

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN CHMELICEK

APPELLANT

VERSUS

CASE NO. 2008-CA-01736

DIANNA CHMELICEK

APPELLEE

**ON APPEAL FROM
THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI**

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of 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
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Columbia, Mississippi 39429 | Attorneys for
Appellant |
| 4. | Samuel Farris
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Hattiesburg, Mississippi 39401 | Attorney for
Appellee |
| 5. | Honorable Judge H. C. Thomas, Jr.
Chancellor, 15 th District
P.O. Box 807
Hattiesburg, Mississippi 39403 | Lower Court
Judge |

Respectfully submitted, on this the 13th day of July, 2009.



Renee McBride Porter
MSB: 

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APPELLEE

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STATEMENT OF THE ISSUES

1. That the Court has placed an obligation on John that is impossible for him to perform.
2. 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).
3. 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).
4. That the Court's division of debts is unfair and not equitable.
5. That the Court made specific findings that were against the overwhelming weight of the evidence.

STATEMENT OF THE CASE

John and Dianna Chmelicek were married in Canada on February 14, 1987.

The parties lived together as husband and wife until May 11, 2007, the date of final separation.

Two children were born of the marriage, namely Katie Chmelicek, born August 7, 1989, and Kristen Chmelicek, born May 20, 1991.

John is a medical doctor and he received his medical degree in Alberta, Canada in 1985. (Record page 304, lines 5-6) Dianna attended Concordia University and Studied Business Administration, (Record page 13, lines 17 and 21) and worked up until the December before the two were married. (Record page 14, lines 14 and 15) After the marriage, Dianna then worked at the Montreal General Hospital handling the billing (Record page 14, lines 20-23) and also worked intermittently for a temporary agency during the beginning of the marriage (Record page 15, lines 17-18) and did the billing for John's clinic when they lived in Calgary. (Record page 16, line 5) This was during the first couple of years of their marriage. Dianna did not go back to work until 2006.

John, on the other hand, worked at Hattiesburg Clinic and Immediate Care. He was paid for 190 hours a month from Hattiesburg Clinic, whether he worked more or less, (Record page 217, line 8) and he was paid his actual hours at Immediate Care. Before Dianna filed for divorce, John would work around 40-50 hours every two weeks at Immediate care, on top of his 190 hours a month at Hattiesburg Clinic. (Record page 231, line 18)

John had the best financial year he has ever had in 2007 when he grossed \$437,550 (Record page 208, Line 11), but that takes into account the 260 to 290 hours he would work a month. John's average income over the past five years was \$363,050. (Trial Exhibit #1) Even though John was making a substantial amount of money, the family debt kept continuing to grow larger and larger. The family was spending more money than John was making, and this spending forced John to work these long hours to try and make ends meet. (Record page 307, lines 1-4)

During the Chmelicek's time in Canada, John and Dianna attended a meeting for investment property that would provide tax deductions. (Record page 341, line 24) The Chmelicek's bought into the investment. The Canadian Government then changed the tax deduction, and decided that the Chmelicek's still owed the taxes on the investment. (Record page 341, line 15-16) The Chmelicek's hired a tax attorney and Dianna met with him in Jackson. (Record page 342, line 11) At the time of separation, the tax debt was approximately \$400,000.00 (Record page 341, line 27)

John spoke with Dianna on many occasions about cutting down the spending so they could get ahead of their debts, but it would usually lead to a fight or crying spell. (Record page 307, lines 14-15) John even encouraged Dianna to go back to work after the children were born to help with the marital debt and marital bills, so they started a photography business for her.

In 2006, Dianna grossed \$31,000 working fifteen percent of the time with the business. (Record page 311, lines 3-8) However, even with the added income from Dianna's business, the Chmelicek's were slipping further and further into debt.

After Dianna filed for divorce on July 18, 2007, a temporary order was entered September 25, 2007, and the court found in part the following:

" 4. The Court, from review of the pleadings as well as the 8.05 Financials, finds that the parties are in dire financial straits and that there is not sufficient money to sustain the lifestyle to which they have created previously.

