

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**WALTER REID ELLIOTT**

**APPELLANT**

**V.**

**DOCKET NO.: 2008-CA-00575**

**DOLORES ELAINE GARNER ELLIOTT**

**APPELLEE**

**APPELLEE'S BRIEF**

**APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI**

**ORAL ARGUMENT IS NOT REQUESTED**

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**CERTIFICATE OF INTERESTED PERSONS**

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

**The Appellant:**

Walter Reid Elliott

**The Appellee:**

Dolores Elaine Garner Elliott  
2985 Pleasant Hill Rd.  
Nesbit, MS 38651

**The Lawyers:**

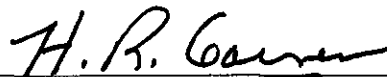
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The Trial Judge:

Chancellor Vicki B. Cobb  
Chancery Court Chancellor  
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P.O. Box 1104  
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A handwritten signature in cursive script, appearing to read "H.R. Garner", is written over a horizontal line.

H.R. Garner, [REDACTED]  
Attorney of Record for Appellee,

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## **STATEMENT OF THE ISSUES**

The issues presented by the Appellee in this appeal are:

ISSUE I: THE CHANCELLOR WAS CORRECT IN AWARDING THE APPELLEE PERMANENT ALIMONY IN THE AMOUNT OF \$500.00 PER MONTH, BASED UPON THE EVIDENCE ADDUCED AT TRIAL.

## STATEMENT OF THE CASE

### A. Nature Of The Case, Course Of The Proceedings And Disposition In The Court Below \*

Appellant, Walter Reid Elliott , filed a complaint for divorce against the Appellee, Dolores Elaine Garner Elliott , in the Chancery Court of DeSoto County, Mississippi, on February 9, 2007 . (CP 4-7) The Appellee, Dolores Elaine Garner Elliott , filed an answer and counter -complaint for divorce on the grounds of uncondoned adultery against the Appellant, Walter Reid Elliott . (CP 8-18) A trial was held on February 28, 2008. The Chancellor rendered an opinion from the Bench pursuant to Rule 52 of the Mississippi Rules of Civil Procedure . (Tr 170-204, MRE 14-48) The Appellee, Dolores Elaine Garner Elliott , was granted a divorce on the grounds of uncondoned adultery from the Appellant, Walter Reid Elliott . An equitable division was made of the marital assets of the parties, the custody of the parties' minor child and child support awarded to the Appellant, Dolores Elaine Garner Elliott, and permanent periodic alimony of \$500.00 per month from the Appellant, Walter Reid Elliott. The Appellee, Dolores Elaine Garner Elliott , waiving attorneys fees and expenses for her attorney's Pro Bono Representation of her. (CP 19-35)

The Appellant, Walter Reid Elliott, being aggrieved of the Court's decision appealed this cause to this Court. (CP 26-28)

**\* The following abbreviations shall apply as used herein for reference: CP means Clerk's Papers. TR means transcript. MRE means mandatory record excerpts.**

## **B. STATEMENT OF THE FACTS AND CIRCUMSTANCES OF THE CASE**

### **PROCEDURAL HISTORY**

The Appellant, Walter Reid Elliott , filed a Complaint for Divorce in the Chancery Court of DeSoto County, Mississippi , against the Appellee, Dolores Elaine Garner Elliott , on February 9, 2007 (CP 4-7) . Appellee, Dolores Elaine Garner Elliott, filed an Answer, Affirmative Defenses, and Counter Complaint for Divorce on the grounds of Uncondoned Adultery. (CP 9-18) No answer or response was every filed by the Appellant, Walter Reid Elliott . A trial was conducted before Chancellor Vicki B. Cobb on February 28, 2008 . The Chancellor at the conclusion of the trial rendered an Opinion from the bench. (TR 170-204, MRE 14-48) The Court granting to the Appellee, Dolores Elaine Garner Elliott , a divorce from the Appellant, Walter Reid Elliott , on the fault grounds of Uncondoned Adultery pursuant to Mississippi Code Annotated Section 93-5-1. (CP 19-20, MRE 7-8) The Court awarded the custody of the minor child of the parties and child support, to Appellee, Dolores Elaine Garner Elliott , and ordered certain educational expenses to be paid by the Appellee and Appellant for the minor child . The Court also made an equitable division of the marital assets of the parties, and awarded the Appellee, Dolores Elaine Garner Elliott , permanent periodic alimony from the Appellant, Walter Reid Elliott . (CP 19-20, MRE 7-8)

The Testimony at trial consisted of six witnesses , and six exhibits introduced into evidence by the parties .

The pertinent portion of the Witnesses' testimony is summarized below :

Testimony of Walter Reid Elliott (TR 14-64) The Appellant, Walter Reid Elliott testified that he was 58 years old at the time of the trial. That he and the Appellee, Dolores Elaine Garner Elliott , were married on March 11, 1982. That there were two children born of the marriage,



namely: Jennifer Elliott, born May 12, 2008, who is now emancipated, and Jessica Elliott who was living with the Appellee and attending college at the time of the trial.

