

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BILLY FRED MCCARRELL

APPELLANT

VS.

CAUSE NO. 2008-TS-00580

JANIE ANNETTE HYDE MCCARRELL

APPELLEE

ON APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY

Counsel of record for Appellee Janie Annette Hyde McCarrell certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

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Appellant

Janie Annette Hyde McCarrell

Appellee

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STATEMENT OF ISSUES

- I. The Chancellor Was Correct in Awarding Rehabilitative Periodic Alimony.
- II. The Chancellor Was Correct in Awarding Attorney's Fees.

STATEMENT OF THE CASE

Nature of Case, Course of Proceedings, and Disposition in Court Below

Appellant Billy Fred McCarrell, Jr. ("Billy McCarrell"), filed for divorce against Appellee Janie Annette Hyde McCarrell ("Janie McCarrell") based on irreconcilable differences on August 2, 2006. On August 26, 2006, Janie McCarrell filed a Petition for Temporary Relief as well as her Answer and Counter-Complaint for Divorce based on fault or, in the alternative, irreconcilable differences. On November 6, 2006, the Court entered an Agreed Order for Temporary Relief ("Temporary Order"), whereby Billy McCarrell was ordered to pay alimony and child support to Janie McCarrell in the amount of \$750.00 every week, which support was to be due and payable on each Friday, beginning October 6, 2006, pursuant to the parties' prior agreement. Further, pursuant to Temporary Order, Billy McCarrell represented and agreed that he had brought the mortgage payments current through September, 2006, on the marital home.

As a result of Billy McCarrell's failure to abide by the Temporary Order by not paying alimony and child support as ordered and by not bringing the mortgage payments current through September, 2006, as he had represented to the Court, Janie McCarrell filed a Petition for Contempt and Other Relief ("Petition for Contempt I") against Billy McCarrell on December 6, 2006. On February 14, 2007, again due in part to Billy McCarrell's failure to abide by the Temporary Order, Janie McCarrell filed a Motion to Compel Discovery, For Contempt and For

Trial Setting.

Prior to the trial on June 9, 2007, the parties entered a Withdrawal of Contest and Stipulation of Divorce and Property Settlement Agreement, whereby Billy McCarrell was ordered to pay \$800.00 per month to Janie McCarrell for child support, Janie McCarrell was awarded primary physical custody of the parties' minor child, Billy McCarrell was awarded standard visitation and joint legal custody of the child, and certain property of the parties was divided. The parties agreed to allow the Chancellor to decide the three remaining issues of alimony to Janie McCarrell, provision of an automobile for Janie McCarrell, and Janie McCarrell's attorney's fees.

On December 19, 2007, the Chancellor issued her Opinion of the Court ("Opinion") to counsel of record for the parties and on December 20, 2007, the Opinion was filed with the Court. In her Opinion¹, the Chancellor awarded Janie McCarrell rehabilitative periodic alimony in the sum of \$1,800.00 per month for a period of five (5) years, with the first payment being payable on January 5, 2008. The Chancellor further ordered Billy McCarrell to pay Janie McCarrell's attorney's fees in the amount of \$15,803.39 in full or make satisfactory arrangements to pay same within sixty (60) days of the date of the entry of the Final Decree of Divorce. The Final Decree of Divorce was signed by the Chancellor on January 10, 2008, and filed with the Court on January 18, 2008.

On January 28, 2008, Billy McCarrell filed a Motion for Reconsideration or to Alter or Amend Final Decree of Divorce. On March 3, 2008, Janie McCarrell filed a Response to Motion

¹ The Chancellor also made an equitable distribution of the vehicles, which ruling Billy McCarrell initially appealed but has since withdrawn as an issue on appeal. See Appellant's Brief, p. 4.

for Reconsideration or to Alter or Amend Final Decree of Divorce. On March 4, 2008, the Court entered an Order Denying Plaintiff's Motion for Reconsideration or to Alter or Amend Final Decree of Divorce. On April 2, 2008, Billy McCarrell filed a Notice of Appeal.

Statement of Facts Relevant to Issues Presented for Review

The facts demonstrated at the trial of this matter and relevant to the issues now before this Court on appeal are as follows:

The parties were married on June 30, 1995. (TR 14). The parties had one child, a son born on November 7, 1996. (TR 14, 15). In April, 2006, the parties resided together with their only child at 1127 Lakeview Drive, Hernando, Mississippi. (TR 19, 20). The parties managed to secure refinancing in the approximate amount of \$250,000.00. (TR 125). The evidence is not clear as to why the note was solely in the name of Janie McCarrell, but the note was in her name only, though she was unemployed at that time. (TR 20, 126). The first mortgage payment in the amount of \$2,828.28 was paid in June, 2006, by Billy McCarrell. (TR 145, 146). At the time, Billy McCarrell earned his living as a 50% partner in Market Safe Investments and repaired automobiles on the side. (TR 127, 128). Billy McCarrell stated in his response to Interrogatory No. 1 that his income for 2006 was \$92,000.00. (TR Ex. 22). Also at this time, Billy McCarrell provided 100% of the income for the family, as Janie McCarrell was unemployed. (TR 145, 146).