7. The Court recognizes that there is much more debt than there is a cash flow to satisfy the debt and therefore, does allow John Chmelicek to access the only available line of credit that the parties have, that being his retirement account. The Court directs a \$7,500, plus taxes and penalties, withdrawal per month which will begin this month, being September of 2007 and will allow the same through December of 2007. Of the \$7,500.00, \$2,500.00 is for the payment to Dianna. The Court will review this matter on the 8th day of October, 2007, in the Chancery Court of Forrest County, and will make a further determination at that time."

An Amended Temporary Order was filed on October 11, 2007, that substantially changed the obligations of John. While John was not directly responsible for the marital home's mortgage, insurance, school expenses, and the costs to maintain the family's automobiles, John was ordered to pay \$10,000 per month, by an order of withholding through his work, for the support and maintenance of the family.

Dianna then filed a contempt motion, and on December 17, 2007, an Agreed Order was

entered that directed John's work to tender any and all bonuses due to John to the Chancery Clerk. The Court entered an Order on January 19, 2008 dividing the money in half and giving it to each party, directing John to use his half in paying the first and second mortgage that the Dianna didn't pay.

The trial began on March 23, 2008. The parties announced an agreement as follows, to wit:

1. Dianna would be entitled to a divorce upon the grounds of adultery.
2. The parties would have joint legal custody of the parties' minor children.
3. John would have visitation with the children.

Therefore, only leaving the issues of alimony, child support, and equitable property division to be decided by the Court. The Court found the following in its Judgement, to which John now appeals:

1. That the parties are awarded joint legal custody of their children, with Dianna having paramount physical custody with John having reasonable standard visitation;
2. That Dianna is awarded child support in the amount of \$4,400.00 a month, and that she will be responsible for the needs of the children as to schooling, maintenance and automobile payments;
3. That John maintain his current life insurance policies of \$350,000.00 and name the children as joint beneficiaries so long as either of them are minors;
4. That John be awarded the marital home encumbered by the mortgages and the Canadian Debt;
5. That Dianna be given credit for the \$9,500.00 for her half of the existing equity in the marital home;
6. That John assume and pay the debt to his father, his vehicle, and the credit card indebtedness of the parties;

7. That Dianna assume and pay the debt on the vehicles of her and her children;
8. That Dianna receive one half of the 401(k) funds plus \$9,500.00, the credit for the marital home, with any tax consequences being paid with Dianna paying 12.5% and John paying 87.5%.
9. That Dianna receive 3/4 of the sky miles for her and the children;
10. That Dianna is awarded a lump sum alimony payment of \$61,965.47;
11. That each party keep the household goods and personalty currently in his or her possession;
12. That John receive his masculine ring and have access to any family pictures for copying at his expense
13. That Dianna be awarded periodic alimony of \$6,000.00 monthly
14. That each party shall contribute to necessary colleges expenses not covered by scholarships or other entitlements with Dianna paying 12.5% and John paying 87.5%;
15. That Dianna be awarded \$20,000.00 in attorney's fees.

TESTIMONY

The trial proceeded on March 23 and 24 of 2008, and then concluded on May 28, 2008. The following witnesses were called and testified:

1. Dianna Chemelick.

Facts relating to Dianna's testimony:

1. Dianna admitted that she had made no contribution to John's medical degree. (Record page 88, lines 4-6, 15-19)
2. Dianna admitted that she was a few hours away from a college degree. (Record page 88,

lines 26-29)

3. Dianna admitted that she was able to work. (Record page 96, lines 22-24)

4. Dianna admitted that John was a good father helping the children with their homework and being involved in the children's lives. (Record page 27, lines 11-14), (Record page 154-155, lines 28-3)

5. Dianna admitted that she knew about the tax lien with Canada, (Record page 32, lines 1-5) and that she had actually saw that the taxes were done each year. (Record page 120, lines 23-29, page 121, lines 17-20)

6. Dianna admitted that after the Court held the first Temporary Hearing John had sold a motorcycle, R.V., Porsche, and a jeep. Dianna also admitted that she had moved out of the marital domicile without conferring with John and had moved into a home owned by her brother with rent of \$2,200.00 per month. (Record page 101, line 9)

7. Dianna admitted that Katie was in college and was on a full scholarship, (Record page 154, lines 25-27) and that she had not done well in college and was in danger of losing her scholarship.

