



## I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant hereby certifies that the following 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 judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Walter Reid Elliott, Southaven, Ms.
2. Dolores Elaine Elliott, Nesbit, Ms.
3. David L. Walker, Southaven, Ms.
4. H.R. Garner, Hernando, Ms.

Respectfully submitted,

This the 17<sup>th</sup> day of October 2008.

  
David L. Walker   
Counsel for Appellant

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#### **IV. STATEMENT OF ISSUE**

Whether the chancellor erred in awarding the Appellee permanent periodic alimony in the amount of five hundred dollars per month.

## **V. STATEMENT OF THE CASE**

### **PROCEDURAL HISTORY**

The Appellant, Walter Reid Elliott, filed a complaint for divorce, in the Chancery Court of Desoto County, Mississippi on February 9, 2007. Clerk's Record. at 4-7. The Appellee, Dolores Elaine Elliott, filed an answer and defenses to the complaint and counter-complaint for divorce. Clerk's record 8-18. A trial was conducted by the chancery court on February 28<sup>th</sup>, 2008. The Appellee was granted a divorce from the Appellant on the grounds of uncondoned adultery pursuant to section 93-5-1 MCA. Clerk's record at 19-20. The chancery court also made an equitable division of the marital property of the parties and determined the custody, care, control and support of the minor child of the parties. Clerk's record at 20-24. The Appellant filed a notice of appeal of the Chancery's Judgment of Divorce and in particular the Court's award of "permanent periodic alimony" in the amount of five hundred dollars per month effective April 1, 2008 until modified by the trial court, death of one of the parties and remarriage of the Appellee whichever event transpires first. Clerk's record at 26.

### **APPELLEE'S TRIAL WITNESSES**

**WALTER REID ELLIOTT**

At the time of the trial the Appellant was fifty eight years old. R. at 15. He married the Appellee on March 11<sup>th</sup>, 1982. Id. The parties had two children during the marriage, Jennifer, born on May 12<sup>th</sup>, 1983 and Jessica, born on May 4<sup>th</sup>, 1988. R. at 16. Jessica was attending junior college and lived with the Appellee at the time of the trial. R. at 16-17.

The Appellant was employed by the Desoto County Schools and had worked there for three years. The Appellee had worked during the marriage, including part-time at a dental lab and for the Desoto County School System as an assistant teacher. R. at 18. The Appellant has a GED. Id. He had attended some technical schools. R. at 19. He is currently in charge of maintenance on vehicles, transportation. Id. At the time of the trial he no longer held a part-time job that had paid \$7.00 per hour. R. at 20. He had to quit this job because of it being hard on his knees and back. R. at 21. Back surgery is a possibility. He takes medication for his knee pain. Id. He had group health insurance on himself and Jessica. The Appellee had her own health insurance. R. at 22. He had cashed in a 401 retirement fund after separation from the Appellee. He kept \$9500 and put \$2500 in the family checking account. After taxes and peralties, he cleared approximately \$4200. R. at 23. These funds were acquired during the term of the marriage. R. at 24.

The marital home of the parties was built from the proceeds of a \$33,000 to \$35,000 loan from the Appellee's father. R. at 25. This loan was repaid. Id. The Appellant valued the marital furniture at \$5,000. R. at 27. He did not take any of this property when departed the marital residence. R. at 29. He has a debt to the IRS of \$4000 for cashing in a 401-K. R. at 31. The only retirement plan that he participated in was via his employer. He did not participate in the state deferred compensation plan. R. at 37.

The Appellant left the Appellee because it became incredibly impossible to satisfy her in anything that he did or did not do. R. at 38. He knows Connic Hartfield, but asserted the Fifth Amendment as to whether he had a sexual relationship with her. Id. He sees her. Id. He also knew Donna Taylor. He also asserted the Fifth Amendment as to whether he had a sexual relationship with her. R. at 39. She worked for him during the summer. Id. He characterized the Appellee as a "fair" wife. R. at 42. He departed the marital home of his own accord. R. at 45. He helps Ms. Hartfield and son do a lot of things. Id.