Billy McCarrell testified that the value of the Lakeview Drive home was \$305,000 at the time of the refinancing arrangement. (TR 125). The debt on the house being \$250,000, there was \$55,000 equity in the home. (TR 125, 126, 145). Billy McCarrell testified that the refinancing arrangement allowed the family to clear some existing debt and still have substantial equity in the home. (TR 21, 125). Billy McCarrell was adamant at trial that he would not allow the foreclosure

of the home because he had a lot of equity to lose. (TR 184, 185).

The undisputed evidence before the trial court was that, prior to Billy McCarrell moving from the marital home in late August of 2006, the July and August mortgage payments were past due. (TR 22, 146-157). Exhibits admitted into evidence at the trial clearly demonstrate that Homecomings Financial, the mortgage company, forwarded several letters to the marital home notifying the McCarrells of the delinquency in payment of the mortgage. (TR Ex. 3, 4, 5, 6, 7, 8, 21).

Though Billy McCarrell represented to the court below at the hearing on October 2, 2006, that the mortgage was paid current through September, 2006, that in fact was not the case. (TR 157, 158, 160, 161). The only evidence presented to this Court at trial of any payment of the mortgage after June 2006 was payment of \$2,830.00 by check number 320 dated October 1, 2006. (TR 157). There is no evidence in this record that Billy McCarrell ever made any other payment that was credited to the account by the mortgage company. The fact that the mortgage was not current through September, 2006, as represented to the court below by Billy McCarrell, was known to the parties prior to the entry of the November 6, 2006 Temporary Order. (TR 157, 158, 160, 161). Yet the Order entered by the Chancellor on November 6, 2006, contains an express representation by Billy McCarrell that the note was current through September. (Appellant's RE 22-24). By the time the Agreed Order for Temporary Relief ("Temporary Order") was entered on November 6, 2006, the mortgage was past due for August, September and October payments. (TR 156, 157).

Exhibits entered into evidence at trial clearly demonstrate the delinquency in the mortgage, including letters forwarded to Billy McCarrell's attorney at the time, Honorable Paige

Williams, enclosing statements and documents from the mortgage company evidencing the amount of the delinquency. (TR Ex. 3, 4, 5, 6, 7, 8, 21). The terms contained in the Temporary Order were clearly based upon the representation of Billy McCarrell that the mortgage was current through September, or at least that he would pay it current through September.

(Appellant's RE 22-24). Janie McCarrell agreed to be responsible for the October 2006 payment and other expenses of the marital home in full reliance on Billy McCarrell's representation that the mortgage was current. (TR 22, 23, 177). That representation was false.

At the time of entry of the Temporary Order, Janie McCarrell had only been working at the FedEx hub in her part-time position since September 6, 2006. (TR 24). With her limited income, Janie McCarrell would have to have received the temporary support payments from Billy McCarrell in order to meet her obligation to pay all expenses of the marital home as required by the Temporary Order. (TR 26, 27, 182). Janie McCarrell's income from her part-time position at FedEx, coupled with the temporary support payments from Billy McCarrell, would have been sufficient to meet her obligations to pay the mortgage and expenses of the household until the house could be sold or this case could be tried on its merits. (TR 26, 27, 182). The house was listed for sale at this time. (TR 179, 180).

Though Billy McCarrell was advised through his attorney that the mortgage was not current through September, he took no action sufficient to bring the mortgage current. (TR 146-194). The unrefuted, documented evidence in this case is that Billy McCarrell had full knowledge of the demand by the mortgage company to bring the mortgage current in order to prevent foreclosure. (TR Ex. 3, 4, 5, 6, 7, 8, 21) (TR 146-194). The evidence in this case is that Janie McCarrell tendered sufficient funds to pay her part of the obligation under the Temporary Order.

The evidence is that even if Janie McCarrell had made payment of the October note to the mortgage company, her payment would not have been sufficient to prevent the foreclosure. (TR 22, 23). All sums due to the mortgage company to prevent foreclosure were sums due as a direct result of Billy McCarrell's failure to bring the mortgage current through September. The fact is that the house was foreclosed and the equity in the house was lost as a marital asset due solely to the fact that Billy McCarrell did not meet his obligations to pay the mortgage current through September. (146 -194).

Not only did Billy McCarrell act in such a way as to dissipate the largest asset of this family in allowing the marital home to be foreclosed, he did so at a time when he had sufficient funds to pay rent on his home while making arrangements to purchase that home solely in his name. (146-194). Billy McCarrell allowed the foreclosure of the marital home to occur at a time when he was making arrangements to purchase a \$68,000.00 Hummer for which he was able to pay \$1,100.00 per month. (TR 195, 196).

