

**THE SUPREME COURT OF MISSISSIPPI
2008-CA-00471**

WILLIE COMMON

DEFENDANT--APPELLANT

VS.

YOLANDA COMMON

PLAINTIFF--APPELLEE

**ON APPEAL FROM THE CHANCERY
COURT OF HOLMES COUNTY, MS
Cause No. 06-0001**

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

Willie Common v. Yolanda Common, 2008 CA 00471

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.

Willie Common, Defendant—Appellant

Yolanda Common, Plaintiff—Appellee

Attorney of Record for Willie Common, Defendant—Appellant

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STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT ERRED IN AWARDING TEMPORARY ALIMONY IN THE ABSENCE OF APPROPRIATE ON THE RECORD ANALYSIS.
- II. WHETHER THE TRIAL COURT ERRED IN ITS IDENTIFICATION AND DISTRIBUTION OF THE MARITAL PROPERTY.
- III. WHETHER THE TRIAL COURT ERRED IN AWARDING ALIMONY.
 - A. WHETHER THE TRIAL COURT ERRED IN AWARDING LUMP SUM ALIMONY WHERE THE COURT DID NOT PROPERLY DETERMINE, APPRAISE AND EVALUATE THE MARITAL PROPERTY AND FAILED TO PROPERLY EXAMINE THE EARNINGS AND EXPENSES OF BOTH PARTIES.
 - B. WHETHER THE TRIAL COURT ERRED IN AWARDING ANY ALIMONY AT ALL WHERE THE EVIDENCE CLEARLY DEMONSTRATED THAT DEFENDANT DID NOT HAVE THE ABILITY TO PAY.
 - C. WHETHER THE COURT ERRED IN REFUSING TO CONSIDER EVIDENCE OF PLAINTIFF'S ADULTERY IN DETERMINING WHETHER ALIMONY SHOULD BE AWARDED.

STATEMENT OF THE CASE

This is a divorce case wherein the Defendant Willie Common (Appellant here) and the Plaintiff Yolanda Common agreed to a divorce on the basis of irreconcilable differences and to the custody and visitation arrangement for their four (4) children. *See* Joint Motion to Withdraw Fault Grounds of Divorce and for Judgment of Divorce on the Grounds of Irreconcilable Differences at 1. The parties could not agree on the amount of child support, the division of the marital property and the award of alimony and left those matters for a determination of the trial court. *Id.* at 2. Defendant appeals from the trial court's decision on the award of temporary alimony and lump sum alimony and from the determination and distribution of the marital property.

A. Course of Proceedings and Disposition in the Court Below

Plaintiff and Defendant separated in the fall of 2004. Plaintiff filed a complaint for separation and separation maintenance in Cause No. 04-0179, and the court held a hearing where the Plaintiff argued that she was entitled to temporary alimony. *See* Notice of Auth. at 1. At the conclusion of that hearing, the court denied Plaintiff's request for temporary alimony or separation maintenance. *Id.* The Plaintiff subsequently abandoned that matter, acquired a new attorney and filed the matter which is the subject of this appeal (Cause No. 06-0001).

In Cause No. 06-0001, the parties appeared before the Court on or about March 2, 2006, for a hearing on Plaintiff's request for temporary alimony (or half of the mortgage on the marital home). *See* 1/9/06 Summons to Willie Common. No hearing was held, but the lawyers for the parties apparently met with the court in chambers. There is no record of what occurred during this meeting (the parties were not present), but Plaintiff later contended that Defendant agreed to pay half the mortgage until the case was finally resolved, and filed a motion to compel the same. At a hearing on the motion to compel, the Defendant testified that he never gave his attorney authority to make such an agreement, and that he only agreed to pay half the mortgage for May and June of 2006.¹ Tr. at 20:26-21:11. The court twice indicated that it would not rely on that alleged agreement, but would make a ruling based on the evidence presented. *Id.* at 4:14-19, 22:1-6. The court would not allow the Defendant to testify as to what he believed he agreed. *Id.* At that hearing, the court ordered the Defendant to pay half the mortgage, which amounted to \$305.00. *Id.* at 45:23—46:3. During the hearing, as a basis for its ruling, the court stated that

¹ At the time of the Marcy 2, 2006 hearing, Defendant was represented by Mr. Antwayn Patrick. After Plaintiff claimed that Defendant had agreed to pay half the mortgage until the case was resolved, Mr. Patrick denied the same, but soon after refused to return Defendant's phone calls. Mr. Patrick has since been disbarred.

the Plaintiff had children at home and should not have to work two jobs. *Id.* However, when the court rendered its written order, the court offered no basis for its ruling except that the parties had allegedly reached an agreement thereto at the March 2, 2006, hearing. *See* 9/14/06 Order.

