, the lack of Yolanda's financial security was addressed, at length by the chancellor, who stated within the Final Judgment of Divorce as follows:

> After making the distribution of marital assets, it became clear to this Court that Yolanda will not be able to maintain the four minor children without additional assistance. The parties must provide living accommodations, care and nurturing for their minor children. Since Yolanda, their mother, has primary physical custody, she must have the time to devote to this task. She cannot provide care for the minor children if she is forced to spend all of her time working outside of the home. It appears in spite of her efforts, Yolanda cannot provide food, clothing and shelter for the children with just the statutory child support in light of their current financial condition (i.e., the mortgage owed on the mobile home far exceeds its value, and the other reasonable expense of maintaining her household exceeds her income plus the child support). One of the minor children has health issues, forcing Yolanda to quit her second job. Therefore, the Court must provide Yolanda lump sum alimony as an equalizer in as much as she is being forced to take the indebtedness that is owed on the house with a deficit, no equity, and the other needs of Yolanda and the minor children.

(R. at 103). Taking the record before the lower court, sufficient evidence was presented, in reliance upon which the chancellor could, within her discretion, award alimony to Yolanda, whether based upon those factors set forth in *Hemsley* or *Cheatham.*

B. ***Willie Has an Ability to Pay Alimony.***

Willie contends that under Mississippi law, "no award of alimony is appropriate where Defendant does not have the ability to pay." Appellant's Brief at p. 17. In support of this erroneous contention, Willie cites to several cases, none of which support the contention that an inability to pay is "the paramount consideration in determining whether to award alimony." Appellant's Brief at 17. It is quite clear from Mississippi law, that a decision to award alimony is not based solely upon one factor, such as the self-serving argument of Willie implies, but is based upon the chancellor's consideration of those factors as set forth *Hemsley*, or similar cases

such as *Armstrong v. Armstrong.*

In citing to *Kergosien v. Kergosien*, 471 So. 2d 1206 (Miss. 1985), Willie represents parenthetically that this Court held, in that case, that alimony should be based on an ability to pay. *Kergosien*, however, was a case in which the Mississippi Supreme Court reversed the judgment of divorce, having found insufficient proof of habitual cruel and inhuman treatment and, in so doing, found that no alimony could be awarded pursuant to § 93-5-23, Miss. Code Ann. (Supp. 1983). 471 So. 2d at 1212 (¶ 6). Noting that the chancellor had erroneously considered the alimony award in his calculation of child support, and further noting Mrs. Kergosien's uncontradicted testimony of her monthly financial need and entitlement to support and separate maintenance, the Court stated "[t]he appellant is entitled to support money in keeping with the appellee's ability to pay and the standard of living to which the appellant and the children have become accustomed." *Kergosien*, 471 So. 2d at 1212 (¶ 6). The case was therefore reversed and remanded to the trial court for its determination of the proper amount of support money for Mrs. Kergosien as separate maintenance (and not alimony), and child support. An accurate reading of *Kergosien* clearly fails to support or substantiate, in any way whatsoever, Appellant's contention that "an ability to pay is the paramount consideration in determining whether to award alimony."

In specific response to Willie's alleged inability to pay, sufficient evidence was presented by Willie upon which the lower court could reasonably have determined his ability to pay approximately $311.00 per month as alimony to Yolanda, primarily for the maintenance and support of his four (4) minor children. As stated on his Rule 8.05 Financial Disclosure and substantiated by Defendant's Trial Composite Exhibit 3, Willie paid a total of $3,764.00 to his

church, King Solomon Missionary Baptist Church, in charitable contribution(s) for the year 2007, and continued to contribute on average $470.00 per month to King Solomon Missionary Baptist Church through the date of trial. Though commendable, a charitable contribution is not a necessary living expense but a discretionary expenditure, one which Willie should willingly forego in consideration of the support, care and well-being of his four (4) minor children. By his own evidence introduced at trial, Willie can easily pay $311.00 per month to Yolanda, while still having the ability to make a substantial monthly contribution to his church in the approximate amount of $159.00. Thus, the chancellor neither abused her discretion nor applied an erroneous legal standard in awarding alimony to Yolanda such that said award is amply supported by the evidence within in the record.

C. The Court Was Presented With and Considered Evidence of Fault, on the Part of Yolanda and Willie.

Fault is neither a factor to be weighed by the lower court when making an award of lump sum alimony, nor when making an award of alimony pursuant to those factors as set forth in *Hemsley*. Thus, fault was not a consideration by the chancellor in this case by virtue of its award of "lump sum alimony" or, if the award was mis-labeled, by the court's direct reference to and reliance upon the factors enunciated in *Hemsley*.

Willie is without knowledge or information sufficient upon which to allege that the lower court did not consider whether Yolanda had engaged in an extra-marital relationship subsequent to the parties' separation. Pictures and testimony, controverted by Yolanda, was presented by Willie to the court of Yolanda's alleged participation in an extra-marital affair subsequent to the parties' separation. (Defendant's Trial Ex. 10; Tr., Vol. 3 of 4, pp. 166-167, 174; Tr., Vol. 4 of

4, p. 211). Similarly, Willie admitted to sharing a home with Shawanda Jefferson, and having sexual intercourse with Ms. Jefferson, also subsequent to the parties' separation. (Tr., Vol. 2 of 4, pp. 51-53). The evidence was clearly before the court for its consideration, but neither party's alleged adultery contributed to the court's award of alimony to Yolanda, nor to the distribution of the parties' marital assets. Rather than assume that the court committed error by a presumed failure to consider the evidence within the record, or applied an erroneous legal standard, it is more plausible to assume that the chancellor determined both parties to have committed adultery, or that the proof presented was insufficient to make a factual finding of fault on the part of Yolanda.

Though neither the parties' assumptions are relevant to this Court's determination, the record clearly contradicts Willie's contention that the court simply did not consider the evidence or applied an erroneous legal standard. This Court therefore must affirm the chancellor's award of alimony, such that fault is not a proper consideration under either *Cheatham* or *Hemsley*, and no evidence suggests that the court either failed to consider all of the evidence or applied an incorrect legal standard.

CONCLUSION

For the above and foregoing reasons, Appellee, Yolanda P. Common, respectfully requests this Court affirm the Final Judgment of Divorce, inclusive of the equitable division of the parties' marital property and the award of lump sum alimony to Yolanda P. Common. Yolanda P. Commons requests such further relief as may be proper in the circumstances.

Respectfully submitted, this the 10th day of December, 2009.

YOLANDA P. COMMON, APPELLEE

By: _____
Kimberly P. Turner (MBN [redacted])

CERTIFICATE OF SERVICE

I, Kimberly P. Turner, do hereby certify that I have this date mailed, via U. S. First Class Mail, postage prepaid thereon, a true and correct copy of the above and foregoing to the following:

Angela Givens Williams
188 East Capitol Street, Suite 500
Jackson, Mississippi 39201

Honorable Janace Harvey-Goree
Holmes County Chancery Court Judge
Post Office Box 39
Lexington, Mississippi 39095

DATED, this the 10th day of December, 2009.

_____
Kimberly P. Turner (MBN [redacted])