

NO. 2008-CA-01041

IN THE SUPREME COURT OF MISSISSIPPI

TOMMY LEE GEORGE

APPELLANT


VS.

DAPHNE DIANE GEORGE

APPELLEE

BRIEF OF APPELLEE

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IN THE SUPREME COURT OF MISSISSIPPI

TOMMY LEE GEORGE

APPELLANT

VS.

No. 2008-CA-00190

DAPHNE DIANE GEORGE

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. Tommy Lee George., Appellant;
2. David L. Walker, Attorney for Appellant;
3. Daphne Diane George, Appellee;
4. George S. Luter, Attorney for Appellee;
5. Hon. Percy L. Lynchard, Chancellor.

Respectfully submitted,

GEORGE S. LUTER


ATTORNEY FOR APPELLEE

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BRIEF OF APPELLEE

I.

STATEMENT OF THE CASE

The appellee, Daphne Diane George (hereafter "Diane"), files this brief to urge the Supreme Court to affirm the decision of the Chancery Court of DeSoto County, Chancellor Percy L. Lynchard, Jr. presiding, wherein the Court made certain division of property and awarding of lump sum and periodic alimony after the parties agreed to an irreconcilable differences divorce with the Court to decide all other issues. (R 15-16). Apparently aggrieved by the Court's decision, the appellant, Tommy Lee George (hereafter "Tommy"), appealed to this Court on May 13, 2008. (R 23-24).

II.

STATEMENT OF THE ISSUE

1. **Did the Chancellor abuse his discretion in awarding Diane George periodic alimony of \$1000 per month and lump sum alimony of \$7750?**

III.

STATEMENT OF THE FACTS

Tommy and Diane George were married in Memphis, Tennessee on March 21, 1975. (R 3) On September 14, 1997, Diane filed for divorce in the Chancery Court of DeSoto County, alleging grounds of Habitual Cruel and Inhuman Treatment, Adultery, Habitual Drunkenness, and Irreconcilable Differences. (R 3-8) On September 24, 2007, Tommy answered denying all substantive allegations and counterclaimed for divorce on grounds of Habitual Cruel and Inhuman Treatment and Irreconcilable Differences. (R 9-14)

On May 21, 2008, Tommy and Diane agreed to withdraw all fault grounds and voluntarily consented to a divorce on Irreconcilable Differences and agreed to submit to the Court for

disposition the following issues:

1. Whether the wife is entitled to any type of alimony from the husband; and
2. The equitable division of the marital home and payment of the existing debt on such home.

(R 15-17)

Trial was conducted on May 20, 2008 before the aforementioned Chancellor Percy L. Lynchard, Jr. (R 1) The only witnesses were Diane and Tommy Lee George. Prior to the testimony, the parties announced to the Court that Tommy agreed that Diane was entitled to 50% of his retirement and the title to the van in her possession and that Tommy would make the van payment until it was paid in full.¹ (R 2-3)

Diane testified she was fifty years old, almost completed the 11th grade, received a GED, and had worked at the Horn Lake High School cafeteria since 1999 as a cook six hours a day at \$9.04 an hour and made about \$400-800 per month.² She further testified she had health insurance through Tommy's employment with Kroger currently but could obtain such through her employment. (R8-9)

Diane testified she had some health problems such as constant back pain and had a nerve block and physical therapy and had recently had bladder surgery. (R 4-5) She stated that she and Tommy moved into their house in 1986 and had made certain improvements. (R 8) She stated she drove a 2005 Chrysler van with 39,000 miles and about \$6,000 owed on it. (R 9)

Although the parties agreed on an irreconcilable difference divorce, Diane testified she filed for divorce because Tommy left her on a Saturday night and had lived for the past two and one-half years at his cousin's house who he sent two greeting cards, (R 15) She further testified Tommy drank quantities of beer and whiskey at their house and in the garage. (R 11-12)

¹Diane's financial declaration stated the loan balance on such van was \$6,000. Exhibit 5.