The matter came before the court for trial on August 23, 2007. The parties presented the court with an agreed order dissolving the marriage on the grounds of irreconcilable differences, and setting the custody and visitation of the minor children. The court heard evidence on the issues of child support, alimony and distribution of property. On that day, the Defendant testified on cross-examination and direct examination. The Plaintiff was called on direct examination and her cross-examination was nearly concluded when the matter was recessed until January 17, 2008. While it remains unclear what happened, the Plaintiff's cross-examination was lost. On January 17, 2008, the trial continued and Defendant was offered the opportunity to cross-examine Plaintiff again.² The trial was concluded on January 17, 2008, and the court rendered its decision on February 29, 2008.

In its Final Judgment of Divorce—Irreconcilable Differences, the court ordered the Defendant to pay Plaintiff lump sum alimony in the amount of \$28,000 over a period of ninety (90) months in equal monthly installments. The court awarded Plaintiff the marital home, all

² It is unclear how the rough transcript recorded on the computer was lost, even if the audio recording was lost. It should also be noted that the loss of this transcript severely prejudiced Defendant's case as Plaintiff had made several concessions and contradictions, which she claimed not to remember on the second cross-examination, and she had new explanations for her actions during the second cross-examination than she had during the original cross-examination.

household furnishing, the lot on which the home sat, a 2003 GMC,³ 1998 Mitsubishi, and her retirement account. The court awarded Defendant a 2002 Tahoe and his TSP account.⁴ The

B. Statement of the Facts

Plaintiff and Defendant were married on November 12, 1994, and had four children. They separated in August 2004. Tr. at 95:6-8. Upon separation, Defendant, on his own accord, had the Department of Human Services (DHS) determine the appropriate amount of child support, and Defendant began paying child support, as determined by DHS in September 2004. *Id.* at 95:2-20. Defendant also paid all of the bills accrued during the marriage with the exception of the mortgage inasmuch as Plaintiff remained in the home. (As noted *supra*, Defendant was later ordered to pay half the mortgage.)

MARITAL ASSETS

When the parties separated, the property they held included the marital home and the lot on which it sat, a 1998 Mitsubishi Diamante, a 2002 Chevrolet Tahoe, and household furnishings and electronics. *See* Def. Ex. 1 (Defendant's Financial Statement); Def. Ex. 7 (Plaintiff's Financial Statement filed in Cause No. 04-0179). Each party also had retirement accounts maintained by their respective employer. After the parties separated, and Defendant paid off the balance of the Mitsubishi, and the court ordered Defendant to pay half the mortgage because

³ As noted below, this vehicle should never have been considered as marital property as Plaintiff purchased this vehicle after the parties separated, Defendant had no involvement in the purchase of the vehicle and never held an interest in it, and there was no intent by either party that it be considered marital property.

⁴ The court also stated that Defendant was awarded cash on hand and all personal property that he currently possessed, but there was no evidence that Defendant had any cash on hand or that he maintained any personal property that was marital property.

Plaintiff allegedly could not survive otherwise, Plaintiff purchased a 2003 GMC Envoy, with a monthly note of \$515.00. *See discussion infra.*

At the hearing, Plaintiff claimed that the marital home was worth only \$22,000, Tr. at 145:22-29, while her Financial Statement provided that the home was worth \$30,000. Def. Ex. 9. In 2004, she claimed that the house was worth \$59,000. Def. Ex. 7; Tr. at 147:11-148:1. Defendant testified that the value of the home was assessed at \$47,490. Tr. at 100:14-22; Def. Ex. 1. Defendant attempted to offer that the value was an online appraisal conducted by MHVillage.com, but the court refused to allow Defendant to offer the appraisal. *Id.* The court indicated that it would order an appraisal on the home, Tr. at 146:23-25, but none was ordered and the court simply averaged the values assigned by the parties.

Similarly, Plaintiff claimed that the lot where the home was located was not worth anything. Def. Ex. 9. The real property, which Plaintiff had originally valued at \$7000, Def. Ex. 7, was obviously worth more than \$0. Instead of determining the fair market value of the property, the court simply averaged the \$0 estimated by Plaintiff and the \$8000 estimated by Defendant, for a value of \$4000.

