IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN CHMELICEK	**APPELLANT**
VS.	**CAUSE NO.: 2008-CA-01736**
DIANNA CHMELICEK	**APPELLEE**

ON APPEAL FROM
THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

ATTORNEY FOR APPELLEE:
SAMUEL E. FARRIS
ATTORNEY AT LAW
MS BAR [redacted]
P.O. Drawer 1190
Hattiesburg, Mississippi 39403-1190
Phone: 601-544-7661
Facsimile: 601-545-1974

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN CHMELICEK	**APPELLANT**
VS.	**CAUSE NO.: 2008-CA-01736**
DIANNA CHMELICEK	**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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible conflicts, disqualifications, or recusal:

1.	JOHN CHMELICEK	Appellant
2.	DIANNA CHMELICEK	Appellee
3.	Renee McBride Porter Anthony R. Dorsett Porter Law Firm, P.A. P.O. Box 982 915 Main Street Columbia, Mississippi 39429	Attorneys for Appellant
4.	Samuel E. Farris Attorney at Law P.O. Drawer 1190 607 Corinne Street, Suite A2 Hattiesburg, Mississippi 39403	Attorney for Appellee
5.	Honorable Judge H. C. Thomas, Jr. Chancellor, 10th District P.O. Box 807 Hattiesburg, Mississippi 39403	Lower Court Judge

Respectfully submitted on this the 16th day of October A. D. 2009.

Samuel E. Farris

Samuel E. Farris, MS Bar [redacted]

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN CHMELICEK — **APPELLANT**

VS. — **CAUSE NO.: 2008-CA-01736**

DIANNA CHMELICEK — **APPELLEE**

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATEMENT OF THE CASE

The parties to this litigation, Dianna Chmelicek and John Chmelicek, lived together as husband and wife having been married February 14, 1987, in Canada (R 13, lines 22 - 29) Dianna and John were married for 21 years before the *Judgment of Divorce* was entered (R 13, lines 4-6).

Dianna was not working at the time that she and John were married. She stopped working in December of 1986 before they were married in February of 1987 (R 14, lines 7-15).

Dianna was in college at the time of their marriage. She dropped out of college without a degree and has not attended college since (R 13, lines 15-25).

After Dianna and John were married, Dianna worked outside of the home intermittently (R 15, lines 15-20). Dianna did some billing for John in his medical practice while they were living in Calgary, Canada (R 16, lines 4 - 5). Dianna did the billing from the marital home (R 16, lines 22-28).

Dianna and John had two children: Katie Chmelicek, born August 7, 1989, and Kristen Chmelicek, born May 20, 1991.

John is a medical doctor (R 304, lines 5-6).

Since Dianna and John moved to Hattiesburg, Dianna has not worked outside of the home. John never asked her to work. She stayed home and took care of the children and did the normal things that a mother and wife do (R 17, lines 16-29).

John testified and in certain exhibits he presented stated that he worked 190 hours with his employer, Hattiesburg Clinic. John does not in fact work 190 hours at Hattiesburg Clinic (R 18, lines 26-29) (R 19, lines 1–5) (R 215, lines 14-22).

John worked for Hattiesburg Clinic, mainly in the office in Purvis, Mississippi. He also worked at Immediate Care, which is owned by Hattiesburg Clinic, located in Hattiesburg, Mississippi (R 20, lines 3–9).

John left the family home on May 11, 2007 (R 21, lines 10–15). Exhibit Number 7 of the divorce trial reflects employment, pay and hours worked in regard to John's employment. He worked the same hours at the same locations before the separation (R 21, lines 27–29) (R 22, line 3–17).

Dianna made every effort during the marriage to see that John had time with his children (R 22, lines 18–29) (R 23, lines 1–3). John worked the hours because he enjoyed his work and wanted to work (R 23, lines 4-10). John had time off from his work and he got paid by Hattiesburg Clinic a salary whether he worked or not (R 23, lines 4–25). Dianna and John and their children enjoyed a life style during the marriage consisting of many vacations, including trip outside of this country. See Exhibit Number 20 (R 23, lines 26–29) (R 24, lines 1-24) (R 25, lines 1-12).

Both of the children had new cars at the time the divorce was heard (R 25, lines 17–26).

John had an income tax problem with the Canadian Government. He owed $75,000 and the assessment was against him. The parties always filed individual income tax returns (R 32, lines 1-15).

John's attitude towards the tax problem was that it was going to go away (R 34, lines 13–25).

Bill McLeod was hired to investigate the Canadian tax lien. Bill McLeod was paid $28,896.70 (R 35, lines 12–28) (R 36, lines 10–13).

John hired the accounting firm of Nicholson and Company to assist him in this litigation. Nicholson and Company billed John $25,000 for the work done in regard to this litigation (R 37, lines 5–9). See also Exhibits numbered 6 and 16.

John made withdrawals from the Fidelity account and Dianna received no part of these withdrawals. It appears that the Fidelity account is a retirement type of account. See Exhibit Number 8 (R 38, lines 8–17). See also Exhibit Number 3 introduced in the Divorce proceedings.

