

COPY

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-01838

HELEN ROGILLIO

APPELLANT

VS

DAVID ROGILLIO

APPELLEE

On Appeal from Warren County Chancery Court
Cause Number 2007-107 GN

APPELLEE'S REPLY BRIEF

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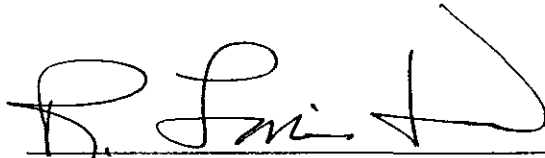
DAVID ROGILLIO

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record 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 the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Helen Rogillio, Appellant
2. David Rogillio, Appellee
3. Honorable Marie Wilson, Warren County Chancellor
4. Mark W. Prewitt, Esq.
5. R. Louis Field, Esq.

A handwritten signature in black ink, appearing to read 'R. Louis Field', is written over a horizontal line.

R. LOUIS FIELD

Attorney for Appellee, David Rogillio

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STATEMENT OF FACTS

David and Helen were married in September 1997. They have one child, Morgan, who is age six. (T. 6, 7). They separated in March 2007 when David and Morgan left their home in Highland subdivision and moved to the residence of David's parents. For at least two (2) years prior to the separation, David and Helen occupied separate bedrooms. David finally vacated the home because of Helen's bizarre behavior and admitted cocaine use. (T. 7,8).

For a number of years prior to the separation, David was the primary caregiver for Morgan. (T. 11). Although Helen denied use of illicit drugs and alcohol, admitted into evidence was an Order by the Chancery Court of Hinds County dated October 2002, documenting that she institutionalized for treatment of drug and alcohol abuse. (Appellee's R.E.1). In March 2007 David filed a petition in the Warren County Youth Court seeking emergency relief including the temporary custody of Morgan and supervised visitation for Helen. The Petition alleged that Helen was abusing prescription drugs and using illicit drugs (T. 105). An order was entered on April 2, 2007, by the Warren County Youth Court giving David temporary custody of Morgan and restricting Helen's visitation. (Appellee's R.E. 2). Also introduced into evidence were pictures of numerous empty bottles and bags of Crown Royal liquor, the ownership of which Helen admitted. (Appellee's R.E. 3). Nevertheless, she denied using alcohol and asserted that she was collecting the bottles for use in a "glass garden". A garden, however, that was never planted. (T. 89,100). Other testimony offered by Helen concerning alleged criminal activity was equivocal, evasive and lacking in credibility (T. 107-108).

Helen is a registered nurse who worked at River Region Hospital in its neo-natal facility for several years. She testified that she worked until she was laid off by the hospital. (T. 109). Helen

presently receives Social Security Disability benefits and claims that she remains disabled. However, she appeared at this two (2) day hearing in Greenville without obvious difficulty or discomfort. She claimed although it was not readily apparent, that she suffered from severe back pain, hand pain, arm pain and leg pain, and that she was experiencing a typical day pain wise. She testified that she was able to clean her house and in fact that she had cleaned the pool and her jaccuzi. (T. 98,99). Part of the personal property jointly owned by David and Helen was divided by agreement. Helen sought and received possession and ownership of an off road ATV 4-wheeler and scuba diving equipment. Helen volunteered that she enjoyed and frequently rode the vehicle through woods, in rough terrain, in creeks, over sand bars and through ravines. Likewise, she stated that she enjoyed scuba diving and was physically able to undertake it. (T 111, 112). On re-direct, however, and in response to a leading question by her counsel, she changed her testimony, stating that she was unable to scuba dive (T. 114).

David is 47 years of age, in good health, and has worked for the United States Corps of Engineers for about ten (10) years. (T. 6). His adjusted gross income is about \$4,200.00 per month and he has monthly living expenses which match that income. (Appellee's R.E. 4). All marital assets which were equitably divided by the court were acquired through contributions made almost wholly by David. (Appellant's R.E. 7). There was an equal division by the court of the assets. The debt was principally allocated to David. (Appellant's R.E. 10-12). Helen agreed and stipulated to the court that the possession and ownership of the marital residence should be awarded to David. (Appellant's R.E. 5). She also readily conceded that the primary care of the minor child, Morgan, should be awarded to David. (Appellant's R.E. 2). Helen receives \$777.00 per month from the Social Security Administration in disability benefits. (T. 7). Her medical expenses are covered by

Medicare Part A, which pays for hospitalization, and Medicare Part B, which pays for physician fees.