The foreclosure necessitated Janie McCarrell seeking other living arrangements for herself and her son. At the time of trial, Janie McCarrell rented a home in Lake Forest in Walls, Mississippi, for which she paid \$800.00 a month in rent. Janie McCarrell has no means to purchase a home, being only part-time employed and having her credit destroyed as a result of the foreclosure. (TR 25-26).

At the time of trial, Billy McCarrell drove a 2006 Hummer and Janie McCarrell drove a 1999 Jeep Cherokee that needed new tires and had significant mechanical issues. (TR 30-32). The evidence in the case from Billy McCarrell's testimony was that he also owned a 1997 Mazda, though that asset was not listed on his Financial Declaration. (TR 257-59).

Also significant to the facts in evidence was the withdrawal by Billy McCarrell of \$15,712.15 from certificates of deposit at Community Bank. These funds were clearly established as marital property. Billy McCarrell did not share these funds with Janie McCarrell and, though he testified that he applied those funds to the payment of the mortgage, that is in fact not the case, as is clearly refuted by the documents before the trial court. Billy McCarrell had neither Janie McCarrell's permission nor knowledge when he cashed in the certificates of deposit. Ironically, the certificates of deposit were cashed at time when the mortgage on the marital home was in arrears. The sum realized from the certificate of deposit was sufficient to bring the mortgage current. (TR 194-195). Instead, Billy McCarrell paid rent on his own residence, purchased a new Hummer, and paid his own attorney's fees, resulting in the foreclosure of the marital home. (TR 194-195, 198).

The evidence before the trial court was that on the day of the trial on June 9, 2007, Billy McCarrell was in arrears in payment of his temporary support obligation by \$800.00. This fact was admitted by Billy McCarrell, as he tendered payment of the arrearage at the trial. Billy McCarrell was admittedly in contempt of this Court for his failure to timely pay for temporary support. (TR 199, 200).

The fact that Billy McCarrell did not meet his obligation to bring the mortgage current through September as he represented to this Court that he had done necessitated Janie McCarrell incurring significant sums in attorney's fees to address the issues related to foreclosure of the home. Janie McCarrell had no resources from which to meet her attorney's fee obligation any more so than she had the resources sufficient to prevent the home from being foreclosed. Having no ability financially to pay the sums sufficient to prevent foreclosure of the home once

foreclosure was imminent, Janie McCarrell applied the funds that she received as temporary support from Billy McCarrell partially to her attorney's fee obligation and the rest to the needs of her family. (TR 33-43). There is no evidence in the record that Janie McCarrell ever took any action other than as was absolutely necessary to protect the interest of the marital assets and her child.

By the end of 2006, just before the foreclosure of the marital home in January 2007, Janie McCarrell was employed part-time at the FedEx hub earning a little over \$11.00 per hour while Billy McCarrell had earned \$92,000.00. (TR 71) (TR Ex. 22). Janie McCarrell was faced with finding a new residence for herself and the child of this marriage, foreclosure being scheduled for January 4, 2007, while Billy McCarrell was living in a home on Parkway Street in Hernando, Mississippi that he purchased in December, 2006 prior to the parties' divorce being finalized. (TR 25, 26, 197, 198). The evidence at trial showed that Billy McCarrell was driving a new Hummer, buying hunting and camping gear on credit, and shopping for dates on the Internet. (TR 207, 208, 212, 213).

SUMMARY OF THE ARGUMENT

The issues before this Court on appeal are simply whether based upon the record before the Chancery Court and as demonstrated at trial, the Chancellor properly awarded Janie McCarrell rehabilitative periodic alimony and attorney's fees.

First, based on the totality of circumstances of the marriage and in light of the factors outlined in Armstrong v. Armstrong, 618 So. 2d 1278, 1280 (Miss. 1993), as applied to the facts of this case and as demonstrated at trial, Janie McCarrell is entitled to the rehabilitative periodic alimony awarded by the Chancellor. The Chancellor properly found that the sum awarded will

allow her to finish college and earn a degree to allow her to re-enter the workforce on a full time basis. Further, the Chancellor found that Janie McCarrell is in need of rehabilitative alimony to avoid being destitute while she seeks to become self-supporting. Hubbard v. Hubbard, 656 So. 2d 124 (Miss. 1995). The Chancellor's award of rehabilitative periodic alimony was not manifest error or an abuse of her discretion and should be upheld.