Appellant, Walter Reid Elliott, admitted under oath that he had left the Appellee, Dolores Elaine Garner Elliott , and filed the Complaint for Divorce against her. Under examination each and every time he was asked about his relationship with two separate women, meaning had he had sexual relations with one or both of them prior to and subsequent to the parties' separation, he invoked the 5<sup>th</sup> Amendment privilege and refused to answer.

He testified that Appellee, Dolores Elaine Garner Elliott , had been a "fair" wife to him. That she cooked for him. Put up with him when he came home drunk once. She was a good mother to their children. She kept a clean house, and was faithful to him during the marriage as far as he knew. She went to church on a regular basis . She stayed with the children because he asked her to and did not get out get a job until the children were up and could get a job. That she worked part time for her brother, Harry Garner, who ran a dental lab out of his home in the neighborhood. That she had job skills as a beautician about twenty-five years before. He testified that he did not want her to work during the marriage and she had no education . (TR 43) That she helped care for her elderly parents, Mr. And Ms. Archie Ray Garner, who lived close by. He admitted that he left Appellee, Dolores Elaine Garner Elliott, of his own accord, and she did not run him off. He never tried to move back . He admitted that Appellee, Dolores Elaine Garner Elliott, made twelve thousand dollars (\$12,000.00 ) per year as a teachers assistant. That he earned forty-three thousand dollars (\$43,000.00), almost three times more than Dolores Elaine Garner Elliott made per year.

He testified that he "helped" his daughter attend college with her college expenses. He admitted that the daughter was doing good in her school work. That he had money to help her

out. He admitted that he would be willing to give her \$200 to \$300.00 per month on her education . That it would not put an economic strain on him. (TR 48)

He had knowledge that Dolores Elaine Garner Elliott had been in the hospital the previous year and admitted visiting her there. (TR 48)

In so far as the marital home was concerned where Dolores Elaine Garner Elliott and the parties' daughter lived, he said had sent Dolores Elaine Garner Elliott \$400.00 per month.

He testified he wanted his fair share of the parties' home. He did not care if the house was sold and his daughter and the Appellee , Dolores Elaine Garner Elliott, were put out in the street he still wanted his share of it. (TR 27)

That he had cashed in a 401k during the marriage and keep all the proceeds, and still owed taxes on it. (TR 31)

He testified on direct examination from his attorney, that he had quit his former employment at a car dealership because his knees hurt him, and he worked twelve hour days. That his back hurt him and he had went to a doctor for it. He was employed by the DeSoto County, Mississippi Board of Education, where he received a salary each month and a 3% cost of living raise each year.

On cross examination, Exhibit No. 6 was introduced which was the W-2s and tax returns of both parties for the year 2007. For the month of August, 2008, he had gross earnings of \$4,134.42. That deducted therefrom each month as \$1,366.61. That he took home after taxes were deducted and state retirement the balance each month.

He admitted that his wife had a car that she used for herself to work, and that she was living in the home with the daughter and another woman who was his former sister-in-law, who had lived in the parties' home for a short time .

Testimony of Donna Taylor. (TR 71-82) Ms. Taylor testified that she had a sexual relationship or an affair with Mr. Elliott. That when they would go out, that he would buy drinks, etc. That she was a former employee of the DeSoto County Board of Education and worked under the supervision of Walter Reid Elliott, the Appellant. That they broke up because he was having an affair with another woman, Ms. Connie Hartfield. Mrs. Hartfield also worked under the supervision of Walter Reid Elliott, at the DeSoto Board of Education. That he had a habit of grabbing women in the bus at work. That she had reported him to his supervisor about the sexual harassment. That Walter Reid Elliott had a habit of drinking on the job. That nothing was every done , and she quit the job.

Testimony of Harry Garner. (TR 86-101) The brother of Appellee, Dolores Elaine Garner Elliott was called to testify. That he lived close by to her. That the lot on which Dolores Elaine Garner Elliott and Walter Reid Elliott house was located on was given to them by Archie Ray Garner, his father. That his father loaned them money to build the house, and helped build it .

That he formerly had a dental laboratory that he worked under prescriptions for Dentists that was located in his garage. That his sister, Dolores Elaine Garner Elliott, worked for him on a part-time basis from 1993 to 2005 when he closed the business. That she also had time off to take school trips with the children, stay home with a sick child, and seldom worked over 40 hours per week. He testified that his sister, Dolores Elaine Garner Elliott , had previously worked for his father, Archie Ray Garner, and had obtained these skills through working for her father. That she did not have any formal education as a Dental Tech. That she only had "on the job " training.

That he was presently employed for the Desoto County Board of Education as the Safety and Training Coordination for the County Transportation . That Walter Reid Elliott worked at

the same place where he was the Service Operations Manager. That Walter Reid Elliott had huge responsibilities and he oversaw the operation of 320 buses for the county. That Walter Reid Elliott supervised the fleet managers .

He testified that he had seen excessive flirtation between Connie Hartfield and Walter Reid Elliott on the job site. He did not confront him about this.

That the entire Garner family lived in the same area. That Dolores Elaine Garner Elliott and the parties' daughter lived in the same house, very close to their parents.

That it was common knowledge among the Garner Family that Walter Reid Elliott wanted Dolores Elaine Garner Elliott to stay at home with the children. That Dolores Elaine Garner Elliott was a faithful mother and wife to Walter Reid Elliott. That she had no opportunity during the marriage to go out and get job skills. That his sister had a GED. That she kept house and was a wonderful mother and wife and was the spiritual leader of the family .

