


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. Tommy Lee George, Olive Branch, Ms.
2. Daphne Diane George, Horn Lake, Ms.
3. David L. Walker, Southaven, Ms.
4. George Luter, Jackson, Ms.

Respectfully submitted,

This the 17 day of November 2008.


David L. Walker
Counsel for Appellant

II. TABLE OF CONTENTS

I.	Certificate of interested persons.....	i
II.	Table of contents.....	ii
III.	Table of authorities.....	iii
IV.	Statement of issue.....	1
V.	Statement of the case.....	2-12
VI.	Summary of argument.....	13
VII.	Argument.....	14-18
VIII.	Conclusion.....	18
IX.	Certificate of service.....	18-19

III. TABLE OF AUTHORITIES

1. Cheatham v. Cheatham, 537 So. 2d 435 (Miss. 1988).....	11
2. Fogarty v. Fogarty, 922 So. 2d 836, 839 (Miss. App. 2006).....	14
3. Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994).....	10
4. Hammonds v. Hammonds, 597 So. 2d 653, (Miss. 1992).....	15
5. Henderson v. Henderson, 757 So. 2d 285, 289 (Miss. 2000).....	14
6. Johnson v. Johnson, 722 So. 2d 453, 459 (Miss. 1998).....	18
7. Jundoosing v. Jundoosing, 826 So. 2d 85, 88 (Miss. 2002).....	14
8. Shows v. Shows, 241 Miss. 716, 133 So. 2d 294 (1961).....	14
Bell on Mississippi Family Law.....	17

IV. STATEMENT OF ISSUE

A. Whether the trial court erred in awarding the Appellee periodic alimony of \$1000 per month and lump sum alimony of \$7750.00.

V. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Appellee, Daphne Diane George, filed a complaint for divorce in the Chancery Court of Desoto County, Ms. on April 14th, 2007 . Clerk's Record at. 6-8

The complaint alleged that she was entitled to a divorce based upon irreconcilable differences, habitual drunkenness and habitual cruel and inhuman treatment from the Appellant, Tommy Lee George. Id. at 4.

The parties executed a voluntary consent to divorce based upon irreconcilable differences with the court to determine issues of alimony and an equitable division of the interests of the parties in the marital home and payment of the debt on said home. Id. at 15. A decree of divorce was filed on May 21, 2008

This decree of divorce awarded the sole use, possession, title and control of the marital house to the Appellee, lump sum alimony of \$7750.00 and periodic alimony of \$1000 per month. Id. at 20. The Appellant filed a notice of appeal of the aforesaid decree of divorce on June 13, 2008. Id. at 23.

B. APPELLEE'S TRIAL WITNESSES

DAPHNE DIANE GEORGE

Daphne Diane George had lived at 2630 Hillcrest Circle, Horn Lake, Mississippi since 1986. R. at 4. She and Tommy Lee George were married on March 21, 1975. Id. The children of the parties were emancipated at the time of the trial. Id. She was fifty years old at the time of the trial. Id. She had constant back pain and had received a nerve block and physical therapy for this problem. Id. She had her bladder tucked back up. R. at 5. She had obtained a GED. Id.

The Appellant was employed at Horn Lake High School cafeteria as a cook. Id. She started to work there in 1999. She works six hours per day. Id. Her pay rate is \$9.04 per hour. R. at 6. She does not get paid when the children are not in school. Id. Prior to this job, she had worked at Ryan's. R. at 7. The Appellant normally paid the household bills during the marriage. R. at 7. She put her pay check in the account of the parties. If needed, it would be used to pay bills and buy groceries. Id. The monthly mortgage payment on the marital home is \$762 or \$764 per month. Id.

Improvements had been made to the marital home such as an enclosed carport, a remodeled kitchen, remodeled bathroom and a patio.

R. at 8. After the divorce from Appellant, the wife would secure health insurance from her employer at no cost. R. at 9. She drove a 2005 Chrysler Town and Country mini van on which a debt of approximately \$6000 existed. Id. She did not approve of the Appellant staying at his cousin's home at times nor of his alcohol consumption. R. at 10-13. She claimed that her husband would come home from work, go to the garage, drink alcohol and talk on his telephone all night. R. at 15. She had never checked on the price of a one bedroom apartment in Desoto County, Ms. R. at 18.

On cross examination the Appellee testified that she was born on July 18th, 1957 and had not been to see a physician since she had her bladder stitched back up in April 2007. Id. She did not have hypertension, diabetes, nor heart disease. R, at 19. She had not missed work in the past six to nine months. Id. At one time she worked at a deli five hours a night for five days out of a week at more than seven dollars an hour. Id. This was during the summer when school was not in session. Id. Recently, she had no need to look for a job. R. at 20. She had three years of service in the state retirement system. Id. She did not make any of the house payments on the marital house unless her husband used some of her check to do so. R. at 21. However, to her knowledge, the Appellant made the house payments.