Second, the Chancellor did not abuse her "broad discretion to make all orders regarding maintenance and alimony" in awarding attorney's fees to Janie McCarrell. Dillon v. Dillon, 498 So. 2d 328, 331 (Miss. 1986). The Chancellor properly found that Janie McCarrell was unable to pay her fees and that the financial disparity between the parties justified the award. Bates v. Bates, 755 So. 2d 478, 482 (Miss. App. 1999). The Chancellor further properly found that Janie McCarrell should be awarded her attorney's fees based on Billy McCarrell's wrongful conduct. Chesney v. Chesney, 849 So. 2d 860, 863 (Miss. 2002); Russell v. Russell, 733 So. 2d 858, 862-63 (Miss. App. 1999). The Chancellor relied on substantial credible evidence in the record in the form of itemized attorney records for time and expenses. Moreover, it is clear from the trial court's written Opinion and Ruling that the Chancellor considered and applied the factors set forth in McKee v. McKee, 418 So. 2d 764 (Miss. 1982), and, further, that the Chancellor based her award on her own experience and observation pursuant to Miss. Code Ann. § 9-1-41. Thus, the Chancellor did not abuse her discretion in awarding attorney's fees to Janie McCarrell. Upchurch Plumbing, Inc. v. Greenwood Utilities Comm'n, 964 So. 2d 1100 (Miss. 2007).

In summary, the Chancellor's awards of rehabilitative periodic alimony and attorney's fees to Janie McCarrell should be affirmed.

ARGUMENT

Janie McCarrell argues that the Chancellor was correct in awarding her rehabilitative periodic alimony and attorney's fees based on Mississippi law and the facts proven at trial.

Standard of Review

Awards will not be reversed on appeal unless a chancellor was manifestly in error in the findings of fact and the decision is "so oppressive, unjust or grossly inadequate as to evidence an abuse of discretion." Powers v. Powers, 568 So. 2d 255, 257 (Miss. 1990); Armstrong, 618 So. 2d at 1280. The Supreme Court has noted that "[o]ur job is not to reweigh the evidence The chancellor, by his presence in the courtroom, is best equipped to listen to the witnesses, observe their demeanor, and determine the credibility of the witnesses and what weight ought to be ascribed to the evidence given by those witnesses." Carter v. Carter, 735 So. 2d 1109, 1113 (Miss. Ct. App. 1999).

I. The Chancellor Was Correct in Awarding Rehabilitative Periodic Alimony.

A. The Chancellor's Award Is Supported By The Evidence.

Mississippi Code Annotated §93-5-3 provides: "When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders . . . touching the maintenance and alimony of the wife or husband, or any allowance to be made to her or him, and shall, if need be require bond, sureties or other guaranty."

In Armstrong v. Armstrong, 618 So. 2d 1278, 1280 (Miss. 1993), the Mississippi Supreme Court delineated twelve factors to be considered in making alimony awards:

1. The income and expenses of each party;

2. The health and earning capacities of the parties;
3. The needs of each party;
4. The obligations and assets of each party;
5. The length of the 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;
7. The age of the parties;
8. The standard of living of the parties, both during the marriage and at the time of the support determination;
9. The tax consequences of the spousal order;
10. Fault or misconduct;
11. Wasteful dissipation of assets by either party;
12. Any other factor deemed by the court to be "just and equitable" in connection with the setting of spousal support.

Armstrong, 618 So. 2d at 1280.

"Rehabilitative periodic alimony" is an equitable mechanism which allows a party needing assistance to become self-supporting without becoming destitute in the interim.

Hubbard v. Hubbard, 656 So. 2d 124 (Miss. 1995).

In the instant matter, the following undisputed, documented facts were adduced at trial as applied to the Armstrong factors:

1. The income and expenses of each party

Billy McCarrell earned \$92,000.00 in income for 2006, and was projected to earn even more income for 2007. (TR Ex. 22). Janie McCarrell earned a little over \$11.00 per hour on a

part-time basis, or about \$16,000.00 per year. (TR 25). Janie McCarrell reentered the job market in September 2006 in an effort to support her family when she learned that her husband was leaving and wanted a divorce. (TR 24). Janie McCarrell's Financial Declaration revealed that, without the temporary support payments from Billy McCarrell, Janie McCarrell would not be able to pay her and her son's living expenses. (TR 26, 27, 182).

2. The health and earning capacities of the parties

Both parties were in good health. The earning capacity of Billy McCarrell was demonstrated by his ability to earn \$92,000.00 in income for 2006, with a projection of earning even more income for 2007. (TR Ex. 22). On the other hand, Janie McCarrell has been a stay-at-home mother with a high school education and only a few hours college credit. (TR 28). Her prior work experience included a factory job. (TR 44, 45). At the time of trial, she was employed at FedEx at the Hub in Memphis on a part-time basis, which affords health benefits for her and her family. (TR 29). Janie McCarrell's earning capacity was expected to increase greatly if she is able to obtain an associate's or bachelor's degree. (TR 73).