DEFENDANT'S INCOME AND EXPESNES

Defendant's gross pay is \$4,266.00. Def. Ex. 1 (Defendant's Financial Statement). Defendant's adjusted gross pay is \$3,227.00 (subtracting his state and federal taxes, social security, Medicare and mandatory retirement as required by Miss. Code Ann. § 43-19-101). *See id.* Defendant also has insurance expenses including health and life insurance (both court ordered) totaling \$296.00, that are automatically deducted from his paycheck. *See* Def. Ex. 1. Defendant also has \$23.00 in union dues that is deducted from his paycheck. These deductions leave him a net monthly pay of \$2908.00.

Defendant produced ample, documentary evidence to support his expenses, most of which were incurred during the marriage. *See* Def. Ex. 3. (Composite Ex. of Defendant's Bills). Defendant has monthly expenses totaling \$3714.00. Defendant testified that he split the utilities

and household expenses with his girlfriend, and his Financial Statement only contained those utilities and household expenses for which he was responsible. Tr. at 52:8-10; Def. Ex. 1. His Financial Statement only included expenses for the rent at \$450.00, food at \$200.00, and rental insurance at \$10.00. Def. Ex. 1. He did not include any expenses for water, sewer, electricity, gas or cleaning and other household supplies as those expenses were paid for by his girlfriend, *see* Tr. at 96:24-97:2, but Defendant, if he lived on his own, would have been responsible for those expenses. Defendant also included expenses for his cell phone at \$100.00, his laundry & cleaning at \$60, his clothing at \$50 and his children's clothing at \$25.00, the car insurance for his Tahoe at \$100.00, his medical expenses at \$61.00, entertainment at \$35.00, gasoline for his automobile at \$200.00 per month, charitable contributions for \$25 per month,⁵ and church tithes for \$470.00 per month. Def. Ex. 1. Defendant provided evidentiary support for his charitable and church donations. Def. Ex. 3; Def. Ex. 5 (King Solomon Tithing Statement).

Defendant's total monthly payments on his loans excluding his automobile loan are \$851.00. Defendant has several outstanding loans including a TSP loan in the amount of \$94.28 per month, a personal loan with Navy Federal Credit Union in the amount of \$306.13 per month, a student loan in the amount of \$155.95 per month. *Id.* He also has a credit card bill totaling \$2,978.36 with varying monthly payments of approximately \$100.00 per month. *Id.* Defendant testified that since the separation, he spent significant sums on his children (in addition to child support) and some of the sums from these loans were used to provide for his children. Tr. at 98:21-99:19, 104:19-105:26.

⁵ Defendant pays \$75.00 every three months to Feed the Children. *See also* Tr. at 93:22-94:3.

Defendant is also paying a loan with Bopti Federal Credit Union in the amount of \$210.00 per month. The purpose of the loan was to consolidate and pay expenses acquired during the marriage to make repairs and improvements to the marital home and to purchase furnishings and electronics for the marital home. The furnishings, electronic and improvements remained with the marital home when the parties separated. Tr. at 88:8-23; Def. Ex. 3. Defendant valued the household furnishings and electronics at \$5000, Def. Ex. 1; Plaintiff did not provide any value to the household furnishings and electronics. *See* Def. Ex. 9 (Plaintiff's Financial Statement).⁶

Defendant is also paying an auto loan with Navy Federal Credit Union in the amount of \$547.02 per month. The auto loan Defendant pays covers the cost of the 2002 Tahoe as well as the 1998 Mitsubishi. Both vehicles were acquired during the marriage. The Plaintiff was responsible for the paying the loan on the 1998 Mitsubishi, and the Defendant was responsible for paying the loan on the 2002 Tahoe. However, after the parties separated, the Plaintiff stopped paying for the Mitsubishi, at which time remaining loan amount on the vehicle was \$6000. Because Defendant's name was also on the loan, and his employment required that he maintain good credit, Defendant was forced to refinance the Tahoe, consolidating with it the remaining \$6000 balance on the Mitsubishi. Plaintiff maintains possession of the Mitsubishi. Tr. at 88:24-89:16. At the time of the trial, the Kelly Blue Book valued the vehicle at \$3,330 in good condition, and \$2,775. *Id.* at 89:17-21; Def. Ex. 2. (Kelly Blue Book Value for Mitsubishi Diamante).

⁶ Plaintiff's Financial Statement was also introduced into evidence as Plaintiff's Exhibit 1; however, it was not a complete document.