The divorce was granted to Dianna on the grounds of adultery. John admitted to the adultery (R 26, lines 9–21).

John and Dianna owed six vehicles and a Harley Davidson motorcycle (R 54, lines 21–29) (R 55, lines 1–2).

John and Dianna also owed a home that was encumbered with two mortgages (R 59, lines 19-23) John and Dianna after purchasing the home refinanced the home so John could get the cash (R 59, lines 24–29) (R 60, lines 1–5).

John supplied Dianna with a list of the personal property that he wanted from the marital home. Dianna allowed him to take those items on his list. (R 63, lines 1–20).

Both of the parties' children attended Presbyterian Christian School in Hattiesburg. The oldest child has graduated from Presbyterian Christian School. (R 69, line 29) (R 70, lines 1–7).

Dianna has a business known as DMC Photography (R 76, lines 20–29).

John suggested to Dianna that if she was going to the expense of buying a camera and getting some equipment that she should make a small business out of it (R 77, lines 1–5).

Dianna's lifestyle has changed drastically (R 80, lines 12–29).

Dianna is in good health (R 89, line 1). The photography business was a hobby (R 91, line 20)

The oldest daughter of John and Dianna is enrolled in college, but does come home on the weekend (R 103, lines 4–11).

John assured Dianna that the parties were in good financial condition and would be out of debt with the next bonus (R 122, lines 12–18).

John told Dianna not to worry about the Canadian tax debt because he was not going to pay it (R 122, lines 19-22).

Exhibit Number 7 shows John's net pay in 2007 was $241,174.35. (Exhibit Number 7 of Divorce proceeding).

John received other income other than his pay from Hattiesburg Clinic and Immediate Care (R 173, line 24–29) (R 174, lines 1-6).

John's pay from Hattiesburg Clinic was based on 190 hours flat based salary whether he worked that many hours or not (R 182, lines 2-9).

John received bonuses in addition to his regular pay from his employer (R 183, lines 3–19).

John had a taxable income in 2007 of $437,550 (R 208, line 8–12).

John's net pay for the year 2007 was $241,174.35 (R 214, lines 10–21).

The Court authorized John to make withdrawals from his Fidelity retirement account of $7,500 plus taxes and penalties each month commencing in October of 2007 and continuing through December 2007 (R 223, lines 22–29) (R 224, lines 1–5).

John voluntarily reduced his hours and, therefore, his income was less asfter the

separation (R 229, lines 26–29) (R 230, lines 21–29).

John was in good health.

Dianna worked at her photography hobby for about 15% of her time per week (R 311, lines 1–5).

The oldest daughter is attending the University of Southern Mississippi. She is on a Presidential Scholarship (R 323, lines 5–7).

John alleges that he owes his father $65,000. This is a debt that he incurred in 1992 (R 339, lines 10–25). The $65,000 debt having been made in 1992 is barred by the statute of limitations (R 339, lines 18–25).

The $75,000 Canadian tax lien against John over the years by the interest accruing has reached the amount of $400,000 (R 341, lines 16-18). That John has an arrangement with the IRS of this country to pay $500 per month toward the Canadian tax lien (R 342, lines 21–24).

John stated that he was really not interested in any of the personal property other than things to do with his children and a ring (R 351, line 29) (R 352, lines 1-10).

John admitted that he voluntarily resigned from his job with Hattiesburg Clinic and identified his resignation letter of June 13 (R 441, lines 14–17) (R 438, lines 21-23). John's letter of resignation is entered into evidence as Exhibit 3 of the contempt hearing (R 438, lines 27–29) (R 439, lines 1–5).

John was found in Contempt of Court for arrearages under the *Judgment of Divorce* and was directed to be incarcerated until the arrearage was paid (R 477, lines 19–29) (R 478, lines 1-12).

John is not entitled to any relief by this Court. He has fled to Canada and refuses to

return. He has also filed a petition for bankruptcy in the Canadian Court. All of this is evidenced by the attachments attached to Dianna's *Request to Supplement the Record.*

The thrust of John's argument on appeal is that John is unable to do that that the trial Court ordered him to do in regard to payments, alimony, etc. In particular, he objects to having to pay certain debts. See the bankruptcy petition filed in Canada and made a part of the *Request to Supplement the Record* herein clearly shows that he has listed these debts in bankruptcy; therefore, these debts are discharged and they no longer should be considered in John's appeal.

John should not be granted any relief by this Court due to the fact that he comes into this Court with unclean hands. John is delinquent and in the arrears in his payment of the child support and alimony that he was ordered to pay and he has allowed the family home and the automobiles of the parties and their children to be repossessed. See the *Petition to Cite for Contempt* and the testimony taken in the contempt hearing whereby John testified that his car was being repossessed and that he had not paid the house notes and the house was now in foreclosure. (Contempt Hearing Page 451, lines 17–25).

On Page 8 -11 of John's brief, John sets out what he alleges is the testimony taken during the trial. He sets out that in the alleged testimony of Dianna that she admitted that she worked fifteen (15) percent of the time as a photographer. However, he directs the Court's attention to the Record, Page 311, lines 3–8. This testimony that he refers to is the testimony of John, not of Dianna.

