

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-01838

HELEN ROGILLIO

APPELLANT

v.

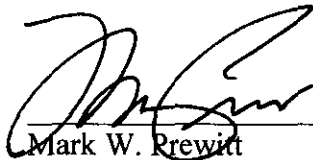
DAVID ROGILLIO

APPELLEE

**CERTIFICATE OF INTERESTED PERSONS**

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, Esquire
5. R. Louis Field, Esquire



Mark W. Prewitt

Attorney for Appellant, Helen Rogillio

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### **STATEMENT OF THE ISSUE**

- I. Whether the Chancellor committed error in not granting Helen Rogillio permanent periodic alimony.

### STATEMENT OF THE CASE

On March 12, 2007, David Rogillio ("David") filed a complaint for divorce against his wife of approximately ten years, Helen Rogillio ("Helen"), in the Chancery Court of Warren County. (C.P. 5). After David subsequently filed an amended complaint, Helen filed an answer and cross-complaint. (C.P. 12; 16). However, prior to this matter being heard before the Chancellor, the parties filed a Joint Motion to Withdraw Contested Allegations, and agreed to proceed on the grounds of irreconcilable differences. (C.P. 47-48). This motion was granted by the Chancellor. (C.P. 49).

This matter came on for hearing before the Chancellor on July 10, 2008. After due consideration, the Chancellor issued the Final Decree, wherein Helen and David were granted a divorce on the grounds of irreconcilable differences and further,

a) David was awarded sole use, possession and ownership of the marital home; b) Helen was awarded sole use, possession and ownership of a mobile home; d) David was charged with the debts of the first and second mortgages on the home, the Thrift Savings Plan loan, the Mutual credit card, and the Servpro construction lien; e) David was awarded the assets accumulated during the marriage through the Thrift Savings Plan, the Public Employment Retirees System retirement account, and the checking and savings accounts; f) Helen was awarded the sum of \$2,038.61 through equitable distribution of assets; g) David was ordered to pay unto Helen the sum of \$4,807.00 for debt accumulated on her credit card; h) David was ordered to pay unto Helen lump sum alimony in the amount of \$15,000.00; i) David was ordered to reimburse Helen for her attorney fees and to pay all court costs.

(C.P. 76-77; R.E. 19-20).

Additionally, the parties agreed David would have physical custody of the couple's minor child, Morgan, and that Helen would have visitation rights. (C.P. 75-76; R.E. 18-19).

## STATEMENT OF FACTS

David and Helen were married on September 18, 1997. This union produced one child, Morgan Anthony Rogillio, born October 21, 2001. (C.P. 5).<sup>1</sup> David left the marital home on approximately March 9, 2007, and he and Morgan have resided with David's father and step-mother since that time. (C.P. 60). Helen continued to reside in the marital home while David paid the monthly mortgage, but did not make any other contribution toward utilities or other household bills. (C.P. 60; T. 36).

Helen is approximately forty-four years old and was formerly employed as a registered nurse. (T. 87). However, Helen had to leave her job as a nurse in 1998 because she suffers from neurofibromatosis, which is a rare genetic illness that causes Helen constant pain, and has claimed the lives of at least two of her immediate family members. (T. 33; 81; 86-87). Helen was diagnosed with this illness at the age of twenty-one and David was aware of this illness when he married her. (T. 80). Over the course of the marriage, Helen's disease necessitated over ten surgeries for the removal of tumors from various parts of her body. (T. 81-82). Helen testified that at the time of trial, she suffered from a tumor in her back, a tumor in her left abdomen and a tumor in the trigeminal nerve of her brain. (T. 81-82). Additionally, Helen testified that she takes two prescription medications daily for pain. (T. 81).

Due to her illness, Helen is not able to work. Helen receives \$777.00 a month in social security disability benefits, which she contributed to the couple's joint account during the course of the marriage. (T. 85; R.E. 23). This check is presently Helen's only source of income.

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<sup>1</sup> David has two children from a previous marriage, one of whom is a minor child for whom he still provides support.