8. Dianna admitted that she was employed as a photographer and worked about 15% of the time as a photographer. (Record page 311, lines 3-8)

2. Tommy Thornton.

Facts relating to Tommy Thornton's testimony:

1. Tommy admitted that John was a good doctor and was working excessive hours by working at the clinic and at Immediate Care. (Record page 219, lines 16-26)

2. Tommy admitted that his employees needed time off and that John was working excessive

hours. (Record page 228 and 229, lines 22-1)

3. Tommy testified as to John's income. (Record page 223, lines 3-9)

John's 2008 income through the first trial date was:

Exhibit 7 States:(Payroll from Hattiesburg Clinic Records)

<u>Date</u>	<u>Place</u>	<u>Hours</u>	<u>Gross</u>	<u>Net</u>
01/06/2008	IC	7.50	\$1,470.00	\$84.54
01/31/2008	HC	Service Award	\$162.432	\$150.00
01/31/2008	HC	190.00	\$12,342.00	\$326.08
02/03/2008	IC	39.75	\$4,796.25	\$94.73
02/17/2008	IC	31.00	\$3,390.00	\$57.54
02/29/2008	HC	190.00	\$12,342.00	\$2,223.00
2008 Totals			\$34,502.68	\$2,941.09

3. Rhonda Freeman

1. Rhonda admitted that she and John had begun having an affair after the separation of John and Dianna. (Record page 246 and 247, lines 29-1)

2. Rhonda admitted that she had met John at the clinic when she worked there.(Record page 279, lines 12-15)

3. Rhonda admitted that John was a great doctor.

4. Rhonda admitted that she had lost her job at the clinic due to her relationship with John.

5. Rhonda admitted that she had lost her car due to losing her job and her mother has had to buy her a car which was a 1999 car valued at \$5,000.00. (Record page 289, lines 23-28)

6. Rhonda admitted that she has had to cash in her 401-k.(Record page 290, lines 7-10)

7. Rhonda admitted that she stayed some at John's, but John did not have enough money to pay his bills much less Rhonda's. (Record page 292, lines 7-15)

4. Lynette Runnells

1. Lynette testified that she worked at the clinic and that John's income for his financial declaration was calculated not by her but appeared to be an average of his income for the past six months.

5. John Chmelicek.

1. John testified that he loved his children and desired a relationship with them. He admitted that the children have not had anything to do with him and he has tried to talk with both Dianna and the children about the relationship.

2. John admitted that he and Dianna have had marital problems beginning when he discovered her in a compromising situation with another woman. John admitted that he has had a post separation affair with Rhonda.

3. John admitted that the parties basically have no assets except for the IRA with fidelity and the household furnishings.

4. John expressed concern over the parties' debts and even monthly debts.

5. John asked the Court to make a fair division of the parties assets and debts.

SUMMARY OF THE ARGUMENT

The Court was in error for the following reasons:

1. That the Court has placed an obligation on John that is impossible for him to perform.

The Court has found that John has the ability to generate a net income per month of \$20,000.00, and out of that income, has ordered him to pay \$10,400.00, as support, plus all debts of the parties, plus attorney's fees, plus lump sum alimony; thus leaving John without the means to live. John was not, at the time of trial, and is not presently, earning even \$20,000.00 per month. Thus, John has no way to satisfy this Court's orders.

2. 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.

The Order of lump sum alimony is totally improper as John was ordered to pay lump sum alimony because of a distribution he made from his 401-k as per the Court's order. The order of periodic alimony further awarded Dianna for not working and living way above her means.

3. That the Court's division of property is unfair, not equitable, and contrary to the law in Ferguson v. Ferguson.

The Court did not even award John one-half of his 401-k and certainly did not award him one-half of assets, despite the fact that the assets were accumulated with his income and due to his working abilities.

4. That the Court's division of debts is unfair and not equitable.

The Court ordered John to pay 93 % of the parties debts and Diana 7%. This is grossly unfair and inequitable.

5. That the Court made specific findings that were against the overwhelming weight of the evidence.

Thus due to the Court's error, John appealed.

ARGUMENT

1. That the Court has placed an obligation on John that is impossible for him to perform.

This Honorable Court has stated that one can not be placed under an obligation that is impossible to perform. Rainwater v. Rainwater, 236 Miss. 412, 110 So.2d 608 (1959)

The Court found that John had an earning ability of \$240,000.00 per year, or \$20,000.00 per month. However, in the six months prior to trial John's income was averaged and was \$15,487.00, per month. John asserts that the finding that he is capable of earning \$220,000.00 per year is not proper. In order to continue to receive the income the Court found that he was making prior to trial John had to work far more than forty hours per week.