In the alleged testimony of Tommy Thornton, John says that Tommy testified that John was working excessive hours. He directs the Court's attention to the Record, Page 219, lines 16–26. Tommy Thornton did not testify that John worked excessive hours.

Tommy Thornton testified that the hours John worked were above average, but he did not know how much above average (R 219, lines 16–26). Tommy also testified that John came to Tommy and said that he, John, wanted to take some time off and wouldn't be available for three months (R 230, lines 23-29).

SUMMARY OF THE ARGUMENT

John is well able to perform the obligations that were placed upon him by the Court.

That after the Divorce was filed John voluntarily reduced his income in an attempt to reduce his obligations to his family.

John has taken steps since the Divorce was filed to evade the jurisdiction of the Mississippi courts and at the same time to take advantage of the Appellate Courts.

He is now a fugitive and has fled to Canada and after filing for bankruptcy in Mississippi has now filed for bankruptcy in Canada listing all of his debts that the lower court directed him to pay.

The Judge found that John was guilty of uncondoned adultery. The Court did not consider the fact that John had an affair before his latest adultery and that he and the Hattiesburg Clinic were sued because of that previous affair with an employee of the Hattiesburg Clinic.

John took over the financial operations of the family at a time when the finances were in good condition. Due to his spending and financial irresponsibility, he placed he and Dianna into debt of a great magnitude. He constantly assured Dianna that the financial affairs of the family were good.

The Chancellor found that John and Dianna had divided the personal property of the marriage before the divorce was granted.

Dianna is basically unemployed since what she is doing in the photography business is a hobby that she created a few years ago at John's insistence.

The proof shows that John depleted the 401K retirement account.

John complains about the Canadian tax lien and the amount, yet the lien is many years old and if John had addressed it at the time the lien was assessed, the amount would have not increased substantially. John has an agreement to pay $500 per month toward the Canadian tax lien. I assume that it was assigned to the IRS in this country for collection.

The parties filed separate tax returns in Canada.

Both parties agree that this is a long term marriage of 21 years.

John has even let the health insurance on the children lapse.

John voluntarily resigned from the Hattiesburg Clinic on June 13, 2008. He was employed by the Clinic for 17 years. It is obvious that this was an attempt to evade the directives of the *Judgment of Divorce*.

John worked extra hours at the Clinic because he enjoyed his work and, of course, enjoyed spending the money.

There are pleadings in the Court file that prove that John filed for bankruptcy first in Mississippi.

There is also in the court file an Affidavit as to the residence of John showing that he is now a resident in Canada.

The disparity between what John was making and Dianna's meager income is great.

This Court should affirm the judgment of the lower court.

ARGUMENT

FIRST STATEMENT OF THE ISSUES

The first assignment of error or issue raised by John is that the Court has placed an obligation on John that is impossible for him to perform. This is a very broad assignment of error or issue and impossible to respond to without more specificity. However, Dianna attempts to answer this argument.

John cites Rainwater v. Rainwater, 236 Miss. 412, 110 So.2d 608 (1959) for the proposition that the Court has placed an obligation on him that he cannot perform. The Rainwater case is clearly not on point. It deals with a complaint filed by Mrs. Rainwater alleging that Mr. Rainwater was in contempt for his failure to pay alimony. I am unable to find anything in this cited case that supports the proposition that the lower Court has placed an obligation on John that he is impossible for him to perform.

The Court found that John is capable and does generate the sum of approximately $240,000 annually. The Court went on to average that out over a twelve month period to be $20,000 monthly. (See the *Judgment of Divorce*, Page 6)

The record is clear that John does have sufficient income and earning ability to satisfy the obligations placed upon him by the trial Court. John presents no proof or authority for his inability to meet the obligation placed upon him by the trial Court. If you subtract the award of child support and alimony amount from John's monthly net of $20,000 you arrive at a figure of $9,600 that John is left with after paying these obligations. Your attention is once more directed to the attachments to the *Request to Supplement the Record.* If you subtract the house note and John's car note, you still leave John with the sum of

$5,109. This should be more than adequate for him to survive on. The lump-sum alimony of $61,965.47 is payable within three (3) years, so that it is not necessarily a monthly charge.

John directs the Court's attention to Yelverton v. Yelverton, 2004-CT-01684-SCT, 961 So.2d 19 (Miss. 2007). The Yelverton case is distinguishable on its facts. The Court found that Mr. Yelverton was capable of making $12,000 per month after taxes. The Court further found that the expenses for Rhonda and the children added up to $6,000 and that Rhonda earned $2,118.65 per month. The Court also recognized that James also had expenses of $6,429 per month. This case is clearly distinguishable, since the Court ordered James to pay an amount that would leave him with a negative balance of $4,429 per month.