That since Walter Reid Elliott had left Dolores Elaine Garner Elliott, Harry Garner had had to help her out with the repairs and maintenance of the home. That his sister, Dolores Elaine Garner Elliott, helped with the care of their elderly parents, who lived next door, especially her mother who was in poor health. That Walter Reid Elliott left his sister about two years before the trial, and never returned. Never knew of his sister, Dolores Elaine Garner Elliott, to run around and drink .

He testified that his sister, Dolores Elaine Garner Elliott , had health problems, one being the carpal tunnel syndrome from which she currently suffered. She had arthritis in her feet and hands.

He testified on redirect that if the Court Ordered Dolores Elaine Garner Elliott to sell the home, that it would "Tear Up the family". (TR 101)

Testimony of Archie Ray Garner. (TR 101-109) He testified that he was the father of Dolores Elaine Garner Elliott. That he bought the original twenty acres of land, and that he had given his children lots to build their homes on out of the 20 acre parcel. That he and his wife, Mary S. Garner, lived on the land. That his wife was elderly and in poor health. That he raised a big garden each year and gave some of the produce from the garden to Dolores Elaine Garner Elliott. He had knowledge that his daughter, Dolores Elaine Garner Elliott, suffered from health problems of carpal tunnel syndrome, arthritis in both hands, feet and legs. That she did not finish high school, but got a GED. That 25 years ago she attended a beauty school, but he had no knowledge of her working as a beautician.

That he gave his daughter, Dolores Elaine Garner Elliott, three acres of land to build a home, loaned them the money to build a home, and did work on the home in helping it get built. That the work he did on the house, he was not paid.

He testified that Dolores Elaine Garner Elliott had been a good wife to Walter Reid Elliott. Kept a clean house during the marriage, was a good cook, a good mother to her children. That he confronted Walter Reid Elliott after he left Dolores Elaine Garner Elliott, but he would not tell him why he left her. That he had given his daughter, Dolores Elaine Garner Elliott, and his grand daughter a little money from time to time.

When asked what effect would it have on the family, if the house was ordered sold by the Court. He stated that it would mess up the family all living around each other. That he did not have room for her and her daughter in his house.

On cross examination he testified that he had loaned Dolores Elaine Garner Elliott and Walter Reid Elliott thirty thousand dollars to build the house, which they paid back. That his

daughter worked during that time for her brother (Harry Garner) who had a dental lab in his home which was right next door. That she primarily stayed home and took care of the children.

When asked when he died did he intend to leave his daughter, Dolores Elaine Garner Elliott, some of property. To which he answered no, that he was intending upon it being sold and divided among his children.

He testified that Walter Reid Elliott was a good father, as far as he knew. (TR 111)

Testimony of Dolores Elaine (Garner) Elliott. (TR 112-140) On direct examination , Dolores Elaine Garner Elliott , Appellant testified that she was 54 years of age at the time of the trial. That she currently had health problems being carpal tunnel syndrome in both hands. That she had been informed by a doctor that the joint was "worn out" and needed replacing. That she had high blood pressure (hypertension ) for which she took medication which she had had for the past eight years. (TR 113)

She testified she attended cosmetology school about 35 years ago, and worked for about a year . That she had worked for her father, Archie Ray Garner, and her brother, Harry Garner , in their dental labs making dentures. (TR 113) She stated she learned it on the job. No formal dental lab training. (TR 114) That she doubted she could currently do that job because of her hands, neck and back . (TR 114) That she was currently employed by the DeSoto County Board of Education in August 2007 as a teacher's assistant. That she was paid on an hourly basis of \$8.49 per hour. (TR 114) That introduced to her testimony was Exhibit No. 6. She testified that she had gross earnings for the year of 2007 of \$11, 466.00. That she had no other source of income other than her teacher's assistant job. (TR 135)

That she and Walter Reid Elliott had two children of the marriage, the youngest of which was Jennifer who was 19 at the time of the trial who lived with her and attended college. (TR

116) That Jennifer worked part time at the Sonic Restaurant to help herself and her mother. That she had a partial scholarship which paid a portion of her college education expenses. That Dolores Elaine Garner Elliott had bought a car for her daughter, Jennifer, but Jennifer paid the gas, notes, and insurance. The car was financed in the name of Dolores Elaine Garner Elliott, but as stated Jennifer paid the notes. (TR 117) That the child lived at home, but does not pay room and board, but has helped out with the bills from time to time. (TR 118) That Walter Reid Elliott has given some money to Jennifer to help her with her education expenses from time to time. (TR 118)

Appellant, Dolores Elaine Garner Elliott , testified that when Walter Reid Elliott left her he still deposited his pay check into the family account, until September 2007 after he had filed for divorce .