Id. The Appellant added a patio to the marital home. Id. The debt on her 2005 Chrysler Town and Country vehicle is approximately \$6000. The Appellant always paid the monthly note on this vehicle. Id. She has health insurance available via her employer at no expense to her. R. at 22.

The Appellee's position is that the Appellant can drink a 12-pack of beer, stay up all night and then get up and drive an 18-wheeler for his job as an over-the-road truck driver. R. at 22-23. She could not produce any DUI and public drunk convictions for the Appellant. R. at 23. She did not subpoena the Appellant's cell telephone records to prove that he sits up all night and talks to someone on his cell telephone. R. at 24.

The Appellee's gross income is approximately \$596.01 per month. Id. With respect to her earning capacity, she testified that she did not have a doctor's excuse indicating that she could only work part-time at the school and could not get another job. R. at 26. She did not believe that she could secure full time employment or another part-time job because of her back problems. Id. However, she admitted that she has not had any back surgery. Id. She apparently had a nerve bloc on her back approximately two years prior to the trial. R. at 27. Her financial needs are reflected in her financial declaration. Id.

The primary assets of the parties consisted of the marital house, the

retirement accounts of the parties, the furniture and vehicles. Id. The parties had been married approximately thirty three years. Id. The children of the parties were grown. R. at 28. The Appellee was fifty years old and the Appellant was fifty four years old at the time of the trial. Id. Her standard of living had not changed much since the separation of the parties, except for the fact that she does not shop. Id. She did not owe any state nor federal taxes. Id. She did not believe that much equity existed in the marital home because the parties it had just been refinanced. Id.

The Appellee alleged that the Appellant was guilty of fault or misconduct for having a girlfriend. Id. She accused him of wasting marital assets by buying his alleged girlfriend cartons of cigarettes, gas, roses, paint for her house, wood things for her house. R. at 29. She was happy working part-time because that was all she had ever had to do. Id. She likes to work in the yard and around the house rather than working full time. R. at 30. She had never considered seeking employment at any of the casinos in Tunica County, Ms. which were 20-25 miles from her home. Id. She never considered seeking employment at one of the local malls. R. at 31.

On redirect examination, the Appellee testified that she could stand for approximately six hours. R. at 32. She did not know the value of her

retirement account, but knew that she had three years of service in it. R. at 33.

APPELLANT'S TRIAL WITNESS

TOMMY LEE GEORGE

Tommy Lee George was born on August 12th, 1953 and has a 12th grade education. R. at 35. He works as a truck driver for Kroger and drives 12-15 hours per day. Id. He drives between four and six hundred miles. R. at 36. He is paid \$14.50 per hour plus mileage. Id. His base pay is \$616 per week. Id. His health is not good. He has had three back operations and has a twenty percent disability rating. Id. His doctor was of the opinion that he would never be able to drive a truck. Id. He also has a busted shoulder and a bone that is messed up. R. at 36-37. He did not know how many more years that he could continue to drive the truck. R. at 37. He has worked for Kroger for ten years. Id.

The Appellant began going into the garage after work because his wife would be cussing and carrying on. He would drink a couple of beers there. Id. He did not have any DUI nor public drunk convictions. R. at 38. He had not been in alcoholic rehab. Id.

The marital house is located in the older part of Horn Lake, Ms. off of Goodman Road and had been extensively renovated. Id. He paid for

the patio addition to the marital house. R. at 39. He paid the monthly house note on the marital house. Id. He valued the marital house at \$85000-\$90000. Id. He does not drink whiskey. R. at 40.

The Appellant's income and expenses are reflected in his financial declaration. R. at 41. He did not expect any promotion at work nor any big pay raise. Id. He is a Teamster and union officials negotiate his pay rate. Id. His obligations and assets are reflected in his financial declaration. R. at 42. He had been staying in a camper before the trial. Id. He last stayed at Ms. Wilson's house in September or October 2007. R. at 43. His standard of living is way down. Id. The tax consequences of the case were undetermined. Id. As far as fault or misconduct on the part of the Appellee, she made the marriage difficult. For example, he had to stay in the garage when he got home from work. Id. He did not waste any marital assets. R. at 44.