In contrast to Helen, David is in good health and has a steady and secure job as a mechanical engineer for the Army Corps of Engineers in Vicksburg, where his salary is approximately \$83,372.00 a year. (C.P. 30). David has been employed with the Corps of Engineers for over ten years, and through his employment, David is provided with a retirement plan, as well as health insurance. (C.P. 20-21; 39; 61). Helen is covered under David's health insurance plan, and it has provided substantial benefit through the course of her surgeries and covers her medications with the exception of the co-pay. (T. 40). Because of her pre-existing illness, Helen herself cannot obtain private insurance. (T. 82). Without the coverage through David's employment, Helen's illness would be covered by Medicaid and she would be responsible for paying for her medications using her \$777.00 monthly income. (C.P. 61; T. 62).

Additionally as a result of her illness, Helen conceded it was in Morgan's best interest that David have physical custody of the child and that she have visitation rights. (C.P. 47; T. 57). Helen receives \$436.00 a month in social security benefits for the care of Morgan. (C.P. 61). However, as David has physical custody of Morgan, David receives this check, and pursuant to the Final Decree, David will continue to receive this check as child support. (C.P. 76; T. 85; R.E. 19).

Helen further asserted it was in Morgan's best interest to move back into the marital home with David. Helen testified that she will move to a mobile home that she owned prior to the marriage and rented out during the course of the marriage. (T. 57). The mobile home has fallen into uninhabitable shape and according to a licensed contractor, will require an estimated \$7,725.00 worth of repairs. (C.P. 62; T. 77; Def. Ex. 5). Helen pays \$420.00 a month for the mobile home and insurance. (T. 80). Helen also

pays \$150.00 rent for space on a mobile home lot and because of her dire financial condition, she has fallen sixteen months behind on this rent. (T. 78). Helen testified she has inquired about apartment rental in Vicksburg, but because of her sparse income, cannot afford the rent. (T. 78-79). Helen also stated she cannot afford moving expenses or deposits for utilities, but that she is still willing to move because it is her belief that Morgan should live in the marital home. (T. 79).

As shown by the facts supra, the gross disparity between David's and Helen's current lifestyles and resources necessitates that Helen receive permanent periodic alimony. See *Monroe v. Monroe*, 612 So.2d 353, 357 (Miss. 1992).

#### **SUMMARY OF THE ARGUMENT**

The Mississippi Supreme Court has stated, "Our scope of review in domestic relations matters is limited under the familiar rule that this Court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard." *Pearson v. Pearson*, 761 So.2d 157, 162 (Miss. 2000) (citations omitted).

In the case sub judice, the Chancellor was faced with two parties living by vastly different means. David is in good health; will reside in the marital home with Morgan; and has steady employment which produces a substantial income, health insurance and a retirement plan. (R.E. 21). Helen is in poor health which leaves her unable to work; will now have to become substantially reliant on her \$777.00 a month income; will now have to become reliant on the Medicaid system, while also paying for her prescriptions; and has been relegated to living in a mobile home which is in need of thousands of dollars of repairs. (R.E. 23; Def. Ex. 5).



In the Final Decree, the Chancellor found that “[i]n this case, the marital assets, after equitable division and after applying the property agreements between the parties and in light of the parties’ non-marital assets, leave Helen, if not with a significant numerical deficit, certainly an equitable deficit.” (C.P. 69; R.E. 12). This finding by the chancellor warranted consideration of an award of alimony.

The Chancellor properly utilized the factors for determining a reasonable award of alimony as outlined by the Court in *Hemsley v. Hemsley*, 639 So.2d 909, 912 (Miss. 1994) and *Armstrong v. Armstrong*, 618 So.2d 1278, 1280 (Miss. 1993). After an analysis of the Armstrong factors, the Chancellor found Helen should be entitled to a lump sum alimony payment. (C.P. 69-72; R.E. 12-15). However, the Chancellor’s analysis actually shows that the majority of the *Armstrong* factors favored Helen’s award of permanent periodic alimony, rather than disfavored.<sup>2</sup> A review of the analysis by the Chancellor will show that she was traveling toward the award of permanent periodic alimony, yet without explanation, turned off at lump sum alimony with no mention of award of permanent periodic alimony. The disproportionality in income, earning capacity and standard of living between Helen and David lead Helen to respectfully submit that the Chancellor erred in not awarding her permanent periodic alimony.