However, even taking the Court's finding of an income figure of \$20,000.00. per month, John is not able to pay the obligations the Court placed upon him. The Court has ordered John to pay the following:

1. Child support in the amount of \$4,400.00 a month;
2. Maintain his current life insurance policies of \$350,000.00 and name the children as joint beneficiaries so long as either of them are minors;
3. The marital home mortgage of \$481,000.00;
4. The Canadian Tax debt of \$221,000.00;
5. Paying Dianna \$9,500.00 for her half of the existing equity in the marital home; (Record page 401, line 8-13)

6. The \$150,000.00 debt to his father;
7. John's vehicle payment;
8. The credit card indebtedness of the parties totaling \$86,685.00;
9. Paying Dianna \$151,622.22, being one-half of the 401(k) funds with John paying 87.5% of any tax consequences;
10. Transferring to Dianna 3/4 of the sky miles for her and the children;
11. Paying Dianna lump sum alimony of \$61,965.47;
12. Paying Dianna periodic alimony of \$6,000.00 monthly;
13. Paying Dianna's attorney's fees in the amount of \$20,000.00;
14. Paying 87.5% of the colleges expenses of the children not covered by scholarships or other entitlements.

John is not able to meet his needs under the current obligations imposed upon him by the Judgment of Divorce. John is ordered to pay \$10,400.00 a month just in child support and periodic alimony. After you take that out of his monthly income, that leaves him with \$9,600.00. If you subtract the house note of \$3,616.00, his car note of \$875.00, the lump sum alimony of \$61,965.47 that he has to pay within three years, the \$20,000.00 award of attorneys fees, the \$500.00 tax lien to the IRS, and \$1,360.00 in credit card bills, John is left with \$972.18 a month. With this \$972.18 a month, John still has to pay for the college of the older child, he still has to eat, he has to pay the debts to his father, he has to pay utilities, and he still has to pay insurance. John deserves to be able to live a life where he can meet some of his needs and be able to enjoy the money that he has worked hard for.

In the case of Yelverton V. Yelverton, 2004-CT-01684-SCT (Miss. 2007), the Court found

that James Yelverton was capable of making \$12,000.00 a month after taxes, but the Court also determined that James's reasonable monthly expenses were \$6,429.00. As for Rhonda Yelverton, the chancellor determined that the necessary expenses for Rhonda and the children added up to \$6,000.00, and that Rhonda currently earned \$2,118.65 per month working part-time as a nurse. The chancellor concluded, however, that Rhonda was capable of working full-time, which would result in an increase in her monthly salary.

Thus, although recognizing that James had to spend \$6,429.00 per month on his expenses, the chancellor ordered James to pay Rhonda \$10,000.00 per month. This award would give Rhonda approximately \$12,118.65 a month, although her monthly expenses totaled only \$6,000.00, and would leave James with a negative balance of \$4,429.00 per month.

The Court found that "Such action by the chancellor leaves John destitute and in hopeless continuous contempt of court. Furthermore the award is not equitable and fair and is per se unreasonable." See Brooks v. Brooks, 652 So.2d 1113, 1124 (Miss. 1995).

In Brooks, the husband was required to pay the wife more per month than he earned. On appeal, this Court stated:

In order to achieve equitable and fair results incident to a divorce, awards of alimony and any division of property should be considered together by a chancellor. We have unequivocally stated that proposition, as follows:

All property division, lump sum or periodic alimony payment, and mutual obligations for child support should be considered together. In the final analysis, all awards should be considered together to determine that they are equitable and fair. 652 So.2d at 1124 (citing

Ferguson, 639 So.2d at 929). (Emphasis in original)

In another similar case, Hopton V. Hopton, 342 So.2d 1298 (Miss. 1977) the Chancellor required a man whose taxable income, in the years covered by the record, averaged about \$12,000.00 a year to pay \$8,400.00 a year for the support of his wife and child. The Court found that "It is not impossible for Mr. Hopton to make these payments, but we find it to be manifestly unjust. The chancellor must consider not only the reasonable needs of the wife but also the right of the husband "to lead as normal a life as reasonably possible with a decent standard of living." Nichols v. Nichols, 254 So.2d 726, 727 (Miss. 1971)."