In this case, deducting the amounts that John was ordered to pay, he still has a balance of upwards of $5,109. This was arrived at since the proof shows that John was not paying the $1,360 in credit card bills that he attempts to take credit for nor is their proof that he was paying the $500 per month lien to the IRS. However, if we deduct the credit card payments, the tax lien and the other deductions, John is still left with $3,249 per month. This is clearly not the case as stated in Yelverton.

The Brooks case as cited by John and reported at Brooks v. Brooks, 652 So.2d 1113, 1124 (Miss. 1995) is distinguishable for the same reason that Yelverton was distinguishable that being basically on the facts.

In Hopton v. Hopton, 342 So.2d 1298 (Miss. 1977) and the case of Nichols v. Nichols, 254 So.2d 726, 727 (Miss. 1971), Dianna asserts that the Chancellors' decision is in line with the holdings in both of the above cited cases. In addition, Dianna would point out to the Court that John has additional income other than that from Hattiesburg Clinic and

Immediate Care. John had a slush fund into which he put his additional income (R 172, lines 17–29) (R 173, lines 1–3) (R 173, lines 25–29) (R 174, lines 1–6).

John complains about what he is required to pay to support his wife and children, but fails to recognize that the Court found on Page 5 of the *Judgment of Divorce* that the children's expenses were $3,911.37 monthly. The Court then found on Page 8 of the *Judgment of Divorce* that Dianna's monthly expenses, in addition to those of the children, were $7,035.70 per month.

> The Court stated, "This Court will only reverse a chancellor's division and distribution of a marital estate when it is not supported by substantial credible evidence." Owen v. Owen, 928 So.2d 156, 160 (Miss.2006) (citing *Carrow v. Carrow*, 642 So.2d 901, 904 (Miss. 1994)). "The 'chancery Court has authority, where equity demands, to order a fair division of property accumulated through the joint contributions and efforts of the parties.'" *Id.* (quoting *Savelle v. Savelle*, 650 So.2d 476, 479 (Miss. 1995)). "[An appellate Court] will not substitute its judgment for that of the chancellor 'even if [it] disagrees with the [chancellor] on the finding of fact and might [arrive] at a different conclusion.'" *Id.* (quoting *Owen v. Owen*, 798 So.2d 394, 397-98 (miss. 2001)). Further, an appellate Court is obligated to uphold a chancellor's finds "unless those finds are clearly erroneous or an erroneous legal standard was applied." *Id.* at (citing *Carrow*, 642 So.2d at 904).
>
> See also Faerber v. Faerber, 2008-CA-00236-COA, 2009-MS-0722.375 (Miss. 2009) under the STANDARD OF REVIEW, states "Generally, a chancellor's finds in domestic cases will not be reversed unless they are manifestly wrong, clearly erroneous, or the proper legal standard was not applied. *Smith v. Smith*, 994 So.2d 882, 885 (Miss. Ct. App. 2008)."

John complains of the findings of the lower Court and states that they are manifestly unjust and that he should not have been directed to pay the amounts that he was ordered to pay. The Court expressly found that John depleted the assets of the marriage. See the

Judgment of Divorce, Page 8. John took over the financial operations of the family (R 50, lines 6–14).

The family was doing pretty good financially until John took over the financial operations of the family. At that time, there were no large credit card debts (R 50, lines 15–29) (R 51, line 1). As to the family doing pretty good financially at the time he took over the financial operations, none of this was denied or rebutted by John.

John gave Dianna no reason to be concerned about the financial affairs of the family. He told her that they were doing fine. John continued to spend (R 51, lines 2–23).

SECOND STATEMENT OF THE ISSUES

The second assignment of error or issue raised by John is that the Court's award of both lump sum and periodic alimony is manifestly in error and contrary to the factors in Armstrong v. Armstrong, 618 So.2d 1278 (Miss. 1993). The appellate Courts have repeatedly held that:

> In Faerber v. Faerber, 2008-CA-00236-COA, 2009-MS-0722.375 (Miss. 2009) under the "Standard of Review" states "Generally, a chancellor's findings in domestic cases will not be reversed unless they are manifestly wrong, clearly erroneous, or the proper legal standard was not applied. *Smith v. Smith*, 994 So.2d 882, 885 (Miss. Ct. App. 2008)." See also Lauro v. Lauro, 2004-CA-02252-COA, 2001-CA-00801-SCT, 847 So.2d 843 (Miss. 2003).

John alleges that the Chancery Court failed to properly apply the factors in Armstrong. However, John merely recites the factors and does not point out how the Court misapplied the factors in Armstrong.

John attempts to use figures from 2006 in order to prove that Dianna had a very large gross income, instead of using tax figures from the year 2007.

The trial Court found in the *Judgment of Divorce* on Pages 6 and 7 that Dianna's net profit for the year 2006 was $1,800. Her 2007 income, averaged $225 per month. (R 67, lines 18–29) (R 68, lines 1–9) (R 68, lines 25–27). This proof on the part of Dianna was not denied or rebutted by John.

John's assertion that Dianna could make $17,488.89 was not supported by any proof or evidence of any kind. John cites nothing upon which to base this figure.