The Court has held, “Lump sum alimony is a final settlement between husband and wife and may not be changed or modified by either party, absent fraud.” *Armstrong*, 618 So.2d at 1281 (citations omitted). Helen asserts that the facts of the case sub judice

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<sup>2</sup> While Helen agrees the Chancellor properly utilized the factors set forth in *Armstrong v. Armstrong*, 618 So.2d 1278, 1280 (Miss. 1993). Helen does not concede and respectfully disagrees with the factors that the Chancellor found to disfavor alimony and those factors which neither favored nor disfavored alimony.

also warrant an award of permanent periodic alimony that anticipates any future need.

The facts are analogous to those in *Driste v. Driste*, wherein the Court of Appeals stated,

Applying the *Armstrong* factors for determining alimony, we are especially concerned about the great disparity in income and earning capacity of the parties, the standard of living and resulting expenses that Mrs. Driste had acquired, and the general equity owed to both parties in a divorce. *Armstrong*, 618 So.2d at 1280. Considering all these factors, the chancellor's award of \$20,000 in lump sum alimony, \$750 for 18 months in rehabilitative alimony, and no periodic alimony is grossly inadequate. Jeanne Driste's total alimony award comes to only \$33,500, paid over 22 months. During that period Mr. Driste is projected to have earned a gross income of close to \$200,000. That income will continue well past 22 months, while the contribution to Mrs. Driste ends. The total of \$33,500 in payments is the equivalent of providing only \$750 per month (the rehabilitative award that ends in 18 months) for less than four years, a period during which Mr. Driste would have earned close to \$400,000. We find this inadequate substitution for meaningful support of Mrs. Driste and reverse all the alimony determinations for further proceedings.

*Driste v. Driste*, 738 So.2d 763, 768 (Miss. Ct. App.1998).

Equity demands that Helen be entitled to permanent periodic alimony which would aid her in becoming remotely close to any sort of financial security, and takes into account her inability to become gainfully employed due to her debilitating illness.

#### STANDARD OF REVIEW

“When reviewing a decision of a chancellor, this Court applies a limited abuse of discretion standard of review. This Court will not disturb the findings of a chancellor ‘unless the chancellor was manifestly wrong, clearly erroneous, or applied the wrong legal standard.’” *Mabus v. Mabus* 890 So.2d 806, 810 (Miss. 2003) (internal citations omitted). “[T]his Court will accept the chancellor's findings of fact as long as the evidence in the record reasonably supports those findings.” *Norton v. Norton*, 742 So.2d 126, 128 (Miss. 1999) (quoting *In re Estate of Taylor v. Thompson*, 609 So.2d 390, 393 (Miss. 1992)).

## ARGUMENT

### **I. Whether the Chancellor erred in awarding lump sum alimony, rather than permanent periodic alimony, to Helen Rogillio.**

Helen is before the Court today asserting that while the Chancellor properly addressed each factor as required by the Court in *Armstrong*, 618 So.2d 1278 at 1280, the conclusion of the Chancellor does not comport with her analysis. The Chancellor's analysis of each factor supports an award of *permanent periodic* alimony. However, the Chancellor found Helen was entitled only to *lump sum* alimony. (C.P. 69-72; R.E. 12-15). The Court of Appeals has ruled 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 optimal. That determination is dependent on the facts of a given case." *Driste*, 738 So.2d at 765. Helen contends that based on the facts of the case sub judice, the Chancellor committed clear error in not awarding permanent periodic alimony.

Helen's financial resources pale in comparison to that of David, and this was recognized by the Chancellor in the Final Decree, wherein she stated,

David earns ten times as much income as Helen and his earning capacity has remained steady; it is expected to remain unchanged in the future. Helen's earning capacity has been diminished due to her illness, thus, increasing her need for financial support. Since Helen's diagnosis of neurofibromatosis, she has been unable to work; the likelihood that she will obtain gainful employment in the future is very slim.

(C.P. 66; R.E. 9).