She testified that she knew or had learned that he was having an affair. (TR 119) She learned this after she found a text message on his phone. (TR 119) She confronted him about it which he denied. (TR 119) That when she confronted him again about his affair that he left the home telling her that "I can't take this anymore". (TR 120) She found out later that he was having an affair with "Connie Hartfield". She actually found his business truck parked at the residence of Mrs. Hartfield and followed him as he left and got in the car with her. (TR 121-122) She later learned that Walter Reid Elliott had had an affair with another woman during the marriage whose name was "Donna Taylor". (TR 123) That she did not forgive him nor condone his affairs. (TR 124)

She next testified about the parties' home. The land on which it was situated was given to them by her father, who loaned them the money to build the home, and helped them work on the building or construction of the home. (TR 124-126)

She testified that she had been a good wife to Walter Reid Elliott. Kept a clean house for him and the family, was a good mother to their children, cooked meals for the family. (TR 126)

She testified that she told him that she did not approve of his drinking and hanging out with his buddies. (TR 127)

She testified that the parties' daughter, Jessica, lived with her and attended college. That she had a partial scholarship and was a good student. She testified that after Walter Reid Elliott stopped giving her money in September or October, 2007, it left her in bad shape. When she got her income tax refund check for 2007 that she used it to pay on the credit cards. (TR 128)

She testified she learned after the separation that Walter Reid Elliott had cashed in a 401K. That he did not give her any of the money. That she did not know what he did with the money. (TR 129)

She testified about her living expenses which was reflected in Defendant's Exhibit 1 introduced into evidence at the trial. She testified that she still owed a \$2,600.00 hospital bill that she had incurred in December 2006. That she used part of the money he was still putting into the bank to pay on the bill, and that she had been paying on the balance owed. (TR 130) That she had paid the taxes and insurance on the parties' home, and car insurance. (TR 133) That Walter Reid Elliott did not pay his one-half on these bills. (TR 132-133) Although he did pay some on these bills. (TR 133)

Dolores Elaine Garner Elliott testified that she takes home each month from her earnings the net sum of \$948.96 after deductions for taxes, medical insurance, and Mississippi State Retirement. (TR 133-134) She testified that her total living expenses each month was around \$2,100.00 per month. (TR 135)



She testified that she was asking the court to award her support from Walter Reid Elliott since he earned over three times per month, what she made. (TR 136)

She testified that she had \$1,500.00 in State retirement, and that Walter Reid Elliott had \$7,548.75. (TR 137)

That she wanted the house to live in for her and her daughter as she had no other place to go. (TR 137) That she had permitted her former sister-in-law to move in for about four months to help pay some of the bills. (TR 137- 138)

She asked that if the Court did not award her the ownership of the home, that it award the use and possession of same for her and her daughter. That it would continue until such time as either she would remarry or die. (TR 139)

She testified that her attorney had waived attorneys fees as a pro bono project and that she was not asking for reimbursement of attorneys fees from Walter Reid Elliott . (TR 139 )

On cross examination, Dolores Elaine Garner Elliott admitted that the house was the major asset of the marriage, since the retirement accounts were relatively small. (TR 140)  
She was questioned in detail about her physical problems, and her ability to work in a dental lab. That her daughter, Jessica , has had to help her some financially. (TR 142-144)

The Appellee, Dolores Elaine Garner Elliott , was cross examined in detail as to how she learned that the Appellant, Walter Reid Elliott , was having an affair or affairs. (TR 146)

The Appellee, Dolores Elaine Garner Elliott, was cross examined about her living expenses and the fact that she had pro rated the taxes, insurance, utility bills, etc. (TR 147)

The Appellee, Dolores Elaine Garner Elliott , was then cross examined under the provisions of the "The Armstrong Factors or Elements for awarding Alimony"(TR 147 150)

The Appellee, Dolores Elaine Garner Elliott , testified that she could not make it on a \$1,000.00 per month. That she was in need of at least \$1,800.00 per month minimum. (TR 150).

The Appellee, Dolores Elaine Garner Elliott , testified under cross examination that if she got use of the home and no alimony, the only way she would be able to live was to sell the house. That she wanted to keep the house for a place to live. If she had to sell the house she would still be in the same shape with no support awarded. She testified that she would not have enough money to meet her monthly needs. (TR 152)

Testimony of Jessica Elliott. (TR 154-161) The Appellee, Dolores Elaine Garner Elliott, called as her final witness the parties' daughter, Jessica Elliot.

On direct examination , Jessica , testified that she was 19 years of age and the daughter of Walter Reid Elliott and Dolores Elaine Garner Elliott . That lived in the home in Nesbit, DeSoto County, Mississippi. That she was a college student, and had a partial scholarship to attend college but it did not cover all her expenses. That she also worked part time at the Sonic Restaurant to help defray her expenses. That she had good grades and was taking a full load in college. She testified as to her expenses to attend college. She was able to pay her car note, gas and insurance each month. In addition thereto, she paid for her own cell phone bill. She had a credit card, which she was able to pay on each month. That if the Court decides to sell the home that she would still live with her mother. (TR 154-161)

On cross examination , Jessica was asked about her grades and studies. She testified that she was eligible for scholarships and loan or grants.(TR 161-162)

On re-direct examination, Jessica was asked that if she was awarded to the custody of the Appellee, Dolores Elaine Garner Elliott, that she in all probability would still be eligible for same. (TR 162 )

Both sides rested their respective cases, and the Court adjourned to Chambers to prepare an Opinion.