John asserts that he is suffering from medical conditions brought on by his overwork. However, he did not produce any medical testimony to substantiate this allegation nor the allegation that he is no longer capable of working ninety (90) hours per week. John gets the same pay from Hattiesburg Clinic each month no matter what number of hours he works or doesn't work per week. (R 229, Lines 17–29). There is no proof in the record that John worked ninety (90) hours per week. See Tommy Thornton's testimony (R 182, lines 1–9) (R 183, lines 1-2). Mr. Thornton testified that John's regular pay was based on 190 hours per month. He stated that all of their salaried employees were plugged in at 190 hours, whether they work 190 hours or not.

It is interesting to note that John complains of medical problems, yet in his testimony on direct examination he stated that he was in good health, a little stressed out, but in good health. (R 304, lines 21–24).

It is also interesting to note that John in his brief did not allege that he did not have the earning ability or capacity to make $20,000 per month.

John and Dianna were married for 21 years, which is, of course, a long-term marriage (R 13, lines 4-6).

John and Dianna and the children enjoyed a very good life time before the separation

including many trips for vacations in this country and overseas (R 23, lines 26–29) (R 24, lines 1–12).

In John's original 8.05 statement being Exhibit 6, he stated that his monthly income was $35,549.08 gross. Sometime later, John filed an amended 8.05 statement that was introduced into evidence as Exhibit 16. Exhibit 16 stated that John's gross monthly income was at that time $15,487.00 (R 326, lines 18–25). John gives no explanation for his alleged reduction in income from $35,549.08 to $15,487.00 gross. It is clearly obvious that John voluntarily reduced his income once a suit for divorce was filed, in hopes of being able to reduce the amounts that he knew the Court was going to order him to pay to his wife and children, along with the other expenses that the Court ordered him to pay.

John asserted that he cannot pay what he was ordered to pay by the Court. However, he stated no basis for this allegation. He does not set out in his brief the expenses that he alleges that he has or anything that would justify and support his assertion that he cannot pay the amounts awarded to his family. John states no authority to backup his allegations in this regard.

John complains about the debts that the parties accumulated during the marriage. However, he fails to recognize that he is the one that made these debts, except for a small percentage that Dianna is responsible for creating.

THIRD STATEMENT OF THE ISSUES

The third assignment of error or issue raised by John is that the Court's division of property is unfair, not equitable, and contrary to the law in Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994).

The Chancellor found that the only marital assets of the parties were the 401K

retirement account, the $19,000 equity in the marital home, and the personalty that John and Dianna accumulated in the form of vehicles and household goods. The Chancellor found that the 401K plan had a balance as of the date of the final hearing of the divorce of $303,244.43. See the *Judgment of Divorce*, Page 6. There is no disagreement that these assets were all acquired during the marriage.

John complains that he did not receive one-half of the assets of the parties. Dianna disputes this since he received what he wanted of the personal property, he received one-half of the retirement fund, he was awarded the marital home and he received one-half of the equity in the marital home. Even if John did not receive one-half of the assets accumulated during the marriage there is no requirement that the marital property be divided equally since Mississippi is not a community property state. Therefore, the Chancellor is not required to divide marital property equally. See Lauro v. Lauro, 2004-CA-02252-COA, 924 So.2d 584 (Miss. 2006). The Chancellor properly applied the guidelines for determining the division of marital property as set out in Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994) and in the case of Ruth v. Wilson, 2005-CA-02096-COA, 975 So.2d 261 (Miss. 2007).

The Court of Appeals' definition of marital property is any and all property acquired during the marriage. The Court cited Hemsley v. Hemsley, 639 So.2d 909, 915 (Miss. 1994). The Court went on to say that assets so acquired or accumulated during the marriage are marital assets and are subject to an equitable distribution by the Chancellor. Once more relying on Hemsley.

Mississippi is an equitable distribution state. The division of marital assets is a matter of discretion for the Chancellor with the Chancellor bearing in mind the equities of the circumstances and the relevant facts and considerations. See Marsh v. Marsh, 2003-CA-

00355-COA, 868 So.2d 394 (Miss 2004). See also Owen v. Owen, 798 So.2d 394, 399 for the determination that Mississippi is an equitable distribution state. The Chancellor made the right determinations in this case and the case law is clear that a Chancellor's decision in a case of this type cannot be disturbed by the appellant Courts unless the lower Court's decision or findings were unsupported by substantial evidence and were manifestly wrong or clearly erroneous, or if the Chancellor applied an incorrect legal standard. See Larue v. Larue, 2004-CA-02453-COA, 969 So.2d 99 (Miss. 2007). See also Jones v. Jones, 2006-CT-00974-SCT, 995 So.2d 706 (Miss. 2008).

FOURTH STATEMENT OF THE ISSUES

The fourth assignment of error or issue raised by John is that the Court's division of debts is unfair and not equitable.

Both parties to this litigation admit that the marriage was a lengthy marriage. The parties having been married for 21 years. The ages of the parties are: John is 47 years old and Dianna is 49 years old. John has a medical degree and Dianna did not finish college. Dianna has never worked outside of the home, except for practicing her hobby of photography (R 13, lines 12–13) (R 14, lines 11–18) (R 15, lines 15-16, 21–27).