John cannot lead as normal a life as reasonably possible with a decent standard of living with the debts that he has been assigned from the Judgment of Divorce. The Judgment of Divorce is manifestly unjust. It is not equitable and fair to John and is per se unreasonable. John is paying out more than he is taking in, and he eventually will be destitute and in hopeless continuous contempt of court under the current obligations imposed upon him by the Chancery Court.

2. 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.

The Court erred in awarding lump sum alimony along with periodic alimony that was not supported by substantial credible evidence and which was more than John Chmelicek could afford to pay.

In determining the proper amount of alimony, the Chancellor was manifestly in error in applying the Armstrong factors as listed below:

Armstrong v. Armstrong, 618 So.2d 1278, 1280 (Miss. 1993):

1. The income and expenses of the parties.

John's average income for the five years prior to filing the divorce is \$360,857.80. John's adjusted gross income for the year 2008 through the first trial date was \$34,502.68. John is a physician and has a good income. However his income does change and vary. John's gross income was averaged over the past six months before the Final Judgment and was \$15,487.00 per month. (Record page 326, line 21) As per the tax returns, Dianna's gross income for her photography business is \$31,480.00 per year (as per the 2006 income tax return) and thus \$2,623.33 per month. This is gross income and certainly she has expenses on that figure, but an examination of her expenses reveal the supplies at \$1,239.00 per year. The other expenses were items such as depreciation and car and truck expenses and landscaping (some of which are one time expenses). Dianna admitted that she only worked 15% of the time. If you were to calculate Dianna's gross income, if she worked the other 85% of the time, you arrive at \$17,488.89 per month, which Dianna could be earning now.

2. The health and earning capacities of the parties.

John is now suffering from the ill effects of overwork. He has been treated for fatigue, stress, anxiety and been advised to cut back on his work hours. He is no longer capable of working 90 hours per week. Dianna is healthy and capable of working more.

3. The needs of each party.

John has had an average gross income earning ability of \$360,857.80, a year working extended and long hours. John has a need to live. He certainly has expenses such as housing, food, and the debt this Court ordered him to pay. John was ordered to pay far more than his earning ability will allow irrespective of his needs. John cannot lead as normal a life as reasonably possible with a

decent standard of living with the debts that he has been assigned from the Judgment of Divorce. The Judgment of Divorce is manifestly unjust. It is not equitable and fair to John and is per se unreasonable.

4. The obligation and assets of each party.

The obligations and assets were distributed by the Chancellor as set out above. This area will be discussed later. But, the Court's order leaves John paying all of the obligations and receiving far less than one-half of the assets.

5. The length of the marriage.

It is admitted that it was a lengthy marriage.

6. The presence or absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide, child care.

While the children have not reached the age of majority - neither are in need of child care being 17 and 19 years of age.

7. The age of the parties.

The John is 47 and the Dianna is 49, both are still of an age where they can work and be gainfully employed.

8. The standard of living of the parties, both during the marriage and at the time of the support determination.

The parties lived beyond their means for some time. See Exhibit 29, which shows that prior to the separation the parties were spending far more than they made.

July of 2006 to August of 2006

Deposits

Checks

	+\$14,346.92	-\$37,827.78
August of 2006 to September of 2006		
	+\$45,998.86	-\$57,087.74
September of 2006 to October 2006		
	+\$13,796.94	-\$22,372.67
October of 2006 to November of 2006		
	+\$13,869.50	-\$20,828.07
November of 2006 to December 2006		
	+\$27,474.68	-\$22,088.89
December of 2006 to January of 2007		
	+\$42,325.84	-\$34,565.23
January of 2007 to February of 2007		
	+\$22,855.58	-\$37,691.33
February of 2007 to March of 2007		
	+\$24,931.49	\$28,077.84
March of 2007 to April of 2007		
	+\$16,679.33	-\$20,759.68
April of 2007 to May of 2007		
	+\$26,163.71	-421,763.50

Before the parties even separated they were not meeting their expenses and incurring too much debt. Unfortunately, if a family lives beyond their means for years it catches up with them at some

time. Both parties, John and Dianna, have to change their spending habits.