PLAINTIFF'S INCOME AND EXPENSES

The Plaintiff's gross income from wages and salary is \$2,322.15. Def. Ex. 9; Def. Ex. 8 (Plaintiff's Wage Statements). Plaintiff's adjusted gross income without child support is \$1939.43 (subtracting state and federal taxes, social security, and mandatory retirement as required by Miss. Code Ann. § 43-19-101).⁷ In addition, Plaintiff, at the time of hearing, was receiving \$700.00 per month in child support, bringing her total income to \$2639.43. *Id.* Notably, the Plaintiff now receives \$774.48 in child support, for a total monthly income of \$2713.91. *See* Judgment.

Plaintiff claimed expenses totaling \$3,783.00. However, Plaintiff's expenses were not documented, and Plaintiff admitted that a number of the expenses were no longer valid or were duplicates. (Notably, Plaintiff had an expense for nearly every line on the financial statement.) For instance, Plaintiff listed \$60.00 for dental expenses. Def. Ex. 9. When questioned about this expense, plaintiff indicated that she bought toothbrushes once a month for each of her children and that she bought teeth whitener for her twelve year old son. Tr. at 130. When it was pointed out that Defendant paid for dental insurance for the children, and that Plaintiff could simply take the child to the dentist, Plaintiff indicated that she now realized that, and that she could avoid

⁷ As discussed below, in its opinion, the court determined that Plaintiff's adjusted gross income was \$1,844.09 apparently also deducting expenses for mandatory insurance and disability insurance as noted on Plaintiff's Financial Statement. However, Defendant listed similar expenses and the court did not deduct those expenses from his gross income. The court provided no basis for the distinction between the deductions allowed for Plaintiff but not allowed for Defendant. Moreover, Plaintiff's latest paycheck stub (at the time of the court's January 2008 hearing) demonstrates that neither mandatory insurance nor disability insurance were deducted from Plaintiff's paycheck. *See* Def. Ex. 8. Earlier paycheck stubs from 2007 demonstrate that the Plaintiff had life insurance deducted from her pay, but that was no longer the case as of the January 2008 hearing. *Id.*

that \$60.00 expense by using the insurance for which Defendant is already paying. *Id.* at 131:4-12. Similarly, Plaintiff listed on her financial statement that she was paying school expenses for herself in the amount of \$60.00 per month. Def. Ex. 9. When questioned about this expense, Plaintiff admitted that she had not been in school since February 2007, and therefore no longer had that expense. Tr. at 131:21-28. Other of Plaintiff's expenses seemed unreasonable and exaggerated. For instance, she claimed \$80 per month for over-the-counter headache and sinus medicine. Tr. 133:17-25.

In addition, Plaintiff indicated that the monthly expense of \$50 that she paid for furniture was no longer applicable because she had paid that bill off. Tr. at 142:22-27. Plaintiff also indicated that she no longer had an expense of \$30 per month to repair her vehicle. Tr. at 137:29-138:29. Plaintiff's testimony regarding her transportation expenses was also contradictory. Tr. at 135:7-136:9. Plaintiff initially testified that the \$175.00 on line 21 was for gas for her vehicle, despite that she had already counted \$140.00 for her oil and gas for her vehicle on line 22. *Id.* At first Plaintiff said that she got it confused with gas for her residence, but when it was pointed out to her that she included gas for her residence on line 8, she said that she used that money for gas that she bought for individuals who babysat her children and for gas that she used to go pick up her children from day care. *Id.*

The house was fully furnished when the parties separated. Tr. at 142:5-7. Plaintiff admitted that she disposed of some of that furniture and bought new furniture including bunk beds and a den set. *Id.* at 142:8-21. Plaintiff claimed that she disposed of the den only because it was torn very badly. *Id.* However, another witness testified that the furniture in the house at the time of the parties' separation was in good condition. Tr. 211:2-9. And that Plaintiff nevertheless bought virtually all new furniture. *Id.* at 211:9-24.

After Defendant paid off the Mitsubishi, Plaintiff bought another vehicle for \$515 per month. Tr. at 142:28-144:5. Plaintiff claimed that she bought the new vehicle because the Mitsubishi had quit

working and could not be fixed. *Id.* at 144:6-7. But Plaintiff admitted that after she bought the new vehicle, she drove the Mitsubishi because she had an accident in her new vehicle. *Id.* at 144:12-17. Plaintiff also testified that she would not sell the Mitsubishi (despite claiming she had financial problems) because she planned to fix it for her son to drive. *Id.* at 144:23-25. The court made no inquiry into the actual working condition of the vehicle.