Her medication expenses amount to about \$40.00 per month. (T. 97, 98)

ARGUMENT

Statement of the issue:

Whether the chancellor erred in awarding lump sum alimony, rather than permanent alimony, to Helen Rogillio.

Helen complains that the Chancellor should have awarded her permanent, periodic alimony rather than alimony in lump sum. She relies principally on the Supreme Court's decision in *Armstrong v. Armstrong*, 618 So.2d 1278 (Miss. 1993) as the basis for an award of alimony, whether permanent alimony, lump sum alimony or both. Seeking permanent periodic alimony she relies principally on the Court of Appeals decision in *Driste v. Driste*, 738 So.2d 763 (Miss. 1998), pointing out in her brief that while the *Armstrong* factors help determine whether or not alimony should be granted, they do not instruct us on what type of alimony is best. That determination is dependent upon the facts of a given case. And finally, she relies principally on the Supreme Court decision in *Monroe v. Monroe*, 612 So.2d 353 (Miss. 1992) in emphasizing the disparity of income between her and David as the most compelling factor in awarding permanent alimony.

The chancellor in this case went through an exhaustive and thorough exercise of determining and dividing marital assets. Utilizing the guidelines set forth in *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994), she systematically allocated assets and debt between David and Helen. The "equitable" division of assets was in fact an equal division of assets. The "equitable" division of debt, placed almost all of the marital debt on David. Notwithstanding this reality, the chancellor in her discretion and in deference to Helen, declared that Helen was left with an equitable deficit and

was therefore entitled to an award of lump sum alimony. (Appellant's R.E. 6-12). Guided by *Armstrong* factors and her wisdom and discretion the chancellor satisfied that deficit by making cash awards to Helen. She ordered David to pay to Helen \$2,038.61 in additional marital assets, \$4,807.00 for credit card debt that she had incurred, and \$15,000.00 in lump sum alimony. (Appellant's R.E. 1). The chancellor's decision regarding alimony was sound, reasonable and equitable. She properly applied the *Armstrong* guidelines to the facts in this case.

The *Armstrong* alimony guidelines are static and universal. The facts and circumstances of individual cases are dynamic and unique and the facts and circumstances of this case differ greatly from the facts and circumstances in *Armstrong*, *Driste* and *Monroe*. The relevant facts in *Armstrong* were these. Stanley and Nina Armstrong were divorced after being married for 21 years. Nina was granted a divorce from Stanley on grounds of adultery. Nina was awarded the custody of the two (2) minor children. There was great disparity between Stanley's income and Nina's income. The lower court ordered Stanley to pay child support and Nina was awarded lump sum alimony. The Supreme Court reversed the chancellor's award of lump sum alimony and converted it to an award of permanent periodic alimony.

The relevant facts in *Driste* were these. Jenny and Michael Driste were married for almost ten (10) years. Grounds for divorce were irreconcilable differences. At the time of divorce Michael was earning over \$96,000.00 per year. Jenny was working part-time making about \$500.00 per month. The couple had no children. Jenny attempted to offer at trial evidence of fault as a factor for determining alimony. Since this was a no-fault divorce, the chancellor chose not to allow any proof of fault. Jenny was awarded lump sum alimony of \$750.00 per month for eighteen months. On appeal, this court reversed and remanded to allow evidence of fault as a factor in determining the

character and amount of alimony.