9. The tax consequences of the spousal support order.

10. Fault or misconduct.

The Chancery Court found that the John committed adultery and awarded Dianna a divorce. However, it is well established that a finding of adultery should not be used to punish a wrong doer.

Davis v. Davis, 638 So.2d 1288, (Miss. 1994)

11. Wasteful dissipation or assets by either party.

Dianna received a total of \$72,500.00 in support and payments from John from October, 2007, until March, 2008, (Record page 151, lines 10-23) in which she only made two payments on the marital home and did not make any payments on the outstanding debts; she left all that for John to pay. Unfortunately, after paying out \$10,000.00 per month and his reasonable living expenses, there was not enough money available to meet all the obligations placed on John by the marriage. Thus, John has had to borrow funds from his father.

12. Any other factor deemed by the court to be “just and equitable” in connection with the setting of spousal support.

The Court awarded Dianna’s attorneys fees in the amount of \$20,000.00, however, the Court stated in the Judgment for Divorce that Dianna was able to “charge some attorneys fees to credit cards included in debt provided above.” (Judgment of Divorce, Page 8, line 20) Thus, John had to pay twice for Dianna’s attorneys fees. This was manifestly erroneous and an abuse of discretion by the Chancellor.

In this case Diana has an earning ability and choose not to work full time. Instead of lump sum

and periodic alimony, John suggests that Dianna is entitled to and admittedly should receive some type of rehabilitative alimony.

In Lauro v. Lauro, 847 So. 2d 843 (Miss. 2003), the Mississippi Supreme Court concluded that: "Rehabilitative alimony is awarded to parties who have put their career on hold while taking care of the marital home. Rehabilitative alimony allows the party to get back into the working world in order to become self-sufficient. Therefore, rehabilitative alimony is not considered during equitable distribution." In this case, instead of periodic alimony, Diana should be entitled to rehabilitative alimony for a time period to get back into the working environment.

3. That the Court's division of property is unfair, not equitable, and contrary to the law in Ferguson v. Ferguson.

It is well established that a finding of adultery should not be used to punish a wrong doer. Davis v. Davis, 638 So.2d 1288 (Miss. 1994) The case of Lenoir v. Lenoir, 611 So.2d 200 (Miss. 1992), is a case where the Court awarded to the husband all three real properties acquired during the marriage, and the case was remanded for equal distribution of the properties or their value and the Court provided "Although this Court certainly does not condone June Lenoir's actions, equity demands that she receive her just share . . . (a)side from sheer punishment, there is no compelling reason not to partition all three marital properties. This Court is moving away from the harsh effects of punishment in domestic cases towards the just principles of fairness." *Id* at 204.

In this case, the parties were divorced upon the grounds of adultery. However, John should still receive equity and his "fair share" of the marital property as per Lenoir.

The parties had the following property:

1. A home that is listed for sale with little or no equity and any equity realized would be taken by the Internal Revenue Service as they have a lien placed on the property. John has had to pay not only the mortgage note on the home but the taxes and insurance. The Court assessed a value on the marital home at \$19,000.00, which was totally improper.

2. The following personal property as listed on Dianna Chmelicek's financial statement Exhibit 2.

Exhibit 2 states: (B. Motor Vehicles)

Dianna's Car

Registered in the name of John Chmelicek

Year: 2002

Model: Mercedes S430

Who paid cost: John Chmelicek

How paid cost: Monthly notes

Mileage: 50,000

Value: \$30,375.00

Loan Balance: \$28,004.00

Equity: \$2,371.00

Krissy's Car

Registered in the name of John Chmelicek

Year: 2006

Model: Jeep Liberty

Who paid cost: John Chmelicek

How paid cost: Monthly notes

Mileage: 15,000

Value: \$20,252.00

Loan Balance: \$26,653.00

Equity: \$5,128.00

Katie's Car

Registered in the name of John Chmelick

Year: 2006

Model: Jeep Wrangler

Who paid: John Chmelick

How cost paid: Monthly notes
Mileage: 15,000
Value: \$26,275.00
Loan Balance: \$19,262.00
Equity: \$7,013.00

Exhibit 2 states:(C. Other Personal Property)