PLAINTIFF'S POST, SEPARATION, EXTRA-MARITAL RELATIONSHIP

Plaintiff admitted that she was dating a gentleman. Tr. at 165:29-166:4. While Plaintiff admitted that he spent the night at her home, she denied that they ever spent the night together. *Id.* at 166:5-8. (Notably, at the August 2007 hearing, Plaintiff claimed that the gentleman never spent the night at her home. During that hearing she was presented with pictures demonstrating that his vehicle was there in the early hours of the morning and the late hours of the night. Again, this transcript was lost, and Plaintiff claimed that she did not recall what she said at the August hearing, *id.* at 166:9-12, admitting that he spent the night but claiming that she was not there.) However, there were pictures produced that demonstrated that Plaintiff and this gentleman were frequently at her home together. Tr. 216-218; Def. Ex. 10. Plaintiff also told one witness that she was engaged to this gentleman. *Id.* at 203:18-27.⁸ Another witness testified that the gentleman's vehicle was at Plaintiff's home overnight on many occasions from the beginning of 2007 through at least August 2007. Tr. at 213:18-214:10.

SUMMARY OF THE ARGUMENT

In the first instance, the trial court erred in awarding temporary alimony to Plaintiff. The court did not consider the appropriate factors before awarding temporary alimony, particularly Defendant's ability to pay, but instead relied on an alleged agreement, which Defendant did not make.

⁸ Defendant subpoenaed Plaintiff's boyfriend, and he appeared in court but left before he was called to testify. Tr. at 205:27-207.

Moreover, distribution of marital assets and a determination of alimony are intertwined. In the instant case, the trial court erred in its decision regarding both. The court erred in its identification and distribution of the marital assets because (1) the court failed to properly consider whether Plaintiff's 2003 GMC Envoy was in fact marital property; and (2) the court relied on guess work rather than the fair market value to determine the value of the marital property.

The trial court also erred in its award of lump sum alimony to Plaintiff. Most notably, the court failed to consider the factors set forth in *Cheatham*. Consideration of the Cheatham factors demonstrates that no lump sum alimony should be awarded. In addition, Defendant does not have the ability to pay, making any award of alimony of any type improper. And finally, the court was required to consider Plaintiff's extra-marital relationship in the award of any alimony. For these reasons, the court's judgment must be reversed, and the order directing alimony be deducted from Defendant's wages vacated.

ARGUMENT

I. The Trial Court Erred in Granting Temporary Alimony Based on a Non-existent Agreement and Absent Consideration of Defendant's Ability to Pay

The trial court erred in awarding temporary alimony in the form of mortgage payments based on an agreement that never occurred. In awarding temporary alimony, the court must consider whether the bills presented by the movant are legitimate, whether the alimony is necessary, and the non-moving spouse's ability to pay. *Neely v. Neely*, 52 So.2d 501, 504 (Miss. 1951). If one of the elements is not present, temporary alimony is not appropriate. *Id.* (noting that three elements were "pre-requisites for relief"). Here, the court did not consider Defendant's ability to pay, but rather granted relief based on an alleged agreement when there was no proof of

such an agreement, and the court expressly refused to hear testimony regarding the lack of an agreement.

Indeed, at the August 31, 2006, hearing, at every instance that Defendant attempted to discuss the lack of an agreement, the court stated that it was not going to rely on any such agreement, and that the court would be making a determination based on the record presented. Tr. at 4:14-19 (“Mr. Gilmore, we are going to pretend that that one does not exist. Just establish for me the income today.”); *Id.* at 22:1-6 (“Okay. Now, I said, we’re going to pretend that order doesn’t exist.”). Yet, when the court issued its order, the court relied only on that alleged agreement. *See* 9/14/06 Order. The court made no findings as to Defendant’s ability to pay, the necessity of the award or the legitimate nature of Plaintiff’s expenses. The court’s ruling is particularly egregious in that the court would not allow Defendant to put on any evidence that this alleged agreement did not exist, leading the parties, at the time, to believe that the court would make a ruling based on the evidence before it. Because the court failed to consider the elements required to establish temporary alimony, the court’s order of temporary alimony was manifestly in error.