Ms. Wilson is the Appellant's cousin. When he lived with her he paid her rent when he could and helped her with repairs. R. at 44. He wanted the trial court to consider his need to have a home. Id. If he had to continue to pay the mortgage on the marital home he could not afford to buy a house. R. at 45. The Appellee told him that she did not want to work. Id. She would point a finger at him so that he would stop

talking to her. Id. He wanted the Appellee to get a job and help pay on the house note. R. at 46.

On cross examination the Appellant testified that the carport was turned into a living room. R. at 47. Ms. Wilson is his second cousin. Ms. Wilson had a two story house and he rented a room from her in the upstairs portion of the house. R. at 48-49. His monthly gross income is \$2648. R. at 50. His total income in 2007 was \$46,492. Id. He made \$2000 more in 2006 than he did in 2007. Id. He had been bidding for lower paying runs. R. at 52. A new bid would have to be made every six months. Id. He bid for the best paying runs that he could get. Id. His runs had Slowed because of the economy going down. R. at 53. For years, he had lived in one side of t he marital house and his wife had lived in the other side. R. at 56.

The trial court inquired of the Appellant as to which party took care of the children of the parties during the marriage and he advised the trial Court that both parties did. R. at 57. She stayed home with the kids and he worked to pay the bills. He sometimes worked two jobs. Id. His income of \$2648 is based upon his base salary and does not include his mileage pay. R. at 59.

D. OPINION OF CHANCELLOR

The chancellor issued a bench opinion and found that the Appellee had few employment skills and a GED. R. at 60. He found that physical ailments make standing for extended periods of time difficult. Id. She works six hours per day. He found that her adjusted gross income was \$426 per month over a twelve month period. Id.

The chancellor found that the Appellant was a high school graduate who worked as an over-the-road truck driver. Id. His adjusted gross income was \$3131. Id.

The chancellor valued the marital home at \$85,000 with an outstanding mortgage balance of \$69,500. R. at 61. The outstanding mortgage was due to financing over the last couple of years for improvements. Id. The equity in the aforesaid marital home was thus \$15,550.

The chancellor indicated that he considered the factors found in **Ferguson v. Ferguson**, 639 So. 2d 921 (Miss. 1994) in determining the equitable division of the assets acquired during the marriage. Id. He classified the marital residence as in fact a marital asset acquired by the parties during the existence of the marriage. It was acquired through the joint efforts of both parties, via the Appellant's direct financial

contributions to purchase the home and the Appellee's participated in the acquisition of the home by the doing of in kind services, such as being a homemaker within the home, raising the children, caring for the children during the period of time in which the husband was employed and away the home. R. at 62.

The chancellor awarded each of the parties \$7750 of the \$15,550 equity in the marital home. The chancellor considered the three types of alimony permitted in Mississippi domestic relations jurisprudence- rehabilitative alimony, lump sum alimony and periodic alimony. Id. He found that rehabilitative alimony was not an option for the Court. Id. The Appellee had no plans to return to school or acquire any further skills for employment. Id. This type of alimony would not be workable. R. at 63.

According to the Chancellor, periodic alimony was appropriate to the facts of this case. Id. Applying the factors of **Cheatham v. Cheatham**, 537 So. 2d 435 (Miss. 1988) the chancellor found that the Appellee was entitled to an award of periodic alimony. Id. He noted that the Appellee was in her fifties and that the marriage of thirty three years was lengthy. Id. She had an extremely low educational level. Id. Her physical limitations keep from standing for any extended period of time. Id. Her

employment history reflected unskilled work left for future employers to consider. Id.

The Chancellor considered the fault or misconduct of the Appellant And specifically found that he engaged during the course of the marriage with a relationship with another. Id.

Finally, the Chancellor considered the disparity in the income of the parties. The income of the Appellee was \$420 per month. The income of the Appellant was \$3131 per month. R. at 63-64.

The Chancellor found that lump sum alimony was also appropriate In this matter. R. at 64. He awarded the Appellee the use and possession Of the marital house at 3630 Hillcrest, Horn Lake, Ms. He considered the Appellee's employment history, lack of skills, physical ailments entitled her to the use and possession of the marital house. Id. He found that a lump sum alimony award of \$7,750 would be appropriate. Id. He decreed that the marital residence would be deeded to the Appellee as her sole property. R. at 65. She would be responsible for the monthly mortgage of \$762 on the aforesaid property. Id. He found that she needed a minimal of \$420 toward living expenses. He awarded her periodic alimony of \$1000 until further order of the Court or the remarriage or death of the Appellee. Id.