Household Furnishings	\$23,800.00
Electronics	\$6,000.00
Collectibles	\$8,000.00
Exercise	\$2,000.00
Bikes/Sports	\$2,000.00
Lawn Equipment	\$6,500.00
Tools	\$3,000.00
Outdoor Furniture	\$6,800.00
China Crystal Silver	\$5,200.00
Camera-Family	\$16,459.00
Jewelry	\$30,275.00
Total	\$110,034.00

Note that this personal property was insured for \$417,400.00, (excluding her jewelry) and Dianna lists it at \$110,034.00. (Including her jewelry) The only other asset of the parties is the IRA, which was valued at \$303,244.43. This is a total property value of \$413,78.43, if you take Dianna's figures, or 720,644.43, if you take the insured figures. John received his masculine ring, his bicycle, his clothes, one TV set, and his computer from the personal property. Dianna took from the home the dining room set, living room sets, TV's, furniture, living room couches, living room rugs, living room tables, den couches, den chairs, den tables, pictures on the walls, decorations of all sorts, the pot hanger over the stove in the kitchen, five bedroom sets, all the dining room furniture, dinettes, all the dishes, porcelain, and the tables. (Record page 346-348) The distribution of personal property was

grossly unfair with the bulk of the property being taken by Dianna, leaving John with practically nothing.

Regarding the equitable distribution of marital property, the Court in Ferguson outlined the following factors for consideration: Ferguson v. Ferguson, 639 So. 2d 921 (Miss.1994).

1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:(a) direct or indirect economic contribution; (b) contribution to stability and harmony of the marital relationship measured by quality, quantity of time spent on family duties and duration of marriage; and (c) contribution to the education, training bearing on the earning capacity of spouse accumulating assets.

In the case at hand, Dianna did not make a substantial contribution to the accumulation of the parties properties. She had consistently failed to get a job when asked to by John, even though she was and is now capable of working. Dianna currently works as a photographer, but chooses not to work full time or be paid adequately for the work she does perform as a photographer. This factor favors John.

2. Degree to which each spouse has expended, withdrawn, or otherwise disposed of marital assets and any prior distribution of assets.

In the case at hand, Dianna had accumulated more of the debt and disposed of more of the assets of the parties. Dianna incurred an additional \$2,200.00., per month in expenses by moving out of the marital house and into a rental house that her brother owned. This was against court order and increased the expenses of the parties by \$2,200.00 each month. Dianna did not seek full time employment when she moved to the rental home and she did not contribute to the parties debt

reduction even though she received the bulk of the parties income.

The testimony proved that John told Dianna many times during the marriage that they had to stop spending and increasing their debt load to no avail. (Record pages 307-308, lines 22-13)

3. Market value and emotional value of assets subject to distribution.

Dianna either undervalued the personal property which she has in her custody and control where the court is concerned, or overvalued the same property where the insurance is concerned - either way it is fraud on the part of Dianna in an attempt to better the position which she was asserting at the time.

4. Value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse.

One of the only items of property that John requested was a ring he had prior to the marriage. This ring is not valued very high but was sentimental to John.

5. Tax and other economic consequences, and contractual or legal consequences to third parties, or the proposed distribution.

The parties have a tax debt which they incurred while living in Canada, which has been assigned to the IRS for approximately \$337,910.00. This debt was entered into by the parties and has risen to this amount by the living and spending of both parties.

In Irby V. Estate of Irby, 2007-CA-00689-SCT (Miss. 4-23-2009), the trial judge found that the federal tax lien that had been assessed against a business owned by Henry Irby to be a joint debt of the marital parties. Even though Henry owned the business, and was primarily responsible for incurring

the lien, the trial court determined that both parties nonetheless enjoyed the fruits of this business and that the assets of both parties would have been reduced equally, had the taxes been paid timely. The Supreme Court of Mississippi stated in that case that "Under Mississippi law, tax liens and the consequences thereof to the marital estate fall under the Ferguson factors. Ferguson, 639 So. 2d at 928. As was found by the trial court, while Sandra (Irby) may not knowingly have been the cause of incurring the tax lien itself, she nonetheless bore some responsibility as far as the marital estate was Concerned." Irby at 234 ¶ 31 Therefore, each party should share in the re-payment of this marital debt to the IRS because it was a marital choice by both parties together to invest their money into this property to benefit from the supposed tax reliefs.

6. Extent to which property division may be utilized to eliminate periodic payments and other potential sources of friction.