²Diane's financial declaration showed a gross monthly income of \$596.01 and an adjusted gross income of \$423.64. Her 2007 W-2 from DeSoto County School showed annual wages of \$7,152.17

Tommy testified he was fifty-four years old, finished the twelfth grade, and drove a truck for Kroger at \$15.40 per hour with 40 hours weekly plus mileage for ten years. (R 36)³

Tommy testified his health was not very good, that he had three back operations, and that his physician said he would never be able to drive a truck after a four wheeler accident. (R 36) He testified he went to work around 2 p.m. and it might be 6 a.m. before getting back after a truck run. (R 37) Tommy further testified he often went home and Diane would be cussing and carrying on and he would go out to the garage and drink a couple of beers. (R 37)

Tommy testified the marital home was in an older part of Horn Lake, that he had remodeled the kitchen and bedrooms and bathrooms and the house was worth about 85-90 thousand dollars. (R 38-39) Tommy further testified he did not drink whiskey. (R 41)

Tommy testified that his pay rate was subject to a Teamster negotiated contract and he did not expect his pay to increase. (R 41) He testified he and Diane were married 33 years and he was currently living in a camper at his house. (R 43)

On cross examination, Tommy testified that his cousin was his mother's sister's daughter's daughter and she was a real good friend. (R 49) He further admitted that his gross income for 2007 was \$46,492 and divided by twelve months was \$3,874, not \$2648 as shown on his financial statement, but that his income changed every six months due to having to rebid the payment of loads he ran for Kroger. (R 51)

On examination by the Chancellor, Tommy agreed they had two grown children and that when they were in the home that he made the money and Diane took care of the kids. (R 57) Upon further questioning by the Court, Tommy admitted that \$2,648.80 was merely his base pay and did not include his pay for mileage. (R 58-59)

After the testimony, the Chancellor rendered an oral opinion finding Diane to be 51 years

³ Tommy's financial declaration stated he had a month gross income of \$2648.80 and living expenses of \$2,632 and his 2007 W-2 from Kroger showed annual wages of \$46,492.71. Exhibits 6 & 7.

old to make \$426 monthly, to have few employment skills, and having physical ailments making it difficult for her to stand extended periods of time. (R 60) The Chancellor found Tommy to be the same age and to have a monthly income of \$3,131. (R 60)

The Chancellor found the marital home to be worth \$85,000 with a mortgage of \$69,500 and equity of \$15,500 and that it was acquired through the joint efforts of both parties and that both were entitled to the equity of \$15,500 or \$7,750 each. (R 61-62) The Chancellor found that it was appropriate to award Diane lump sum alimony of \$7,750 by awarding her Tommy's equity in the marital home and such would be deeded and decreed to be Diane's sole property, but she would be responsible for the mortgage payment of \$762. (R 64-65)

In regard to periodic alimony, the Chancellor found Tommy had an adjustable gross monthly income of \$3,131 and it would be appropriate to order him to pay Diane \$1,000 monthly periodic alimony due to factors set forth in Armstrong⁴ since Diane was now in her fifties, the marriage was for 33 years, her education level was low, her physical limitations keep her from standing for any extended period of time, her employment history left little for future employers to consider and her employment skills were unskilled. (R 63) Further, the Chancellor stated it considered the misconduct of Tommy in that he had engaged in a relationship with another and made a base pay of \$2,648 monthly and a monthly adjusted gross income of \$3,131. (R 64) The Chancellor's decision as to contested and agreed matter was reduced to a written decree of divorce and filed May 21, 2008. (R 18-22)

Tommy George appealed to this Court on June 13, 2008. (R 23)

⁴ Armstrong v. Armstrong, 618 So. 2d 1278 (Miss. 1993),

SUMMARY OF THE ARGUMENT

The Chancellor did not err in granting Diane George lump sum alimony of \$7,750 being equity in the marital home or \$1,000 monthly periodic alimony considering she had a monthly income of \$426 monthly contrasted by Tommy George's monthly income of \$3131 and further considering she had to pay the monthly house note of \$762 and other factors such as Diane's age, education, health, and unskilled employment skills.

ARGUMENT

1. The Chancellor did not abuse his discretion in awarding Diane George periodic alimony of \$1000 per month and lump sum alimony of \$7750.