The Chancellor subsequently returned and rendered an oral Opinion consisting of a finding of facts and conclusions of law. (TR 169-204)

The Court ruling as follows:

1. A divorce was awarded to the Appellee, Dolores Elaine Garner Elliott, from the Appellant, Walter Reid Elliott, on the grounds of uncondoned adultery .
2. That the Court made an equitable division of the marital assets, inter alia, awarding the Appellee a 60% interest and use of the home under certain conditions; and the Appellant a 40% interest of the home. Each party was ordered to pay their pro rata taxes and insurance on the home.
3. That the Appellee, Dolores Elaine Garner Elliott, was awarded the custody of the parties' daughter, Jessica, and the Appellant, Walter Reid Elliott , was ordered to pay child support, medical insurance and other portions of expenses for the parties' minor child.
4. The Appellee, Dolores Elaine Garner Elliott , was awarded alimony of \$500.00 per month from the Appellant, Walter Reid Elliott, until such time as she dies or remarries or until otherwise modified by the Court.
5. That the Appellee, Dolores Elaine Garner Elliott , was not awarded attorneys fees and expenses as her attorney had waived any fees and expenses as a Pro Bono Project for the Appellee.

## **SUMMARY OF THE ARGUMENT**

The argument of the Appellee, Dolores Elaine Garner Elliott, is summarized as follows:

**ISSUE I: THE CHANCELLOR WAS CORRECT IN AWARDING THE APPELLEE PERMANENT ALIMONY IN THE AMOUNT OF \$500.00 PER MONTH, BASED UPON THE EVIDENCE ADDUCED AT TRIAL.**

Based upon the evidence adduced at trial the Chancellor was correct in awarding the Appellee permanent alimony in the amount of five hundred dollars per month from the Appellant. Awarding the custody of the parties' minor child to Appellee, and requiring support to be paid by the Appellant. That the determination of the equitable distribution of the marital assets by the Chancellor was correct, in awarding the Appellant all his retirement funds, funds withdrawn from a 401k that he had withdrawn and spent; and 40% interest in the parties' marital home. The Chancellor was also correct based upon the evidence adduced at trial and the application of existing case law in awarding the Appellee 60 % interest in the parties' marital home, the exclusive use, possession, and control of same under certain conditions, awarding her small retirement to her, and other personal property. Also, by requiring each of the parties to pay their respective pro rata share to pay all taxes and insurance on the parties' marital home. An analysis of the evidence and the law in making these awards clearly weighs in favor of the Appellee.

## ARGUMENT

### A. STANDARD OF REVIEW

This Court “employs a limited standard of review” of the division of marital estate in divorces. Such division “will be upheld if it is supported by substantial credible evidence.” This Court will not substitute its judgment for that of the Chancellor “even if this Court disagrees with the lower court on the finding of fact and might . . . (Arrive) at a different conclusion.” Owen v Owen, 798 So2d 394 (Miss. 2001) (citations omitted). This Court will not disturb the findings of a Chancellor unless it appears that the Chancellor “was manifestly wrong, clearly erroneous , or an erroneous legal standard was applied.” Ferguson v Ferguson, 639 So2d 921, 930 (Miss. 1994) (citing Bell v Parker, 563 So2d 594 , 596-97 (Miss. 1990).

**B. ISSUE I: THE CHANCELLOR WAS CORRECT IN AWARDING THE APPELLEE PERMANENT ALIMONY IN THE AMOUNT OF \$500.00 PER MONTH, BASED UPON THE EVIDENCE ADDUCED AT TRIAL.**

The Chancellor in her opinion found that in regard to alimony that alimony and property distribution work together to provide for the parties after the divorce. Buckley v Buckley, 815 So2d 1260 (Miss. Ct. App. 2002). The Chancellor, after equitable division and in light of the parties’ non-marital assets, will adequately provide for both parties, then no more need be done. Ferguson, 639 So.2d at 929. If an equitable division of marital property, considered with each party’s non-marital assets, leaves a deficit for one party, then alimony should be considered. King vs. King, 760 So.2d 830 (Miss. Ct. App. 2000). Pursuant to Hammonds vs. Hammonds, 597 So.2d 653 (Miss. 1992), the following factors are to be considered by the Court: (1) The income and expenses of the parties; (2) The earning capacity of the parties; (3) The needs of each party; (4) The obligations and assets of each party; (5) The length of the marriage; (6) The presence of minor children in the home; (7) The age of the parties; (8) The standard of living of the parties; (9) Tax

consequences of a spousal support order; (10) Fault of misconduct; (11) Wasteful dissipation of assets by either party; (12) Any other factor deemed to be just and equitable.