John alleges in his brief that they were spending far more than he was making. See (John's Brief, Page 18).

The record reflects that John had taken over the financial operations of the family sometime in the year 2000. Therefore, if there was any problem with overspending it was created by John (R 49, lines 4–9) (R 50, lines 8–14).

The financial condition of the family at the time John took over the finances was good (R 50, lines 15-29) (R 51, line 1). The family continued to travel and John never gave

Dianna reason to be concerned about the family's financial condition (R 51, Lines 2–3). The spending of the other members of the family, other than John, did not force John to work long hours as he alleged. John liked to work and John, of course, liked to spend money (R 168, lines 17–21).

It is interesting to note that nowhere in the record does John say that Dianna was overspending. His allegations always are that we are overspending. If Dianna inquired about how the family was doing financially, John replied as he did on one occasion that "we are one bonus away from being out of debt." (R 22, lines 16–18).

John did not attack or question the expenses that were proven for the children and for Dianna. It is well settled in this state that the Chancellor's decision as to marital assets and alimony support, etc. be based upon the wife's custom and standard of living. See Riley v. Riley, 2002-CA-00049-COA, 846 So.2d 282 (Miss. 2003).

While Dianna was in charge of the financial operations of the family there was no problem (R 50 and R 51).

John alleges that the Chancellor somehow punished him because of his admitted adultery. However, there is no proof in the record that the Chancellor punished John in any way. In fact, the Chancellor says very little about the adultery, except in the *Judgment of Divorce* where the Chancellor found that John admitted that he committed adultery during the marriage and that it was not condoned by Dianna and, therefore, a divorce was granted on the grounds of uncondoned adultery. (*Judgment of Divorce*, Page 1-2).

The Court did not allude at all to John's previous conduct as far as adultery is concerned. John previously had a lawsuit filed against him and Hattiesburg Clinic because of an affair that he had with an employee of Hattiesburg Clinic (R 49, lines 4–18).

John complains about Dianna not making certain payments on the marital home and other debts (John's Brief, Page 20, Paragraph 11). The Court's attention is directed to the Order filed on February 19, 2008. In this order, the Court expressly found that "it is quite apparent to the Court, and the Court does hereby find, that Dianna was not able to make the mortgage payments, as well as the additional expenditures, needed in the months of December and January due to the lack of funds."

In considering Factor 11 of the Armstrong factors "wasteful dissipation of assets by either party." John does not allege that Dianna has disposed of any property or was guilty of dissipation of any assets or was wasteful of any assets.

However, the trial Court said "the Court is cognizant of the actions of the Defendant in wasting potential marital assets during the marriage, but finds these are largely present now in debts which he must pay." (*Judgment of Divorce*, Page 8).

John complains because the Court awarded Dianna attorney's fees in the amount of $20,000. The amount requested by Dianna as evidenced by Exhibit 15 shows a great deal more than the amount awarded by the Court. Dianna's attorney offered his bill into evidence, which is marked as Exhibit 15, and there was no objection. John's attorney stated that "I don't have any objection to that." There was no objection as to the reasonableness of the fees, no objection as to whether or not Dianna was entitled to attorney's fees, and, in fact, John was completely silent regarding attorney's fees. (R 10, lines 29) (R 11, lines 1-3). John also complains because Dianna charged some attorney's fees to a credit card. John suggested that Dianna hire an attorney (R 153, lines 4–7). There is no allegation by John that Dianna was able to pay her own attorney's fees nor was any proof offered that she had funds or assets with which to pay her own attorney's fees. See Lauro v. Lauro, 2004-CA-

02252-COA, 924 So.2d 584 (Miss. 2006). The Court of Appeals affirming an award of attorney's fees stated at Page 6, Paragraph 29 "an award of attorney's fees in domestic cases is largely a matter entrusted to the sound discretion of the trial Court." See Poole v. Poole, 701 So.2d 813, 819 (¶ 26) (Miss. 1997); Arthur v. Arthur, 691 So.2d 997, 1004 (Miss. 1997).

In Lauro v. Lauro, it states "Unless the Chancellor is manifestly wrong, his decision regarding attorney fees will not be disturbed on appeal. *Bredemeier v. Jackson*, 689 So.2d 770, 778 (Miss. 1997). Absent an abuse of discretion, the chancellor's decision in such matters will generally be upheld. *Armstrong v. Armstrong*, 618 So.2d 1278, 1282 (Miss. 1993); *Martin v. Martin*, 566 So.2d 704, 707 (Miss. 1990); *Kergosien v. Kergosien*, 471 So.2d 1206, 1212 (Miss 1985)." The Chancellor in this case was not manifestly wrong and did not abuse his discretion in awarding attorney's fees to Dianna. See also Smith v. Smith, 2009-MS-0527.147, 2007-CA-01920-COA. In the Smith case, the Chancellor found that attorney's fees in a domestic case was left to the sound discretion of the Chancellor and unless he abused this discretion his decision would be upheld. The Appellant Court upheld the award of attorney's fees in Smith v. Smith (Miss. 2009).