In Lauro, the Court found that "Helen was granted permanent periodic alimony; therefore, case law mandates that her award of alimony be considered with the equitable distribution of the marital property." *Id*, 847 So.2d at 849 (¶ 15) John was ordered to pay Dianna periodic alimony in the amount of \$6,000.00 a month. However, Dianna still received a windfall in the property division where she received almost all of the property whereas John received all of the debt, on top of his obligation to pay periodic alimony. The Chancellor's equitable division of property was not equitable and is unjust.

7. Needs of the parties.

John is paying so much in debts, child support, and alimony that he is going deeper into debt everyday. At the time of trial, he was already "crashing and burning." (Record page 357, line 3) He

needs relief from the Judgment of Divorce so that he may lead as normal a life as reasonably possible with a decent standard of living.

8. Any other factor which in equity should be considered.

John did not even receive one-half of the 401-k because he had to pay Diana the \$9,500.00, for her one-half equity (which did not exist) and \$61,965.47 as lump sum alimony which was one-half of the 401-k withdrawn by John. John had authority to withdraw the 401-k as per the Order of the Court entered on October 11, 2007, which provided “ The Court recognizes that there is much more debt than there is a cash flow to satisfy the debt and therefore, does allow John Chmelicek to access the only available line of credit that the parties have, that being his retirement account.” Now the Court is punishing John for complying with its Court’s Order. Diana received the benefit of this withdrawal in the payment of marital debts and now she receives it again in the benefit of this alimony.

4. That the Court’s division of debts is unfair and not equitable.

The Court found that the parties total debt was: \$1,054,296.00, “a figure that far exceeds the assets of the parties”(Judgment of Divorce, p. 6, lines 17-18) One half of said debt is \$527,148.00. Dianna’s equitable share of the parties \$1,054,296.00 debt, as found by the Court, was \$73,919.00; the loan balances of her vehicle and the children’s vehicles. It is grossly unfair for John to be saddled with ninety-three percent of the marital debt.

5. That the Court made specific findings that were against the overwhelming weight of the evidence.

The Court’s order provided that The Judgement had reference to trips that were not contained in the record.

The Court found that there was equity in the home, however, there is not equity in the home as the Internal Revenue Service has a lien on the home. (See Exhibit 14) This award of equity is making John pay the Internal Revenue Service debt and equity in the home which is double payment.

The Judgement also provided that John received quarterly bonuses and the testimony reflected that the bonuses were paid two times per year.(Record page 183, lines 8-11)

These specific findings that were not contained in the record amount to manifest error by the Court. This matter should be reversed and remanded so that these specific findings be taken out of the record and that the Chancellor render his decision consistent with this Courts Order.

CONCLUSION

John prays that this Court read the record and find that the Court placed an obligation on him that is impossible for him to perform; that the Court's award of alimony, both lump sum and periodic, is not fair to John and is contrary to the factors in Armstrong v. Armstrong; that the Court's division of property is unfair and not equitable and contrary to the law in Ferguson v. Ferguson; that the Court's division of debts is unfair and not equitable; and that the Court made specific findings that were against the overwhelming weight of the evidence.

John requests that this Court reverse and render this case and place it's order commensurate with the proof and reduce his obligations and review the property award.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN CHMELICEK

APPELLANT

VERSUS

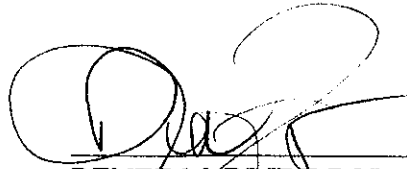
CASE NO. 2008-CA-01736

DIANNA CHMELICEK

APPELLEE

CERTIFICATE OF SERVICE

This is to certify that I, Renee McBride Porter, on the 13th day of July, 2009, furnished a true and correct copy of the above and foregoing **BRIEF OF APPELLANT** to the Honorable Judge H.C. Thomas, Jr., Chancellor, 15th District, P.O. Box 807, Hattiesburg, Mississippi 39403, 10th District, by placing same in the United States Mail, postage prepaid, and mailing it to his usual office address of Post Office Box 1664, Hattiesburg, Mississippi 39403, and to the Honorable Samuel Farris, 607 Corinne St Ste A2, Hattiesburg, Mississippi 39401, Attorney for Appellee.



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