The Chancellor first determined what property of the parties based upon the evidence at the trial was marital and non-marital as defined under Hemsley vs. Hemsley, 639 So.2d 915 (Miss. 1994), and directed by Ferguson vs. Ferguson, 639 So.2d 921 (Miss. 1994). The Court then applied the Ferguson guidelines which the Court should consider: 1. Substantial contribution to the accumulation of the property as evidenced by direct or indirect economic contributions to the acquisition, contribution to the stability and harmony of the marital and family relationships, contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets; 2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise; 3. The market value and emotional value of the assets subject to distribution; 4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution such as property brought to the marriage by the parties and property acquired by inheritance or by gift by or to an individual; 5. Tax and other economic consequence; and 6. The extent to which property division may, with equity to both parties be utilized to eliminate periodic payments and other potential sources of future friction between the parties; the needs of the parties for financial security; and any other factor which inequity should be considered. (TR 181, MRE 25)

The Chancellor being directed to consider the wife's contribution as a homemaker and care giver of the children is considered equal to that of the husband's contribution that earns a salary and maintains a business. Ferguson, *supra*. Assuming for divorce purposes that the contributions and efforts of the marital partners, whether economic, domestic or otherwise, are of equal value. Hemsley vs. Hemsley, 639 So.2d 915 (Miss. 1994). (TR 181, MRE 25)

The Chancellor must then apply the guidelines of Ferguson and the principles set forth in Hemsley

The Chancellor finding in her Opinion as follows:

The next issue that the Court or the next issues that the Court has to determine is an equitable division of your marital assets, a determination of if there's an award of alimony and if so, what that will be. And those are basically the other issues. (TR 180, MRE 24)

...

the only thing left for the Court to determine is an equitable division of the marital assets and whether there will be an alimony award and if so, how much. And I'm going to -- I'm going to talk for a few minutes about the legal considerations, the legal facts that the Court has to consider because they are similar in a division of -- an equitable division of the property of the parties and an alimony award. (TR 180-181, MRE 24-25)

Although they are outlined by different cases, the Supreme Court has given some direction to us Judges about what factors we are to consider when we are making an equitable distribution of the marital assets and also an award of alimony. (TR 181, MRE 25)

The Ferguson case basically sets out factors that we are to consider in making an equitable division of the parties -- of the property and one of those is the contribution of the parties; the respective contributions of the parties to the accumulation of the marital assets. And Ferguson very clearly outlines or stands for the proposition that the

homemaker's contribution is presumed to be equal to those of the wage earner. (TR 181, MRE 25)

We're also supposed to consider the needs of the parties; the respective needs of the parties. Each party's separate estate. And we're supposed to also consider, in making a division of the marital assets, if we can possibly alleviate the need for alimony in making our decision. Also, we're supposed to determine whether fault is a factor -- the fault in the marriage. (TR 182, MRE 26)

And, the prior use or prior distribution of assets. If the parties have, by their own actions prior to coming into court, already divided the assets or if one party has dissipated some of the marital assets on their own or by agreement of the parties, and the actual value of the assets. The value of each asset; their real value as well as the emotional value of the assets. Also, the tax consequences of the distribution need to be considered by the Court. (TR 182, MRE 26)

And, as I stated earlier, the factors that the Court must consider in making an award of alimony are outlined in the case of Armstrong (Armstrong v. Armstrong, 618 So.2d 1278, 1280 (Miss. 1993), (Hemsley vs. Hemsley, 639 So.2d 915 (Miss. 1994), and some of these factors are similar or the same as for the equitable distribution. (TR 182-183, MRE 26-27)

The Court has to consider the income of the parties, the standard of living of the parties at the marriage - - or during the marriage, as well as at the time the Court's making this Order; and the expenses, the reasonable expenses of each party's; whether either party's is going to be awarded free use of the home or the car or any other assets; the



presence or absence of children in the home requiring expenses or child care for that child; the respective obligations of each party; the assets of each party, if there are any separate non-marital assets; and any disparity in the income of the parties, if there's -- a disparity exists, then we have to address those issues. (TR 183, MRE 27)

The length of the marriage is a very important factor; the age and health of the parties, fault on the part of the parties and also whether either one of the parties again has made any dissipation of the marital assets, and any other factors that the Court considers important or relevant to the distribution -- I mean to the alimony award and also the tax consequences of the alimony award. (TR 183-184, MRE 27-28)

...

The first fact is that this was a 26 year marriage and that is a very important factor. (TR 184, MRE 28)

...

However, I am given direction by the Supreme Court about factors I am to consider and in a study of when the Courts have awarded alimony in marriages over 20 years, there is a much greater percentage of alimony awards. Especially in this particular case, Mrs. Elliott was a homemaker for most of -- well, for all of the marriage -- the latter part of the marriage, maybe about the last 10 years, I think, there was testimony that you worked part time with your brother as a dental technician. But, you testified, Mrs. Elliott, your brother testified, your dad testified, and Mr. Elliott testified that Mr. Elliott wanted you to be a homemaker. He wanted you to take care of the home. This was an agreement that the two of you made. Usually, regardless of what the agreement has been during the

marriage, usually by the time people get to me, the husband is all of a sudden deciding that wasn't his agreement, even though that even though that might have been the path that the parties have taken for some time. But Mr. Elliott does not disagree that this was his choice. That he wanted you to stay home and take care of the family and be a homemaker. Everyone who testified testified that you had done so and you had done so in a very – you have done a real good job of that. (TR 185-186, MRE 29-30)

The respective ages of the parties . . . are 58 and 54, . . . you're not of an age that you're going to have a good chance of getting a lot of work or able to start a new career, but, you're also not old enough to start drawing Social Security or to actually retire so I think that is important. (TR 186, MRE 30)

. . .