II. The Trial Court Erred in Its Determination of What Was Marital Property and the Proper Value of that Property.

To provide equitable distribution of marital assets, the Court must first determine what property constitutes marital property, and then, determine the fair market value of that property. *Craft v. Craft*, 825 So. 2d 605 (Miss. 2002); *Wideman v. Wideman*, 909 So. 2d 140, 143-44 (Miss. Ct. App. 2005); *Ward v. Ward*, 825 So.2d 713, 718 (Miss. Ct. App. 2002) (division of marital property was abuse of discretion where Court failed to identify and properly assess fair market value to all marital property); *Drumright v. Drumright*, 812 So. 2d 1021 (Miss. Ct. App. 2001) (*en banc*) (“[p]roperty division should be based upon a determination of fair market value

of the assets, and these valuations should be the initial step before determining division") (alteration in original) (quotation marks and citation omitted). Here, the court erred in two respects: (1) the court included Plaintiff's 2003 GMC Envoy, acquired after the parties' separation, as marital property; and (2) the court did not properly value that which was marital property.

Property acquired after separation of the parties or a temporary support order is separate property and not marital property. *Pittman v. Pittman*, 791 So. 2d 857, 864 (Miss. Ct. App. 2001). In this case, Plaintiff acquired the 2003 GMC Envoy long after the parties had separated and after the court entered an order of temporary support. Therefore, the court's inclusion of the Envoy as a marital asset was an error. (Although, the court could consider this asset in determining Plaintiff's wealth for purposes of alimony.) To compound this error, the court did not obtain the fair market value of the vehicle, but accepted Plaintiff valuation at \$21,000. Moreover, the court provided that there was \$22,000 owed on the vehicle, creating negative equity, when there was absolutely no record evidence to support what was owed on the vehicle.

The court also erred in its valuation of marital assets. The court did not determine the fair market value of the property as required by this Court. *See Drumright, supra*. Instead, the court simply averaged the respective values assigned by each party without regard to the legitimacy of those assignments. For instance, the court averaged the values assigned the marital home by Defendant and Plaintiff despite that Plaintiff had given several wildly different valuations of the property and was clearly simply guessing and attempting to devalue the property to her benefit. Moreover, the court averaged the value of the real property on which the marital home was placed using the Plaintiff's value of zero despite that the real property was clearly worth more

than \$0, and that Plaintiff had earlier valued the property at \$7000.⁹ In addition, the court improperly valued the 1998 Mitsubishi at \$500, when the Kelly Blue Book Value clearly provided that the car was worth more. The court's failure to properly obtain the fair market value of the marital property requires reversal.

III. The Trial Court Erred in Awarding Alimony.

The trial court erred in awarding alimony. First, the court failed to consider the *Cheatham* factors in awarding lump sum alimony, requiring reversal on this basis alone. Second, no award of alimony in any form is appropriate because Defendant does not have the ability to pay.

A. The trial court erred in awarding lump sum alimony.

The trial court improperly awarded lump sum alimony without an adequate examination of the value of the marital assets, and the factors enunciated in *Cheatham v. Cheatham*, 537 So. 2d 435, 438 (Miss. 1988). As noted in *Miller v. Miller*, 874 So. 2d 469, 472 (Miss. Ct. App. 2004), "lump sum alimony is a hybrid divorce concept, providing support as does other alimony but also making an unalterable distribution of property as does equitable distribution." To award lump sum alimony, the court must consider four factors: (1) substantial contribution to accumulation of total wealth of the payor either by quitting a job to be a housewife, or by assisting in the spouse's business; (2) a long marriage; (3) where the recipient spouse has no

⁹ Similarly, the court valued Plaintiff's retirement account at \$2500 without any record support for this determination, and despite that Plaintiff's Wages Statement demonstrated that there was more nearly \$1500 contributed to that account in the first eight months of 2007 alone. See Def. Ex. 8. Plaintiff did not list the value of her retirement account on her Financial Statement as required so there is no way to know what was accumulated in the years previous to the hearing, and the court did not require Plaintiff to submit statements regarding the value of her retirement account. Moreover, the court did not examine what was accumulated before and after separation, in determining the value of either Defendant's or Plaintiff's retirement accounts.

separate income or the separate estate is meager in comparison; and (4) without a lump sum award the receiving spouse would lack any financial security. *Id.* Notably, fault is not a consideration in lump sum alimony. *Id.* Lump sum alimony is only appropriate where the distribution of property leaves one spouse's assets out of balance to the other in such a way as to be inequitable. *Id.* Moreover, the court must consider the "'husband's financial ability to respond to an award in gross.'" *Retzer v. Retzer*, 578 So. 2d 580, 591 (Miss. 1991) (quoting *Miller v. Miller*, 159 So. 2d 112, 119-20 (Miss. 1935)). Failure to follow the *Cheatham* factors must result in reversal of the court's decision. *Haney v. Haney*, 788 So. 2d 862, 866 (Miss. Ct. App. 2001). At the outset, the court considered none of the factors in *Cheatham*, and the court's ruling requires reversal on this basis alone. (Instead, the court considered the factors that must be considered in awarding permanent alimony.¹⁰) However, even if the court had properly considered the *Cheatham* factors, the record reveals that an award of lump sum alimony would be inappropriate.