The Appellant gross income is \$43,000 and the Appellee's gross income is \$12,000 per year. R. at 46. He gives the minor child of the parties cash to help her go to school. R. at 47.

Appellee lives with Cynthia Thomas in addition to the minor child. R. at 49. Ms. Thomas stays overnight at the marital house. R. at 50. The Appellee attacked the Appellant as a person. R. at 52.

On cross examination the Appellant testified that he was born on November 7<sup>th</sup>, 1949. R. at 55. He and the Appellee separated on or about June 1<sup>st</sup>, 2006. Id. The marital house was acquired on December 30<sup>th</sup>, 1987. Id. The debt on this house has been paid for two or three years. R. at 56. The Appellee's father was paid back approximately \$30,000 for the marital house. Id. This sum was paid back out of the Appellant's funds. Id. The minor child works full-time at Sonic. R. at 56.

The Appellant has problems with his back and knees. Id. He will require back surgery if his pain continues. R. at 57. The Appellant only has technical education and no college degree. Id. The Appellant's health is worse than it was two to three years ago. R. at 58. He did not foresee any promotions in his employment. Id. He does not get any performance bonuses, but does get a cost-of-living raise. Id. His wife's vehicle is paid for and she works full time as an assistant teacher. R. at 59. He provides the minor child funds whenever she needs them. Id. She is on full scholarship. Id. At the time of the trial, the Appellee had free use of the home furnishings

The Appellant's monthly gross income is \$3675.60 R. at 66. The primarily wealth of the parties consisted of the marital home and three acres of land. R. 60-61. He was not vested in his state retirement account. R. at 68.

### **DONNA TAYLOR**

Donna Taylor knew the Appellant. R. at 72. She and the Appellant worked for the same employer at the same time. R. at 73. He was her supervisor at one of her jobs. Id. The Appellant was extremely flirtatious with her. Id. He took her crappie fishing. R. at 74. She was under the impression that he was about to be divorced. Id. Her relationship with him lasted from October 2005 until January 2006. R. at 76. She engaged in sexual relations with him. Id. According to Ms. Taylor, the Appellant left her for Connie Hartfield. R. at 77.

On cross examination Ms. Taylor testified that her relationship with the Appellant was voluntary. R. at 82. Her husband did not know about her relationship with the Appellant initially, but did before his death. R. at 83. She enjoyed her time with the Appellant. R. at 85.

### **HARRY GARNER**

Harry Garner is the older brother of the Appellee. R. at 86. The Appellee worked for him in a dental laboratory from 1993 until 2005. R.

at 88. She worked on an as needed basis and made between eight and nine dollars per hour. R. at 88-89. She has a GED. R. at 93. The Appellee provided a substantial amount of care for her eighty three year old mother. R. at 94.

On cross examination Mr. Garner testified that he and the Appellee expect to inherit property , money etc. when their parents die. R. at 99. The Appellee's carpal tunnel syndrome did not stop her from working as a dental technician. R. at 100.

#### **ARCHIE R. GARNER**

Archie R. Garner is the father of the Appellee. R. at 102. Her gave his daughter three acres of land. Id. He has not had to help out his daughter from a financial standpoint after she separated from the Appellant. R. at 107.

On cross examination Mr. Garner testified that the Appellee and Appellant repaid the \$30,000 loan used to build the marital house. R. at 109. When he dies, he intends to divide his property equally between his children. R. at 110. The Appellant was a good father to the children of the parties. R. at 111.

#### **DOLORES ELLIOTT**

At the time of the trial the Appellee was fifty four years old.

Her health problems include carpal tunnel syndrome in her hands, arthritis in her feet, back and knees and high blood pressure. R. at 112-113. She has a GED and went to cosmetology school. She worked as a hairdresser for about a year thirty five years ago. R. at 113. She also worked for her father and brother at a dental lab. Id. She did not believe that her health would permit her to return to work as a dental lab worker. R. at 114. At the time of the trial, she worked as a teacher's assistant at \$8.49 per hour. Id. On average she makes \$1039.00 per month. R. at 115. Jessica's automobile is in the Appellee's name. R. at 117. However, Jessica pays the note on the vehicle. Id. Jessica helps her mother financially. She has paid an Entergy bill, a cell telephone bill and bought a few groceries. The Appellant has given Jessica some money. Id. From the time the Appellant walked out he kept his paycheck in the bank up until September or October. Then he stopped putting it in there. R. at 118-119.