The relevant facts in *Monroe* were these. Rebecca and James Monroe were married for 22 years. While James attended undergraduate school Rebecca supported the couple on her teacher's salary. Rebecca made a 90-mile commute each day to work for three (3) years while Jim was enrolled as a full-time student. Later, Jim was accepted into medical school. Rebecca got a teaching position at a school some 25 miles from where they lived. Jim attended medical school for five (5) years. While Jim was enrolled in medical school, Rebecca worked three (3) jobs to support the family. Rebecca's work was terminated when she became pregnant with the first of two children she bore to Jim. During the time Jim was in medical school, Rebecca withdrew \$5,000.00 which she had saved and set aside for her retirement. The money was deposited into a joint savings account which covered overdrafts written on their joint checking account all while Jim attended medical school. This money was completely depleted. Several years prior to their divorce, Rebecca was hospitalized for treatment of emotional and psychological problems. She incurred substantial medical bills. While she was hospitalized, Jim coerced Rebecca into conveying to him her interest in some jointly owned property. Jim sold the property, generously paid Rebecca's medical bills, and kept the rest of the money for himself. Within days of Rebecca signing the deed, Jim asked for a divorce. On the day that Rebecca was released from the hospital, Jim informed her that he wanted a divorce and that she need not return to their home. He left all of her clothes in the hospital waiting room. Rebecca was denied access by Jim to their savings account, checking account and credit cards, which he had placed in his name only. Upon release from the hospital, Rebecca moved to Brandon and lived with her mother. At the time of the divorce, Rebecca was working at Dominoes Pizza earning \$400.00 per month. Jim was earning about \$91,000.00 annually. The lower court

granted Rebecca a divorce on grounds of desertion and settled Jim's account with her for \$12,000.00 in lump sum alimony. The case was reversed and remanded for a proper determination and award of periodic alimony for Rebecca's most deserved support. Lower court error in each of these cases was obvious and egregious.

The relevant facts here are that David and Helen were married for ten (10) years, the last two (2) of which were spent in separate bedrooms. David is gainfully employed and makes a good salary, although after payment of regular recurring monthly bills, he has no disposal income. Helen claims she is disabled and receives \$777.00 per month from Social Security. Other Social Security benefits include medical coverage through Medicare Part A and B. Helen is a registered nurse but claims she is unable to work. However, her appearance in court, her ability to communicate, her ability to drive, to clean house, to recreate by scuba diving and cavorting over hill and dale on an ATV belie her claim of physical incapacity. David has custody of their 6 year old son and was the child's primary emotional and physical caregiver for several years prior to separation. Though she denies at every turn, this marriage ended because of Helen's malevolence. She was institutionalized for either drug or alcohol abuse, but she denies the obvious. She lost the custody of her child because of abuse of drugs, but she denies the obvious. There is circumstantial evidence of her drinking at home, which she denies. She was charged with acts of criminal harassment, assault and shoplifting, but characteristically denies all wrongdoing. Credibility of a witness is always relevant and important. Remarkably, the record is absolutely silent about David's culpability in the marriage break up. There is not one sentence, phrase, word, inference or allusion that associates him with the cause of divorce.

Alimony and equitable distribution are distinct concepts. But together, they command the

entire field of financial settlement of divorce. Therefore, where one expands, the other must recede. *Lauro v. Lauor*, 847 So.2d 843 (Miss. 2003). The decision by chancellor in matters such as this is afforded great deference. Alimony awards are within the sound discretion of the chancellor and will not be disturbed or overturned unless the decision constitutes manifest error, or the chancellor abused his discretion. *Voda v. Voda*, 731 So.2d 1152 (Miss. 1999). This chancellor did neither.

Motion For Attorney's Fees

Appellant cites no authority for an award of attorney's fees at the appellate level and this motion should be denied. *Ruff v. Estate of Ruff*, 989 So.2d 366, 372, (¶ 23) (Miss. 2008).

CONCLUSION

The chancellor's distribution of marital assets was fair and equitable. The award of lump sum alimony was within her sound discretion. The decision should be affirmed and Appellant's motion for attorney's fees denied.

Respectfully submitted,

DAVID ROGILLIO, Appellee

BY:



R. Louis Field, MSB# [REDACTED]
Counsel for Appellee


CERTIFICATE OF SERVICE

I, R. Louis Field, do hereby certify that I have this date sent by regular U.S. Mail, postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellee to:

Chancellor Marie Wilson
P. O. Box 1762
Greenville, MS 39702-1762

Mark Prewitt, Esq.
P. O. Box 750
Vicksburg, MS 39181

SO CERTIFIED this the 2nd day of September, 2009.



R. LOUIS FIELD