VI. SUMMARY OF ARGUMENT

The Chancellor erred in awarding the Appellee lump sum alimony of \$7750 and periodic alimony in the amount of \$1000 per month. The Appellant had the capacity to work at an additional part-time job in which she would be paid approximately \$700 per month, but chose not to do so. Thus, she voluntarily decreased her earning capacity. An award of lump lump alimony in this case is an abuse of discretion based upon the division of assets made by the chancellor in that the Appellant received title to the marital house, her vehicle with the Appellant being responsible for the debt on the aforesaid vehicle and fifty percent of the Appellant's retirement account.

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. Fogarty v. Fogarty, 922 So. 2d 836, 839 (Miss. App. 2006) and Jundoosing v. Jundoosing, 826 So. 2d 85, 88 9 (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 the 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 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 amount of alimony awarded in a divorce action is a matter primarily within the discretion of the chancellor because of its peculiar

opportunity to sense the equities of the situation before it. Forarty at 841.

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 seeking the same in a domestic relations case as set forth Hammonds v. Hammonds, 597 So. 2d 653 (Miss. 1992). R. at 24-29.

The Appellee testified that her adjusted gross income was \$596.01 per month. R. at 24. She was happy working part-time. R. at 29. However, she had worked for Schnuck's in the past during the summer at seven dollars plus per hour. R. at 19. 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 night 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. Moreover, the Chancellor noted she was in her fifties (she was 50 years old at the time of the trial having been born on July 18th, 1957) and was actually younger than the Appellant who was fifty four years old at the time of the trial (having been born on August 12, 1953). Moreover, the Chancellor placed too much weight on the Appellee's health in that she had not undergone any back

surgery. She had not missed any work because of the condition during the past six to nine months prior to the trial. R. at 19. She apparently last had medical treatment for her back pain approximately two years prior to the trial. This treatment consisted of physical therapy and a nerve block. R. at 26. No physician testified as to her restriction on being able to stand nor an inability to work more than six hours per day.

The additional of the income from the Appellee seeking another part-time job such as the one she previously held at Schnuck's would substantially decrease the disparity incomes between the parties that concerned the Chancellor in his opinion. For example, this income would be the approximate amount of the mortgage payment due on the house awarded to the Appellee. That is, the house note is \$762.00 per month and the additional part-time income would be approximately \$700 per month assuming a pay rate of \$7.00 per hour. Appellant would note that the Appellee could not remember exactly how much she made per hour, but believed that it was greater than \$7.00 per hour. The decision of the chancellor encourages the Appellee not to work to maximum capacity and nor take personal responsibility for meeting her monthly expenses.

The Appellee testified that her standard of living had not changed much since the separation of the parties except for the fact that she could

not shop anywhere. R. at 28.

The Chancellor abused his discretion in finding that the Appellant was guilty of fault or misconduct during the marriage in that he had a relationship with another during the marriage of the parties. R. at 63.. The Appellee did not call Alicia Wilson as a witness at the trial of this case and interrogate her as to whether she had an extramarital affair with the Appellant. No admission was made by the Appellant at the trial that he had any kind of sexual relationship with Ms. Wilson. She was his second cousin and a real good friend. R. at 48-49. He moved in with her because he could not afford an apartment and could not get along with the Appellee.

The chancellor abused his discretion in awarding the Appellee lump sum alimony in the sum of \$7750 because the he awarded her fifty percent interest in the Appellant's retirement account with his employer and exclusive use and possession of and title to the marital house, thus making this award financially unnecessary. Clerk's record at 21. Property division may be accomplished by a lump sum award to one party to offset the value of assets awarded to the other. Bell on Mississippi Family Law at 240. In this case, the Appellee was awarded the exclusive use, possession of and title to the major asset of the parties, the marital home, fifty per cent of the Appellant's retirement account, full interest in her vehicle with the


Appellant being responsible for the debt on same. Thus, an award of lump sum alimony to the Appellee to offset the value of assets awarded to the Appellant is clearly an abuse of discretion. Thus, based upon this valuation of marital assets, the award of lump sum alimony in the amount of \$7750 should be reversed. Johnson v. Johnson, 722 So. 2d 453, 459 (Miss. 1998).

VIII. CONCLUSION

In conclusion, based upon the foregoing argument and authorities the Appellant urges the Court to find that the Chancellor abused his discretion in awarding the Appellant periodic alimony of \$1000 per month and lump sum alimony in the amount of \$7750 per month.

Respectfully submitted,

This the 18th day of November 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 This day either hand-delivered or mailed a copy of the Appellant's Brief to

George S. Luter, Esq. counsel for the Appellee at his usual mailing address
POB 3656 Jackson, Ms. 39207-3656 and Hon. Percy Lynchard, Jr.,
Chancellor, at the Desoto County Courthouse, Hernando, Ms.

This the 18th day of November 2008.


David L. Walker