See McCarrell v. McCarrell, 2008-CA-00580-COA (Miss. 10-13-2009) where the Court of Appeals affirmed an award of attorney's fees to Ms. McCarrell.

John argues that Dianna should have received rehabilitative alimony instead of lump sum and periodic alimony; however, he fails to state how rehabilitative alimony would help Dianna since she has no profession and has not been in the workforce for many, many years and has no college degree.

FIFTH STATEMENT OF THE ISSUES

The fifth assignment of error or issue raised by John is that the Court made specific findings that were against the overwhelming weight of the evidence. John alleges that the Chancellor punished him for committing adultery. To avoid repetition, the Court's attention is directed to the last paragraph of Page 22 and the first paragraph of Page 23 above.

John contends that there was little or no equity in the marital home and alleges that the Court assessed the value of the marital home at $19,000. This is a Scribner's error or oversight on the part of the drafter since the Court found that $19,000 was the equity in the home. See the *Judgment of Divorce*, Page 4, Paragraph 1). John cites no authority to support this allegation. It is interesting to note that John, although he complains about the Court's finding as to the marital home, he did not secure an appraisal of the marital home and have it entered into evidence.

John also complains and states that the home had little or no equity and that any equity received would be taken by the Internal Revenue Service. However, he fails to advise this Court that he has an agreement with the IRS to pay $500 per month and in return the IRS agrees that they will not collect any more (R 342, lines 11–24). This, of course, has to do with the Canadian tax lien. If the Canadian tax lien had been addressed by John at the time it occurred, the amount of the tax lien would not have increased significantly.

John repeatedly assured Dianna that she did not need to worry about the tax lien because "they can't touch us." (R 127, lines 1–12). The tax lien is accessed against John. John and Dianna each filed a separate return; so, the tax lien is against John and his tax return (R 128, lines 10–18).

John alleges that he has had to pay the mortgage note on the home and the taxes and insurance. This is not a true statement. John testified in a contempt hearing that he had not

paid the house note for awhile and that the home was going to foreclosure. He further testified that he had not paid a house note in three months. (Hearing on Contempt; R 451, lines 16–29); R 452, lines 1–3).

John complains that the personal property was not divided equitably. However, the record reflects that John gave Dianna a list of personal property that he wanted from the marital home and he has gotten everything on the list. Plus, when John moved to an apartment he took some additional household goods from the home. (R 62, lines 27-29) (R 63, lines 1–20).

John testified that the only parts of the personal property that he wanted was anything to do with the children and a ring that he had before the marriage. (R 52, lines 1–10).

The Chancellor in the *Judgment of Divorce* at Page 7 in the last paragraph on that page stated that "each party shall keep the household goods and personalty currently in his or her possession as the Court finds that they have divided that marital property prior to trial."

John attempts to put a value on the personal property that was left with Dianna and attempts to use what he alleges the property was insured for; however, as the Court knows, that is not the value of the personal property. John should have gotten an appraisal of the personal property and submitted that into evidence.

Regarding the equitable distribution of marital property, on page 24 of his brief, John stated that Dianna did not make a substantial contribution to the accumulation of the parties' properties. The record reflects that Dianna stayed home, took care of the children, saw to their needs, got them to school and doctor's appointments, etc.

A homemaker's contributions are considered equal to those of the wage earning spouse. See Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994) and Faerber v. Faerber, 2008-CA-00236-COA, 2009-MS-0722.375 (Miss. 2009).

As to the allegation that John asked Dianna to stop spending, there is absolutely no proof in the record other than John's unsubstantiated allegations. It appears that if John had wanted Dianna to work he could have gotten her employment with Immediate Care or Hattiesburg Clinic. John did not attempt to do any of this.

John has also alleged that the Canadian tax lien is a debt that has risen to the amount that it now stands at by the living and spending of both parties. It is very difficult to see how the actions of living and spending can increase a tax lien. No authority is given for this proposition nor is there a cite back to the record.

John attempts to apply the law in the State of Mississippi and the United States of America to the Canadian tax lien. However, since it was incurred in Canada, the Canadian law would apply. John has furnished no authority to substantiate his position that the law of this state and country should apply to the Canadian tax lien.

As to the division of the 401K retirement account, John alleges that he did not receive his one-half of the account since he had to pay Dianna $9,500 for her one-half of the equity. He fails to recognize that he was also awarded $9,500 for his one-half of the equity and granted title to the marital home. There is no directive from the Court that the equity had to be paid from the 401K account. He also alleges that he had authority to withdraw from the 401K account per the order of the Court entered on October 11, 2007. John does not reveal that the Court order only allowed him to withdraw $7,500 a month for four months. In fact, John withdrew $123,930.94 between January 1, 2007 and March 25, 2008

from the 401K account. (*Judgment of Divorce*, Page 3, Paragraph 2). Dianna did not know about the withdrawal from the Fidelity 401K account, except those that were Court ordered (R 82, lines 24-29) (R 83, lines 1-2).