The Appellee discovered that the Appellant was having an affair via a text message on his cell telephone. This message was "Good night, Baby, I love you." R. at 119. One day she saw the Appellant get into Ms. Hartfield's truck. R. at 121. She has seen his vehicle parked in Ms. Hartfield's apartment complex. R. at 123. She did not know about her husband's affairs until he departed the marital home. Id. She would not

accept the Appellant back as a husband. R. at 124. During the marriage of the parties, both the Appellant and Appellee agreed that the Appellee should stay home and be a wife and mother. R. at 126. She did not cash her 2007 tax refund check until the Appellant stopped putting his check in the bank. R. at 128. Her car is paid for. R. at 129. She claimed monthly living expenses of \$2100 per month. R. at 135. This included prorated taxes and insurance. Id. She requested support from the Appellant of \$800.00 per month. R. at 136. She was of the opinion that she could get a job at Wal-Mart if she needed to pay bills. Id. The value of the Appellant's retirement account was \$7548.75 and the value of the Appellee's retirement account was \$1500. R. at 137. The ex-sister-in-law, who lives with the Appellee and her minor daughter, has helped out some on the household bills and purchased some groceries. Id.

On cross examination the Appellee agreed that the marital house was the major asset of the parties accumulated during the marriage. R. at 141. She admitted that her income was supplemented by funds given to her by her ex-sister-in-law, Cynthia Thomas. Id. The son of Ms. Thomas sometimes stays with the Appellee. These two individuals add to the household expenses. R. at 142. For example, her utility bill is higher. She met the Appellant in a barroom and had been married twice before

marrying the Appellant. R. at 143-144. The Appellee voluntarily has homeowner's insurance on the marital home. R. at 145. The Appellee wanted to stay home during the marriage. R. at 146. Her only living expenses were such items as utilities, food and things of that nature. R. at 148. She admitted that she did not have a house note to pay. R. at 150. No physician has told her that she is permanently disabled. R. at 151. She received a \$2000.00 tax refund in 2007. R. at 152. She claimed the minor child as a tax exemption. Id.

### **JESSICA ELLIOTT**

At the time of the trial, Jessica Elliott was nineteen years old and lived with the Appellee. R. at 154. She was enrolled in nursing school. Her father gave her \$400 for school expenses. R. at 155-156. She works approximately twenty five hours a week at Sonic at \$5.00 per hour. R. at 156. She tries to help her mother on groceries. R. at 157. She need a couple of hundred a month from her parents. This money would be used mainly for gas. R. at 158.

On cross examination Ms. Elliott admitted that Ms. Thomas and her son consume some of the groceries purchased by the Appellee. R. at 161. She receives tips at Sonic and these are in addition to the \$5.00 per hour that she makes. Id. At the end of this case she is going to apply for grants. Id.

## **VI. SUMMARY OF ARGUMENT**

The chancellor erred in awarding the Appellee permanent periodic alimony in the amount of five hundred dollars per month. The chancellor awarded the Appellee sixty percent equitable interest in the marital home and land and exclusive use, possession and control of the aforesaid property. This property is debt free. The Appellee has three individuals residing in the marital home, one of whom is the minor child of parties. The daughter is contributing to the expenses of the home and the others adding to the expenses. An analysis of the factors utilized in awarding permanent alimony weighs in favor of the Appellant.

## VII. ARGUMENT

The standard of review in a domestic relations matter is limited. A reviewing court may not disturb a chancellor's findings unless they are manifestly wrong, clearly erroneous or if the chancellor has applied an erroneous legal standard. **Jundoosing v. Jundoosing**, 826 So. 2d 85, 88 (Miss. 2002).

The reversal of a chancellor's findings of fact may occur when there is no substantial credible evidence in the record to justify her findings. **Henderson v. Henderson**, 757 So. 2d 285, 289 (Miss. 2000).