3. The needs of each party

Janie McCarrell was awarded primary physical custody of the parties' minor child pursuant to the parties' agreement and, thus, her needs included providing housing for her and her son, with rent in the amount of \$800.00 per month, along with utilities, lawn maintenance, groceries, gasoline, automobile upkeep, clothing, and school expenses, among other obligations. (TR 26, 27).

4. The obligations and assets of each party

As a result of the settlement agreement between the parties, Janie McCarrell was obliged

to pay the debt on her credit card and for an on-line investment loan. There were few assets of the marriage. By agreement of the parties, Janie McCarrell retained the furnishings of the marital home, including a computer, and Billy McCarrell retained all guns, ATVs, motorcycle, pool table and deep freezer. (Appellant's RE 70, 71) (TR 221). Billy McCarrell also possesses as an asset the home he purchased in which he is building equity, which Janie McCarrell, as a result of her destroyed credit and insufficient income and earning capacity, could not similarly do.

5. The length of the marriage

The parties were married twelve (12) years.

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

The parties agreed that Janie McCarrell would have primary physical custody of their minor son, who was 10 years old, as the custodial parent. (Appellant's RE 65). Janie McCarrell will likely be required to provide child care for the parties' minor son if she goes back to school and/or acquires full-time employment.

7. The age of the parties

At the time of trial, Billy McCarrell was 44 years old and Janie McCarrell was 45 years old.

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

During the last couple of years of the marriage, Janie McCarrell enjoyed a standard of living which allowed her to be a stay-at-home mother, providing the primary care for the parties' minor child. (TR 17). During the entire marriage, Billy McCarrell paid all bills and expenses for the family, and took care of all financial matters, though not very well at times. His income

increased dramatically since 2005. Though the family had financial difficulty in the past, the standard of living greatly improved in 2005, allowing Janie McCarrell to stay at home and enabling her to devote more time to their son. (TR 18, 19).

Janie McCarrell was always provided a late model, sometimes brand new, reliable vehicle to drive. (TR 31, 104) During the marriage, the family lived in a nice home that they owned. However, after Billy McCarrell moved out of the marital home and allowed the marital home to be foreclosed, Janie McCarrell was forced to move with her children out of the marital home and into a small rental house in Walls, Mississippi. (TR 25, 26). After the parties separated, Janie McCarrell obtained a part-time job at the FedEx Hub. (TR 24). Janie McCarrell is now responsible for paying all bills and for taking care of all financial matters for her and her children, one child age 18 from a prior marriage. At the time of trial, Janie McCarrell drove a 1999 Jeep Cherokee with over 130,000 miles that needed new tires and had serious mechanical issues. (TR 30, 31, 32).

Meanwhile, after serving his wife of 12 years with divorce papers and moving out of the marital residence, Billy McCarrell rented his own house in Hernando, Mississippi, which he owned at the time of trial. (TR 197, 198). Billy McCarrell drove a 2006 Hummer and owned a 1997 Mazda as well as a 2003 Honda Motorcycle. Billy McCarrell made over \$92,000.00 in 2006. (TR 257-259) (TR Ex. 22). Since the separation, Billy McCarrell went on hunting trips and purchased hunting and camping supplies on credit. In November, 2006, Billy McCarrell was searching for dates on the Internet, a service for which he paid a fee. (TR 207, 208, 212, 213).

9. The tax consequences of the spousal order

As for the tax consequences of an order granting Janie McCarrell alimony, Billy

McCarrell will be allowed to deduct the amount of alimony paid on his income taxes. Thus, he will pay less taxes on his income.

10. Fault or misconduct

Janie McCarrell withdrew her contest for a divorce based on fault and the parties agreed to a divorce based on irreconcilable differences.

11. Wasteful dissipation of assets by either party

The documented evidence at trial clearly demonstrated that Billy McCarrell wastefully dissipated the largest asset of the marriage, the equity in the marital home. By Billy McCarrell's own testimony, at the time of the refinancing of the marital home in April, 2006, there was \$55,000.00 equity in the home. (TR 125, 126, 145). By making only one (1) payment after the refinancing, and by failing to take meaningful steps to prevent the foreclosure of the home, all equity in the home was lost at foreclosure. (TR 145, 146). Conveniently for Billy McCarrell, Janie McCarrell was the only one who was obligated on the mortgage note for the marital home at 1127 Lakeview Drive, Hernando, Mississippi, after the refinancing he suggested. (TR 20, 126). Thus, Billy McCarrell's credit was unaffected by the foreclosure of the marital home, while Janie McCarrell's credit was destroyed. That fact was clearly evidenced by Billy McCarrell's ability to purchase his own house in Hernando, in which he is building equity and improving his credit rating. (TR 197, 198). There was evidence before the trial court that Billy McCarrell had already added a driveway to his new home.