First, the "common thread" in the award of lump sum alimony is that the "wife had through her efforts been a material economic benefit in the creation of her husband's wealth,

¹⁰ However, the Court even failed to properly consider these factors. In fact, with respect to the factor that requires the Court to consider the tax consequences of the permanent alimony payment, the Court completely missed the point. Instead of acknowledging that the Plaintiff would receive an additional \$3800 tax free and that Defendant would be paying taxes on \$3800 of income that he will never be able to use, the Court talked about the fact that the Ms. Common had committed tax fraud by allowing someone else to claim two of the children for payment of money. *See* Judgment. While it is true that Ms. Common has committed tax fraud, that is not what that factor was about. Moreover, the Court failed to discuss that Plaintiff engaged in an extra-marital relationship after the parties' separation with a man to whom she is now engaged stay. In addition, the Court fails to discuss Plaintiff's dissipation of marital assets such as disposal of furniture in the marital home. Finally, the Court failed to consider that Defendant, particularly given a child support order of \$774.00 a month, simply did not and does not have the ability to pay any alimony, which is a paramount consideration in the *Aldridge* factors.

such as quitting her job to help him in his business or profession, helping him through college, working in his business or profession, and frequently offering him valuable counseling in his business or investments.” *Retzer*, 578 So. 2d at 591. Here, there was no evidence presented to demonstrate that Plaintiff contributed to any accumulation of wealth by Defendant. Indeed, the evidence actually demonstrates that neither party accumulated wealth. Plaintiff did not quit a job to help Defendant with a business as he had none, nor was there any evidence that Plaintiff helped Defendant through college.

Second, the marriage was not particularly lengthy. The parties were married less than ten (10) years when the parties separated.

Third, Plaintiff’s estate was not meager in comparison to Defendant’s estate. Defendant left the marriage with nothing but the 2002 Tahoe (which had a considerable negative equity given that he had to refinance it and pay off the Mitsubishi) and the bills that had been accumulated throughout the marriage. Indeed, Defendant did not have any positive equity in his estate. On the other hand, if awarded the marital home, furnishings, real estate, and the 1998 Mitsubishi, the Plaintiff’s estate would be worth considerably more than Defendant’s. Even accepting the court’s improper valuation and excluding the GMC Envoy, it is clear that Plaintiff’s estate upon division would be negative \$1255.00, whereas Defendant’s estate upon division would be a negative \$40,679, leaving Defendant with the far smaller estate. Therefore, this factor clearly counsels against an award of lump sum alimony. *See Magee v. Magee*, 661 So. 2d 1117, 1122-23 (Miss. 1995) (holding that award of lump sum alimony was not appropriate even though wife’s expenses were more than her earnings where the separate estates of the husband and wife were similar).

And finally, the court did not and could not properly consider Plaintiff's financial security absent alimony. Plaintiff repeatedly indicated that her Financial Statement was inaccurate and included expenses that she did not have, or that were exaggerated. *See* discussion *supra*. And while the court said during the proceedings that it would require the parties to submit new Financial Statements, Tr. at 243:4-7, Plaintiff did not do so,¹¹ and the court relied on the erroneous Financial Statement.

Moreover, because the court did not properly determine the marital assets and their value, the court could not have properly assessed lump sum alimony (or any alimony for that matter). *See Miller*, 874 So. 2d at 472.

B. No award of alimony is appropriate where Defendant does not have the ability to pay.

The law in Mississippi is clear that ability to pay is the paramount consideration in determining whether to award alimony. *See Retzer, supra*; *Kergosien v. Kergosien*, 471 So. 2d 1206 (Miss. 1985) (holding that alimony should be based on ability to pay); *Hopkins v. Hopkins*, 165 So. 414 (Miss. 1936); *Thompson v. Thompson*, 816 So. 2d 417 (Miss. Ct. App. 2002) (upholding denial of alimony despite fact that wife could not work where evidence demonstrated that husband's income would not support award of alimony); *Graham v. Graham*, 767 So. 2d 277, 280 (Miss. Ct. App. 2000) (reversing award of alimony and noting “*the right of the husband to lead as normal a life as possible with a decent standard of living*”) (citation omitted and emphasis added). The court clearly did not consider Defendant's ability to pay, and even if court did, the evidence clearly demonstrated that Defendant did not and does not have the ability to pay alimony.