The general rule under which the amount of alimony to be awarded is calculated provides that the recipient should be entitled to a reasonable allowance commensurate with the standard of living to which he or she has become accustomed measured against the ability to pay on the part of the party subjected to the payment order. **Shows v. Shows**, 241 Miss. 716, 133 So. 2d 294 (1961). Periodic (permanent) alimony should be considered by the trial court only after due consideration has been given to the guidelines by which equitable division of marital assets are to be applied.

The trial court gave the Appellee the exclusive use, possession and control of the marital house and a sixty percent equity interest in the

aforesaid house. Clerk's record at 23. The equitable division of the marital house, which was the major asset of the parties, adequately provided for the needs of the Appellee. **Henderson v. Henderson**, 703 So. 2d 262 (Miss. 1997). There was no debt on this house. The Appellee had some financial assistance from the individuals who resided there with her. R. at 117 and 141. She benefited from a \$2000 tax refund that she did not use in calculating her average monthly income. The trial court also awarded her child support for the minor child of the parties of \$350.00 per month for the minor child of the parties. Clerk's record at 20. The Appellee also benefited from the use of a 1994 Buick LeSabre vehicle that was debt free. Id. at 21.

The Appellant interrogated the Appellee as to an application of the 12 factors to be considered in determining the amount of alimony to be awarded a party in a divorce case as setforth in **Hammonds v. Hammonds** 597 So. 2d 653 (Miss. 1992) R. at 147-150.

With respect to the income and expenses of the Appellee she claimed a gross income of \$1200 per month from her job as an assistant teacher. Exhibit 1. She claimed expenses for herself of \$2174.50. Id.

With respect to her earning capacity, she did not believe that she make any more money. R. at 147.

With respect to the her needs, these are reflected in her financial statement and the testimony. R. at 148.

With respect to the obligations and assets of the Appellee had no house payment and no car payment, only every day living expenses. R. at 148.

With respect to the length of the marriage, the parties were married on February 12, 1982. Id.

With respect to the presence or absence of minor children in the home, there was one minor child in the home, Jessica. Id. This child contributes some to her own support. R. at 149.

With respect to the age of the Appellee, she was fifty four at the time of the trial. Id.

With respect to the standard of living of the parties, both during the marriage and at the time of the support determination, the Appellee had to watch expenses after the Appellant pulled his money out. Id. She did not live extravagantly. Id.

With respect to the tax consequences of any spousal support ordered, this would be decided by an application of the appropriate tax laws. Id.

With respect to fault or misconduct, she accused the Appellant of uncondoned adultery. Id.

With respect to wasteful dissipation of assets by either party, she

did not know how the Appellant spend the funds that he withdrew from a 401 K plan. R. at 150.

With respect to any other factor deemed by the court to be just and equitable in connection with setting spousal support, she was of the opinion that she could make it on \$1000 per month. She could not pay her bills. She needed a minimum of \$1800 per month to pay her bills. R. at 150. She conceded that the major expense of individuals would be a house note and she did not have one. Id.



An analysis of these factors weigh in favor of the Appellant. Applying the \$2000 tax refund to the Appellee on a monthly basis would increase her monthly income by \$166.66 per month. Adding the award of \$350 per month for child support would bring her monthly income to \$1516.66, excluding any funds given to her by Jessica and Ms. Thomas. She lacks a car note and a house payment to make. She will to inherit a fourth of her father's estate upon his death. The Appellee clearly had the ability to earn wages and was doing so at the time of the trial.

### **VIII. CONCLUSION**

In conclusion, the Chancellor was manifestly wrong in awarding the Appellee periodic (permanent alimony in the amount of \$500 per Month.

Respectfully submitted,

This the 17<sup>th</sup> day of October 2008.

  
David L. Walker   
Counsel for Appellant  
POB 896  
Southaven, Ms. 38671  
662-280-3300

**IX. CERTIFICATE OF SERVICE**

I, David L. Walker, counsel for the Appellant, hereby certify that I have either mailed or hand-delivered a copy of the Appellant's Brief to Hon. Vicki B. Cobb, chancellor, and H.R. Garner, Esq., counsel for the Appellee, at their usual mailing addresses.

This the 17<sup>th</sup> day of October 2008.

  
David L. Walker