The Court addressed a similar situation in *Monroe v. Monroe*. The Court found the Chancellor abused his discretion in failing to award permanent periodic alimony, holding,

The most significant factor is the disparity between Rebecca's and Jim's income as well as their earning capacity. Jim is in good health and

currently earning over \$90,000 a year practicing medicine. Dr. Monroe's earning capacity appears steady, with a very good possibility of increasing over time. . . . Rebecca is currently earning \$400 a month delivering pizzas for Domino's, and her prospects of improvement in her earning capacity is around \$23,000 at best, being employed as a public school teacher. Rebecca estimates her monthly living expenses at \$2,305, while Dr. Monroe lists his at around \$2,750. Given Dr. Monroe's significant income, he should have no problem contributing monthly support payments to Rebecca, even though he is responsible for raising their two children.

*Monroe*, 612 So.2d 353 at 357. Additionally, in *Gable v. Gable*, the Court of Appeals upheld an award of permanent periodic alimony where the wife's income was "substantially less" than that of her husband and that this disparity would "affect the quality of life" of the wife when compared to the quality of life of her husband. *Gable v. Gable*, 846 So.2d 296, 300-01 (Miss. Ct. App. 2003).

Helen is mindful that David was charged with some amount of debt. However, David has the capacity to earn a steady paycheck which contributes not only to the repayment of the debt, but to financial security. Additionally, David has a responsibility to Helen, who because of her disability, has been reduced to living on \$777.00 a month in a dilapidated mobile home. In *Curtis v. Curtis*, the Court of Appeals upheld an award of permanent periodic alimony due to Mrs. Curtis's disability and inability to seek employment (*Curtis v. Curtis*, 796 So.2d 1044, 1052 (Miss. Ct. App. 2001)). The Court of Appeals held that while the monthly payments were a "large percentage of [Mr. Curtis's] actual income, compared with her income the amount is not so high as to warrant reversal or modification." *Id.* *Tilley v. Tilley* instructs, "In Mississippi, alimony should be awarded to the wife in accordance with her needs with consideration being given to the ability of the husband to make the payments." *Tilley v. Tilley*, 610 So.2d 348, 354 (Miss. 1992) (citing *Dudley v. Light*, 586 So.2d 155, 161 (Miss. 1991)). Helen asked that David

pay her \$1500.00 a month in permanent periodic alimony, an amount not outside of David's earnings. (T. 97).

Based on the foregoing argument, Helen respectfully submits to the Court that error was committed in not awarding her permanent periodic alimony.

### **CONCLUSION**

Since 1856, our courts have recognized the need to balance the equities in the separate estates of a husband and wife.

There appears to be no fixed rule upon this subject, but it depends upon the discretion of the court, to be exercised with reference to an equitable view of all the circumstances of the particular case, the only general rule being, that the wife is entitled to a support corresponding to her rank and condition in life, and the estate of her husband. These principles are recognized by our statute, which provides, that the court may make such allowance "as from the circumstances of the parties and the nature of the case may be fit, equitable, and just."

*Armstrong v. Armstrong*, 32 Miss. 279 (Miss. Err. & App. 1856) (citing Hutch. 496, § 7)). Helen is not before the Court asking for an extravagant lifestyle. Helen is not able to work, and has moved out of the marital home and into a mobile home for the benefit of her son. Helen is before the Court asserting the Chancellor committed error in not awarding her permanent periodic alimony to which she is entitled based on the precedent of the Mississippi Supreme Court and Court of Appeals.


**MOTION FOR ATTORNEY'S FEES**

Appellant moves the Court for an award of a reasonable attorney's fee in following this appeal through the appellate process and preparation of the Brief of Appellant, pursuant to the Court's general rule and law in such cases.

Respectfully Submitted,  
HELEN ROGILLIO

BY: 

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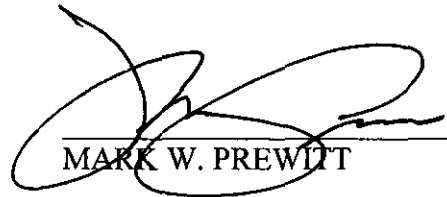
**CERTIFICATE OF SERVICE**

I, Mark W. Prewitt, attorney for Appellant, do hereby certify that I this day mailed, via U.S. mail, postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellant to the following:

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Honorable Marie Wilson, Chancellor  
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DATED this the 12<sup>th</sup> day of June, 2009.

  
\_\_\_\_\_  
MARK W. PREWITT