Tommy George's argument that the Chancellor abused his discretion can be reduced to this statement on page 15 of his brief:

"The Chancellor in his opinion abused his discretion in finding that the Appellant had little to offer future employers to consider. She obviously had the ability to secure part-time employment but simply chose not to do so. She had worked five hours per day for five days per week at Schnuck's. Thus, her gross wages at \$7.00 per hour would be \$175 per week or \$700 per month."

Rather Diane George would respond that the Chancellor did not abuse his discretion in awarding her periodic alimony of \$1000 per month and lump sum alimony of \$7750 per month.

First, the question of a proper amount of alimony is a matter of the chancellor's discretion. *Ethridge v. Ethridge*, 648 So. 2d 1143, 1145-1146 (Miss. 1995). "Where the exercise of that discretion is supported by substantial evidence, we defer to it." *Id.*

As stated in *Armstrong v. Armstrong*, 618 So 2d 1278 (Miss. 1993) and reiterated again in *Stribling v. Stribling*, 906 So. 2d 863 (Miss. App. 2005) a chancellor should consider the following factors in determining the proper amount of alimony:

1. the income and expenses of the parties;
2. the health and earning capacities of the parties;
3. the needs of each party;
4. the obligations and assets of each party;

6. the presence or absence of minor children in the home;
7. the age of the parties;
8. the standard of living of the parties, both during the marriage and at the time of the support determination;
9. the tax consequences of the spousal support order;
10. fault or misconduct;
11. wasteful dissipation of assets by either party; or
12. any other factor deemed by the court to be "just and equitable" in connection with the setting of spousal support."

Watson v. Watson, 724 So. 2d 350 (Miss. 1998).

Taking into consideration each of the aforementioned factors, Diane would argue that the Chancellor did not abuse his discretion in awarding her \$1000. monthly periodic alimony considering she was fifty (50) years old, had only a GED education, and had only an adjusted gross income of \$423.64 per month compared with Tommy's income which the Chancellor found to be \$3,131.00 monthly. Whether or not Diane could earn \$300. more monthly by working another job is speculation at best considering her age, education and health. The Chancellor properly exercised his discretion based upon the facts before him in regard to periodic alimony.

Secondly, the award by the Chancellor of \$7750 in lump sum alimony is not erroneous, particularly in view of the Chancellor's merely awarding such by finding approximately \$15,000 in equity in the marital domicile and awarding Diane the value of Tommy's one-half interest in such equity or \$7750 and exclusive use and possession of such house, the marital domicile.

Cheatham v. Cheatham, 537 So. 2d 435 (Miss. 1988) set forth the following factors to consider in awarding lump sum alimony:

1. Substantial contribution to accumulation of the payor either by quitting a job to become a housewife, or by assisting in the spouse's business.
2. A long marriage.
3. Where recipient spouse has no separate income or the separate estate is meager by comparison.

4. Without lump sum award the receiving spouse would lack any financial security.

In awarding such lump sum alimony the Chancellor apparently considered that Diane was a housewife for many years raising the couple's two children, that the couple had a long marriage, and that Diane had a separate income or estate that was meager in comparison to Tommy's income and retirement estate.⁵ Diane would assert that the Chancellor did not abuse his discretion in awarding such lump sum alimony and that the exercise of such discretion was supported by substantial evidence.

CONCLUSION

The Court should affirm the decision of the Chancellor awarding Diane \$1,000 monthly periodic alimony and \$7750 lump sum alimony since such awards were clearly within the discretion of the Chancellor and are supported by substantial evidence.

RESPECTFULLY SUBMITTED,

DAPHNE DIANE GEORGE, Appellee

BY: George S. Luter
GEORGE S. LUTER, Her Attorney

⁵ Although the parties announced that Tommy was giving Diane one half of his retirement account, Tommy's financial declaration listed "0" as the value of "Retirement (IRA, etc.)" See Exhibit No. 6.

CERTIFICATE OF SERVICE

I, George S. Luter, attorney for Appellee, hereby certify that I have mailed postage prepaid a copy of the foregoing *Appellee's Brief* to the following:


Hon. Percy L. Lynchard, Jr.
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SO CERTIFIED this the 19th day of February, 2009.



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