Billy McCarrell further dissipated assets of the marriage by cashing in over \$15,000.00 worth of certificates of deposit. Billy McCarrell made no accounting of those assets and he certainly did not share those funds with Janie McCarrell. (TR 194).

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

In light of the factors outlined in Armstrong as discussed above, Janie McCarrell was actually entitled to periodic alimony. Yet she did not ask the Court for periodic alimony. Janie McCarrell did not want to be dependent upon Billy McCarrell for support. Janie McCarrell only wanted the opportunity to attain the level of education necessary to support herself. The Chancellor’s award to Janie McCarrell of rehabilitative alimony in the amount of \$1,800.00 per month for five (5) years is designed to allow Janie McCarrell to attain that goal. This sum will allow her to finish college while continuing to work part-time and earn a degree to allow her to re-enter the workforce on a full-time basis. The Chancellor correctly found that Janie McCarrell is in need of rehabilitative alimony to avoid being destitute while she seeks to become self-supporting. See Hubbard, supra.

Based on the totality of circumstances of the marriage and application of the Armstrong factors to the facts proven at the trial of this matter, the Chancellor, who was in the best position to hear the witnesses’ testimony at trial, consider their respective demeanor, and determine their credibility, correctly found within her discretion that Janie McCarrell should be awarded rehabilitative periodic alimony in the amount of \$1,800.00 per month for a period of five (5) years. The Chancellor’s award should be affirmed.

B. The Chancellor’s Due Date for the First Payment of Alimony Is Correct.

As to the timing of the Chancellor’s award, Billy McCarrell was aware as early as December 20, 2007, that the Chancellor, in her written Opinion filed that date, had ordered him to begin making alimony payments on January 5, 2008, and on the 5th day of each month

thereafter for a period of five (5) years. Now, on appeal, Billy McCarrell claims to not know when he should have made his first payment since the Final Decree of Divorce was not entered with the court until January 18, 2008. As Billy McCarrell purports in his Brief, this first payment date is “important” to him because there is a pending Contempt action against him for his failure to make his first (and any subsequent) alimony payment, either on the 5th or the 18th of January, or any date whatsoever.

Notwithstanding Billy McCarrell’s math skills as demonstrated in his Brief as to the proration of the first payment and his attempt to confuse this issue, the Chancellor clearly and unambiguously ordered him almost three (3) weeks prior, on December 20, 2007, to make his first payment of alimony on January 5, 2008, a fact of which he was well aware. Rather than feigning confusion as to *when* his payment was due, he should have followed the Chancery Court’s directives and simply *made* the payment and asked for clarification and/or credit, if necessary. Nevertheless, if this Court determines that the Final Decree of Divorce should have been entered *nunc pro tunc* to January 5, 2008, then this Court can remand to the Chancery Court for such entry and render accordingly.

II. The Chancellor Was Correct in Awarding Attorney’s Fees.

The Court has the authority to award attorney’s fees based on the Chancellor’s broad discretion to make all orders regarding maintenance and alimony. Dillon v. Dillon, 498 So. 2d 328, 331 (Miss. 1986). An award of attorney’s fees requires proof that the requesting party is unable to pay her fees and that the financial disparity between the parties justifies the award. Bates v. Bates, 755 So. 2d 478,482 (Miss. App. 1999). An award of attorney’s fees was appropriate to a wife whose monthly expenses exceed her income from a husband whose income

was double hers. See Daigle v. Daigle, 626 So. 2d 140, 147 (Miss. 1993). See also Hemsley v. Hemsley, 639 So. 2d 909, 915 (Miss. 1994) (wife whose expenses exceeded her income not required to deplete \$9,000.00 share of marital home to pay fees); East v. East, 775 So. 2d 741 (Miss. App. 2000) (wife should not be required to pay attorney's fees from lump sum alimony that was her only liquid asset).

Attorney's fees may also be awarded based on a party's wrongful conduct, including "failure to comply with a temporary order" and "persistent" recalcitrance that caused "numerous unnecessary hearings". See Chesney v. Chesney, 849 So. 2d 860, 863 (Miss. 2002); Russell v. Russell, 733 So. 2d 858, 862-63 (Miss. App. 1999).

In McKee v. McKee, 418 So. 2d 764, 767 (Miss. 1982), the Mississippi Supreme Court stated that an award of fees should be fair, should compensate only work actually performed, and should be based on a finding that the work was reasonably required and necessary. The McKee Court established the following factors for consideration in determining the proper amount of fees to be awarded: (1) the parties' relative financial ability; (2) the skill and standing of the attorney; (3) the novelty and difficulty of the questions; (4) the degree of responsibility involved in management of the case; (5) time and labor; (6) the usual and customary charge in the community; and (7) preclusion of other employment as a result of accepting the case. McKee, 418 So. 2d at 767.