¹¹ There was no need for Defendant to submit a new Financial Statement as he testified that his Financial Statement had not changed. Tr. at 243:24-27.

Defendant submitted a copy of every bill he had, and none of his expenses were challenged. Defendant even excluded living expenses he would otherwise have because they were being paid by his girlfriend. Defendant's expenses including child support was more than \$3700, whereas his take-home income was \$2908. Defendant clearly does not have the ability to pay clearly does not have the ability to pay. Indeed, a number of the bills he has now are bills from the marital relationship. These bills include automobile loans for vehicles that both he and Plaintiff drove, and for the vehicle that Plaintiff still has in her possession. Moreover, as he testified, his bills also include bills acquired during the marriage including loans for the improvement of the marital home, which was awarded to Plaintiff. Indeed, the only consumer bill of the marriage that Defendant did not take over after he and Plaintiff separated was the mortgage for the home, of which Plaintiff maintained possession. Defendant is entitled to maintain a reasonable standard of living, and he is unable to do so when he constantly has to be borrow to even survive. Because Defendant cannot afford to pay alimony, any award of alimony, in any form would be improper.

C. The court erred in not considering evidence of Plaintiff's post-separation, extra-marital affair in determining alimony.

If the court is going to award periodic alimony under the *Armstrong* factors, it must consider that Plaintiff engaged in an extra-marital affair after the parties separated. *Hammond v. Hammond*, 641 So. 2d 1211 (Miss. 1994) (reversing award of alimony to former wife who had after separation started a relationship with another man). The court made much of the fact that Defendant obtained a girlfriend after the parties separated. (Defendant testified that he and his girlfriend began dating in 2005, after the parties had already separated. Tr. 33:20-34:13.) However, the court did not consider that Plaintiff also engaged in an extra-marital relationship after the parties separated.

Plaintiff admitted that she had a boyfriend during the period of separation. She even told others that they are engaged to be married. At the hearing on August 23, 2007, Defendant testified that her boyfriend had never spent the night at her house, but confronted with pictures, months to think about it and the loss of the transcript from the August proceeding, she testified at the January 2008 hearing that he spent the night, but only to keep the children while she was working. But Plaintiff's statement was belied by testimony and pictures. There was also uncontroverted evidence that the boyfriend's vehicle was seen at Defendant's home consistently on a nightly basis for a number of months.

The court erroneously indicated that Defendant would need to show direct proof that Plaintiff was having sex with her boyfriend, but the case law indicates that the defendant does not bear such a heavy burden. Indeed, the law is clear that adultery can be established by circumstantial evidence. *Dorman v. Dorman*, 737 So. 2d 426, 430 (Miss. Ct. App. 1999) ("direct evidence is not required given the inherently secretive nature of adulterous relationships"). All that is required to establish adultery is "1) an adulterous inclination coupled with 2) an opportunity to consummate the inclination." *Id.* at 429-30. The adulterous inclination may be shown by "either 1) *an infatuation with a particular person or* 2) a general adulterous propensity." *Id.* at 430. Even if you just accept only Plaintiff's testimony, Defendant has established adultery. Plaintiff admitted that she and her boyfriend were in a relationship and that he spent the night at her house, which established the infatuation and the opportunity to consummate that the adulterous inclination. If you couple her testimony with the uncontradicted fact that she was engaged to marry him, and that his car was at her home on occasions in the early hours of the morning and late evening hours when Plaintiff was also there (as evidenced by both her work vehicle, her personal vehicle and his vehicle being at the home along), there is

only one logical conclusion but that Plaintiff had been engaged in an adulterous relationship. The court's failure to take this into consideration in any award of alimony is reversible error.

CONCLUSION

For the foregoing reasons and authorities and based upon the entire record, Defendant respectfully requests that the Court reverse the trial court's grant of temporary alimony, alimony and distribution of property. The trial court's order directing the deduction of alimony payments from Defendant's wages must be vacated.

Respectfully Submitted,

By:




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CERTIFICATE OF SERVICE

I, Angela Givens Williams, do hereby certify, that I have this day mailed via FIRST CLASS U.S. MAIL, postage prepaid, a true and correct copy of the foregoing Brief to the following counsel:

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This the 4th Day of September, 2009


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