The award of lump sum alimony in the amount of $61,965.47 is one-half of the 401K withdrawal made by John. The lump sum alimony is due and payable in 36 months from the date of the Judgment. (*Judgment of Divorce*, Page 7, Paragraph 3).

John alleges that Dianna received benefit from the withdrawals made by John from the 401K account. There is absolutely no proof in the record that this was the case. The Court's attention is directed to the Amended Temporary Order filed on October 11, 2007, Page 2, Paragraph 4 that states "If it is, then the Court directs a $7,500 plus taxes and penalties withdrawal per month which will begin in October of 2007 and will allow the same through December, 2007, which sums withdrawn will be used by John to pay his outstanding monthly expenses." See the Amended Temporary Order, Page 2, Paragraph 4.

One thing that John has not brought out and appears to not have considered is the vast disparity between his earning capacity and Dianna's earning capacity. This Court has said in previous decisions that a significant disparity in the earning capacity of the parties is a major factor in deciding periodic alimony. See Davis v. Davis, 2001-CA-00900-SCT, 832 So.2d 492 (Miss. 2002); Yelverton v. Yelverton, 2004-CT-01684-SCT, 961 So.2d 19 (Miss. 2007); Cheatham v. Cheatham, 537 So.2d 435 (Miss. 1988); Johnson v. Johnson, 2002-CA-01552-COA, 877 So.2d 485 (Miss. 2003).

The Court's attention is also directed to the Judgment of Contempt filed on October 27, 2008, wherein John was found in contempt and ordered to be incarcerated.

The Court's attention is further directed to the Order Releasing Defendant from

Incarceration filed January 15, 2009. In this order, it was represented to the Court and the Court found that the Ne exeat Bond had been signed by John Chmelicek and his father. A complete review of the record and the Court file reveals that John never posted the Ne exeat Bond that the Court thought he had done.

John has an obligation to inform this Court of his change in circumstances in regard to his debts, foreclosure of the home and his bankruptcy petition filed in Canada. In a Motion for Relief from Judgment or Order filed by Dianna on November 3, 2008 there is an Attachment A that is an e-mail from John to the children stating that he is a fugitive and that he has no intention of paying their mother a red cent.

I am sure that this Court has enough cases to hear without hearing this case and, then, having to look at it again if it is sent back for questions of bankruptcy, repossession and foreclosures.

John gives no evidence nor is it born out by the record nor does he direct this Court to any portion of the record that substantiates this allegations or issues in his appeal. Therefore, Dianna should be granted attorney's fees for expenses incurred in defending John's appeal.

CONCLUSION

Dianna asks of the Court that the Court find that the Chancellor's decision was proper and based upon the facts and the law. That John's appeal should be dismissed. That Dianna should be granted attorney's fees for expenses incurred in defending this appeal.

That this Court should consider what John has done since the *Judgment of Divorce* was entered as far as payment of debts, alimony and child support and find that he cannot complain about those things that he was ordered to pay by the Chancellor if, in fact, he has not paid them or is discharging them in bankruptcy.

Dianna once more asks of this Court that the Chancellor's findings and decision be affirmed in total.

RESPECTFULLY SUBMITTED, this the 16th day of October A.D. 2009.

DIANNA CHMELICEK

By: Samuel E. Farris
Samuel E. Farris, Attorney for Appellee

Samuel E. Farris
Attorney for Appellee
MS Bar Numbe[redacted]
Post Office Drawer 1190
Hattiesburg, MS 39403-1190
Office (601) 544-7661
Fax (601) 545-1974

CERTIFICATE OF SERVICE

I, the undersigned, being the attorney of record for the Appellee in Docket No. 2008-CA-1736 in the Supreme Court of Mississippi, do hereby certify that I have, this day mailed by regular United States Mail, postage prepaid to the Honorable Renee Porter, at her usual address, Post Office Box 982, Columbia, MS 39429-0982 and to Honorable James H. C. Thomas, Jr., at his usual address, Post Office Box 807, Hattiesburg, MS 39403-0807.

This the 16th day of October A.D. 2009.

Samuel E. Farris

Samuel E. Farris
Attorney for Appellee
MS Bar Number [redacted]
Post Office Drawer 1190
Hattiesburg, MS 39403-1190
Office (601) 544-7661
Fax (601) 545-1974

CERTIFICATE OF SERVICE FOR FILING

I, the undersigned, being the attorney of record for the Appellee in Docket No. 2008-CA-1736 in the Supreme Court of Mississippi, do hereby certify that I have, pursuant to the Mississippi Supreme Court Rules 25 and 31, this day hand-delivered for filing the original and three copies of the foregoing Brief of Appellee to Honorable Betty W. Sephton, Supreme Court Clerk, 450 High Street, Jackson, MS 39201.

This the 16th day of October A.D. 2009.

Samuel E. Farris

Samuel E. Farris
Attorney for Appellant
MS Bar Number [redacted]
Post Office Drawer 1190
Hattiesburg, MS 39403-1190
Office (601) 544-7661
Fax (601) 545-1974