Further, as to the making of an award of attorney's fees, Miss. Code Ann. § 9-1-41 provides as follows:

In any action in which a court is authorized to award reasonable attorneys' fees, the court shall not require the party seeking such fees to put on proof as to the reasonableness of the amount sought, but shall make the award based on the

information already before it and the court's own opinion based on experience and observation; provided, however, a party may, in its discretion, place before the court other evidence as to the reasonableness of the amount of the award, and the court may consider such evidence in making the award.

Miss. Code Ann. § 9-1-41.

The Mississippi Supreme Court in Upchurch Plumbing, Inc. v. Greenwood Utilities Comm'n, 964 So. 2d 1100 (Miss. 2007), found nothing incongruous between Miss. Code Ann. § 9-1-41 and the Court's ruling in McKee v. McKee, 418 So. 2d 764 (Miss. 1982). In Upchurch, the defendant argued that the trial judge failed to make substantive findings of fact in accordance with the McKee factors. Id. at 1115. The Supreme Court found that the plaintiff had submitted itemized attorney records for time and expenses, which the trial court considered. Id. The Court quoted from Mabus v. Mabus, 910 So. 2d 486, 489 (Miss. 2005), that "where a trial judge 'relies on substantial credible evidence in the record regarding attorney's fees,' the trial judge has not abused his discretion." Id. at 1116. The Court found that, even though he did not detail his reasoning, it was clear from the language of the trial court's order that the judge in fact applied the McKee factors and, thus, did not abuse his discretion in awarding attorney's fees. Id.

An itemized statement of attorney's fees incurred by Janie McCarrell showing work performed, hours worked, hourly rates and expenses was made an exhibit at the trial of this matter. (TR Ex. 2). Testimony and evidence adduced at trial revealed that Janie McCarrell, based on her expenses that exceed her part-time income, did not have the financial ability to pay her attorney's fees, and that she in fact used temporary support payments to make a partial payment of fees incurred on her behalf. (TR 33-43). Janie McCarrell does not have any further assets to use to pay her attorney's fees. On the other hand, the evidence at trial was that Billy

McCarrell made \$92,000.00 in 2006. (TR 71) (TR Ex. 22). In September, 2006, Billy McCarrell cashed in certificates of deposit totaling over \$15,000.00 without notifying Janie McCarrell and without sharing any of the money with Janie McCarrell. (TR 195-98). Billy McCarrell purchased his own home in December, 2006, drove a 2006 Hummer, for which he paid \$1,100.00 per month, and Billy McCarrell was projected to earn even more income for 2007. (TR 71) (TR Ex. 22). The proof at trial showed a great financial disparity existed between the parties. Billy McCarrell had the financial ability to pay Janie McCarrell's attorney's fees. Janie McCarrell was unable to pay.

Additionally, the record reveals that Billy McCarrell failed to comply with the Agreed Order for Temporary Relief ("Temporary Order") on numerous occasions. (TR 146-194). In fact, he was delinquent in payment of his court-ordered temporary support to Janie McCarrell at the trial of this matter, as acknowledged by Billy McCarrell at trial. (TR 199-200). Janie McCarrell was forced to incur insufficient fund charges due to Billy McCarrell's bad checks for temporary support. (TR 30-43). Janie McCarrell was forced to go to the bank time and time again to determine if Billy McCarrell's checks for temporary support would clear the bank. Janie McCarrell was forced to file two (2) separate Petitions for Contempt of the Agreed Order against Billy McCarrell. Billy McCarrell brought to one of the hearings on the Petition for Contempt four (4) delinquent payments to avoid being held in contempt. One of the checks did not clear the bank due to insufficient funds.

Further, the evidence showed that numerous hours and attorney's fees were expended in an attempt to force Billy McCarrell to comply with the Agreed Order, in which he represented that he had brought the mortgage payments on the marital home current through September,

2006. The evidence before the trial court was overwhelming that, at the time of his representation to the Chancery Court, the mortgage was delinquent, resulting in eventual foreclosure of the martial home. (TR 146-194; 245-247). Billy McCarrell never took any meaningful steps to insure that the mortgage was actually current through September, 2006, which was a condition precedent to Janie McCarrell's obligation to pay the mortgage beginning in October, 2006. (TR 26-27, 182). To exonerate his contempt, Billy McCarrell blamed his banker (for bouncing his checks) and/or his prior attorney, Honorable Paige Williams (for not telling him he lied to the Court). (TR 146-194). Billy McCarrell's concocted story and testimony at trial was nothing more than a farce. As the documented evidence showed, for months Janie McCarrell's attorneys spent significant hours and fees attempting to force Billy McCarrell to bring the mortgage current through September, 2006. (Appellee's RE 2, 4). Meanwhile, during the entire tumultuous time that Janie McCarrell was forced to incur significant attorney's fees for Billy McCarrell's wrongful and contemptuous conduct, and which ultimately resulted in the martial home being foreclosed, Billy McCarrell never missed a rent or house payment on his house on Parkway in Hernando, Mississippi, never missed a Hummer payment, went on an extravagant hunting trip, and was shopping for dates on the Internet. (TR 194-95, 198).