There is one minor child in your home who is a college student to be provided for. The Court has given that some consideration. (TR 186-187, MRE 30-31)

Both you and Mr. Elliott, Mr. and Mrs. Elliott testified that they had some health issues. Mr. Elliott testified that he has some back problems, some knee problems, he has a high cholesterol condition but it seems to be controlled by medication. (TR 187, MRE 31)

The wife testified that she had carpal tunnel syndrome, her left wrist was worn out, she had high blood pressure, some arthritis or other problems in her feet, her neck, her knees and back. (TR 187, MRE 31)

Neither one of you seem to have health issues that would keep you from doing any sort of work or that would qualify either one of you for Social Security Disability. (TR 187, MRE 31)

However, neither one of you testified that you have some debilitating health issues. (TR 188, MRE 32)

...

With regard to your education, neither one of you completed high school, but both of you, at some point later, obtained a GED. (TR 188, MRE 32)

There was testimony that Mr. Elliott has some training in technical schools as a mechanic and he has continued that training as he has worked all of the years outside in the public. He has used that training he had received training and he put the training to use in his employment. (TR 188, MRE 32)

There was testimony that you( Dolores Elaine Garner Elliott )graduated from beauty school about 35years ago and that you had skills that you had as a dental technician were basically acquired through your apprenticeship. You have never -- or I think maybe you testified for a year or just a short period of time, actually practiced the skills -- your beauty school skills. (TR 188-189, MRE 32-33)

Mr. Elliott has continued to work. He's worked all throughout your marriage. He's worked as a mechanic, a shop foreman and presently he's the head of the school bus shop for the DeSoto County Schools Department of Transportation and he has been there for about three years. (TR 189, MRE 33)

The Court found that his present job and his income is a little bit less than it was in past years. He testified he left some of the other jobs that he had because he was getting older and it was a little harder to do some of the work that he did. But, he still has an income that's more than three times the income of Mrs. Elliott. (TR 189, MRE 33)

Mrs. Elliott's work history has primarily been as a homemaker. She's been a part time dental technician for about ten years, but her testimony was that her carpal tunnel syndrome and the problem with her wrist will prevent her from using that training to continue to do that because her body is just not going to allow her to do *it*. She's worked for about a year in the DeSoto County School system as a teacher's assistant and that is probably going to be about the limit of what she's going to be able to do as far as employment. (TR 189-190, MRE 33-34)

The next category that I have to consider or the next issue is . . . (the) respective earning capacities. . . .Mr. Elliott's earning capacity based on his present earnings is at least three times Mrs. Elliott's earning capacity. (TR 190, MRE 34)

Her gross . . . a little bit over a \$1,000 a month and his is about 3,900 a month. Her net, as she testified was about 948 or \$950 a month. His net's about \$2,600 a month, possibly . . . more than that. (TR 190, MRE 34)

He (Walter Reid Elliott) was also working part time at the Civic Center. He quit doing that about the time that the divorce action was filed. But, that possibly could be another source of income that he could have. He has done it in the past for several years. I

think he only it only netted him about \$2,000 a year, but still, it was about \$2,000 a year.  
(TR 190-191, MRE 34-35)

The testimony was uncontradicted that Mrs. Elliott has been a good wife and a good caregiver for her family as well as for her extended family. The fault in the divorce I as I found earlier rests with Mr. Elliott. He has had numerous affairs; at least two that we know about that were testified to. (TR 191, MRE 35)

The decision for her to stay at home and be a homemaker and a caregiver was a mutual decision. Both parties testified as well as the other witnesses who testified. (TR 191, MRE 35)

... there was testimony that Mr. Elliott had cashed in a 401(k) and that she received none of that money. And as far as dissipation of marital assets, I think there was -- other than that, both parties have lived pretty conservatively. (TR 191, MRE 35)

Mr. Elliott -- there was testimony that as he was entertaining his lady friends, he did spend some money on them. There was not a lot of proof about that. Donna Taylor did testify though that when she and Mr. Elliott were out together that he paid for food and drink or whatever they needed and that he bought her a gift or two. So, if there was any dissipation of marital assets I would think it would have been on the part of Mr. Elliott. (TR 191-192, MRE 35-36)

... dividing the marital assets I first have to determine what assets are marital what are non-marital. Well in your situation I did not hear any testimony that there were non-marital assets. (TR 192, MRE 36)

. . . all assets that you had are marital assets. The family home; the contents of the home; the items that Mr. Elliott has removed from the family home; your -- Mrs. Elliott's car, which is a 1995 Buick; Mr. Elliott's truck; which is a 1982 Chevrolet truck, Mr. Elliott's retirement that he testified he's not vested in, but he is contributing, probably because he is required to present retirement. He has some tools. He had a 401(k) that he cashed in. (TR 192-193, MRE 36-37)

The only asset . . . I would consider a non-marital asset is the child's car. . . . (TR 193, MRE 37)

All of the other property is basically marital assets. . . . In making a distribution . . . the husband is going to be allowed to keep his state retirement and the 401(k) that he cashed in. (TR 193-194, MRE 37-38)

I am awarding the 1995 Buick, to her ( Dolores Elaine Garner Elliott ). I am awarding the 1982 Chevrolet truck to Mr. Elliott and I say these things because I believe that the testimony was they're probably titled in both of your names. So, I am making the respective awards and you can swap titles to actually facilitate the ownership being given to one or the other. (TR 194, MRE 38)