The evidence at trial supported the Chancellor's finding that Janie McCarrell was unable to pay her attorney's fees, that a great financial disparity existed between the parties, that Billy McCarrell was able to pay her attorney's fees, and, further, that Billy McCarrell should be made to pay Janie McCarrell's attorney's fees incurred as a result of his wrongful conduct and recalcitrance and his utter contempt for this Court which was persistent and caused numerous

unnecessary hearings. See Russell, supra.

As to the procedural aspect of the Chancellor's award of attorney's fees to Janie McCarrell, it is clear from the Chancellor's written Opinion and Ruling that the Chancellor considered the McKee factors and, further, that the Chancellor based the award on her own experience and observation pursuant to Miss. Code Ann. § 9-1-41. An itemized statement of attorney's fees showing work performed, hours worked, hourly rates and expenses was made an exhibit at the trial of this matter, **notably, without objection, challenge, cross-examination, or proof of his own by Billy McCarrell on the subject of attorney's fees.** The Chancellor is familiar with Janie McCarrell's attorneys, Myers Law Group, PLLC, that her attorneys possess appropriate skill and standing in the legal community to handle the difficulty of the questions involved in the proceeding and, further, that the work performed on Janie McCarrell's behalf and the fees charged were fair and reasonably necessary, and such rates are in keeping with the usual and customary charge in the community. Janie McCarrell further testified that a large portion of the attorney's fees she owed were incurred as a result of Billy McCarrell's wrongful conduct and in what proved to be a futile effort to keep the marital home out of foreclosure. (TR 30-43). Thus, the Chancery Court had substantial evidence before it to make an award of attorney's fees and did not abuse its discretion in awarding Janie McCarrell all of her attorney's fees incurred through trial, including those she had already paid. Upchurch, 964 So. 2d at 1116. The Chancellor's award of attorney's fees in the amount of \$15, 803.39 should be affirmed.

CONCLUSION

The facts and documented evidence at trial established that the Chancellor was within her discretion in awarding Janie McCarrell rehabilitative periodic alimony in the sum of \$1,800.00

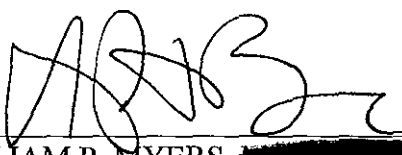
per month for a period of five (5) years based on the totality of the circumstances of the marriage and application of the factors set forth in Armstrong v. Armstrong, 618 So. 2d 1278, 1280 (Miss. 1993). Further, the facts and documented evidence considered by the Chancellor pursuant to Miss. Code Ann. § 9-1-41 and Upchurch Plumbing, Inc. v. Greenwood Utilities Comm'n, 964 So. 2d 1100 (Miss. 2007), demonstrate that the Chancellor was within her discretion in ordering Billy McCarrell to pay Janie McCarrell's attorney's fees as a result of her inability to pay, his ability to pay, the financial disparity between the parties, and Billy McCarrell's contemptuous and recalcitrant conduct towards the Chancery Court. For these reasons, the Chancellor's awards in the Final Decree of Divorce dated January 18, 2008, should be affirmed.

CERTIFICATE OF SERVICE

The undersigned attorney for Appellee, Janie Annette Hyde McCarrell, does hereby certify that I have this day mailed a true and correct copy of the above and foregoing **Brief of Appellee Janie Annette Hyde McCarrell**, U.S. mail, postage prepaid, to the following:

William B. Seale
961 Main Street
Southaven, MS 38671
Attorney for Appellant Billy Fred McCarrell, Jr.

This the 5th day of December, 2008.



WILLIAM P. MYERS, [REDACTED]
AMY HOLLIMAN BROWN, [REDACTED]

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BILLY FRED MCCARRELL

APPELLANT

VS.

CAUSE NO. 2008-TS-00580

JANIE ANNETTE HYDE MCCARRELL

APPELLEE

CERTIFICATE OF SERVICE

The undersigned attorney for Appellee, Janie Annette Hyde McCarrell, does hereby certify that I have this day mailed a true and correct copy of the above and foregoing **Brief of Appellee Janie Annette Hyde McCarrell**, U.S. mail, postage prepaid, to the following:

William B. Seale
961 Main Street
Southaven, MS 38671
Attorney for Appellant
Billy Fred McCarrell, Jr.

Honorable Vicki Cobb
DeSoto County Chancery Court Judge
245 Eureka Street
P.O. Box 1104
Batesville, MS 38606

This the 10th day of December, 2008.



AMY HOLLIMAN BROWN, MB NO. [REDACTED]