. . . I am awarding the household furnishings and all of the furnishings that are left at the household -- at the home, to Mrs. Elliott. I am awarding to Mr. Elliott those items that he's removed from the household and his tools that he testified that he's removed. (TR 194, MRE 38)

. . . upon questioning by the Court, I asked Mr. Elliott is there anything else at the home that you need, that you want, that you have any need of, and he said no. He had removed everything from the home that was his, so I'm going to award to him those things that he has previously removed from the home. (TR 194-195, MRE 38-39)

I am going to award to the wife the exclusive use and possession of the family home for her lifetime, unless she remarries, moves out of the home or moves some male into the home with whom she's romantically involved and not married to. Until one of those items happens, if they do, Mrs. Elliott will have exclusive use and possession of the marital home. (TR 195, MRE 39)

. . . at some point, one of those contingencies will happen and then the parties still own the home together, so there's going to be, there will have to be a division at that time, of the home. I am making a finding that the husband is going to be awarded 40 percent of the equity in the home. (TR 194, MRE 38)

. . .

I'm making this 40/60 percent award for several reasons. One is there's testimony that Mrs. Elliott's father gave them the land that the house is on. There's also testimony that Mrs. Elliott's father helped with the construction of the house and Mrs. Elliott helped with the construction of the house. The parties paid for the house -- the actual house, not the land, during the course of the marriage from their income and each of them made, I'm going to say, substantial contributions to the acquisition of the property. However, the reason that I'm making the different percentage award is partially because Mrs. Elliott's

father actually gave them the land that the house is on and it's partially because I am allowing Mr. Elliott to keep his state retirement and to keep the 401(k) that he cashed in. (TR 197, MRE 41)

I am making a slightly larger award of the equity of the home to Mrs. Elliott, to try to even out those inequities. (TR 198, MRE 42)

The only other issue that the Court has got to address . . . is the payment or non-payment of periodic alimony. (TR 198, MRE 42)

. . . this is a 26 year marriage. This marriage dissolved primarily because Mr. Elliott walked out . . . when he was confronted with having had affairs, and rather than staying in the home, he walked out. . . . He did not testify and there was no testimony that there were problems in the marriage that caused him to leave. (TR 198, MRE 42)

He did say that Mrs. Elliott nagged a little bit . . . I think when we get right down to it, when she found out he was having some affairs and started asking him some questions and started pressuring him about that . . . when he decided he was going to leave the marriage. (TR 198-199, MRE 42-43)

This was not a mutual decision and but it was a mutual decision for Mrs. Elliott to be a homemaker, to not be able to pursue a career, not be able to pursue some skills that would allow her to be able to support herself and they have basically lived and relied on Mr. Elliott being the primary bread winner in the home. This is a very long term marriage. (TR 199, MRE 43)



Mrs. Elliott . . . at 54, I don't think it would be reasonable to think that she's going to be able to go out and begin a career that would -- where she could produce enough income to equalize the disparity in Mr. and Mrs. Elliott's incomes. (TR 199, MRE 43)

. . . the direction I've gotten from just the study of what the Supreme Court has done to equalize incomes or making alimony awards . . . (TR 199, MRE 43)

So, there is, looking at your respective financial declarations, it appears that there is about \$1,690 of disparity in your respective incomes. The difference in that would be about \$845. So, if I were going to actually equalize your incomes, I would take \$845 from Mr. Elliott and award \$845 directly to Mrs. Elliott as alimony to equalize the incomes. (TR 200, MRE 44)

However, I did award Mrs. Elliott ultimate use and possession of the family home, which is jointly owned. So, I'm giving you use and possession of something that half of it, well 60 percent of it is yours and 40 percent is his anyway. (TR 200, MRE 44)

I am going to require Mr. Elliott to pay periodic alimony payments, but I'm going to set those payments at \$500 per month. I think that will equalize your incomes taken into consideration the award of the use and possession of the family home to Mrs. Elliott. (TR 200, MRE 44)

. . .

Because of the 60/40 split, Mr. Elliott is going to be required to pay 60 percent of the -  
- I mean, excuse me, 40 percent of the insurance and 40 percent of the taxes on the home.

. . . each is awarded their own retirement accounts. (TR 201, MRE 45)

MR. WALKER: . . . is there a termination date for the periodic alimony? (TR 202, MRE 46)

THE COURT: Mrs. Elliott's death or remarriage.(TR 202-203, MRE 46-47)

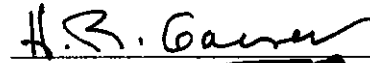
## CONCLUSION

In conclusion, the Chancellor clearly held correctly based upon the evidence adduced at the trial and the application of the existing law to same.

Was it fair? Yes! Was it just? Yes.!

The Chancellor's decision should be affirmed, and all costs assessed to the Appellant.

Respectfully submitted,



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H.R. Garner, [REDACTED]  
Attorney for Appellee

CERTIFICATE OF SERVICE

I, H.R. Garner, do hereby certify that I have this date mailed by United States Mail,  
postage prepaid, a true and correct copy of the foregoing APPELLEE'S BRIEF to:

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Dated this the 17<sup>th</sup> day of November, 2008.

H. R. Garner  
H.R. Garner,  
Certifying Attorney