

IN THE SUPREME COURT OF MISSISSIPPI

NO.: 2009-TS-00161

MARTIN L. PIERCE

APPELLANT

VERSUS

STAR PIERCE

APPELLEE


I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of records 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 this Court may evaluate possible disqualifications or recusal.

1. Martin L. Pierce, Appellant
2. Star Pierce, Appellee
3. Wendy Hollingsworth, Attorney for Appellant
Law Offices of Wendy Hollingsworth PLLC
2900 Government Street, Suite D
Ocean Springs, MS 39564
4. William E. Tisdale, Attorney for Appellee
Sekul Hornsby & Tisdale
958 Howard Avenue
P.O. Box 548
Biloxi, MS 39530 or 39533
5. Honorable Carter O. Bise
Chancery Court of Harrison County
Post Office Box 659
Gulfport, MS 39502-0659
6. Guy N. Rogers, Jr., Trial Attorney for Appellant
2679 Crane Ridge Dr., Suite B
Jackson, MS 39216

SO CERTIFIED on this the 10 day of August, 2009.


WENDY C. HOLLINGSWORTH

WENDY C. HOLLINGSWORTH, MSB 
LAW OFFICES OF WENDY HOLLINGSWORTH PLLC
2900 Government Street, Suite D
Ocean Springs, MS 39564
Phone: (228) 875-7530
Fax: (228) 875-7531

II. TABLE OF CONTENTS

I. Certificate of Interested Persons.....	i, ii
II. Table of Contents	iii
III. Table of Authorities	iv
IV. Statement of the Issues	1
V. Statement of the Case.....	2
A. Nature of the Case, Proceedings and Disposition.....	2
B. Statement of the Facts	3-4
VI. Summary of the Argument	5-6
VII. Argument.....	6-22
A. The court erred in its division of marital assets and liabilities.	
B. The chancellor erred in awarding Star Pierce periodic alimony.	
C. The chancellor erred in awarding Star use and possession of the marital home, with Martin Pierce paying the note, taxes and insurance thereon in the approximate amount of \$700.00 per month, until Star remarries or until her 11-year-old child from a previous relationship graduates from high school.	
VIII. Conclusion	22
IX. Certificate of Filing and Service.....	23

TABLE OF AUTHORITIES

STATE CASES

<i>Alex v. Tarver</i> , 879 So. 2d 1078 (¶ 7) (Miss. Ct. App. 2004)	20
<i>Armstrong v. Armstrong</i> , 618 So. 2d 1278 (Miss. 1993)	12, 13
<i>Brendel v. Brendel</i> , 566 So. 2d 1269 (Miss. 1990).....	13
<i>Brooks v. Brooks</i> , 652 So. 2d 1113 (Miss. 1995)	20
<i>Burcham v. Burcham</i> , 869 So. 2d 1225 (Miss. Ct. App. 2004)	19
<i>Burnham-Steptoe v. Steptoe</i> , 755 So. 2d 1225 (Miss. Ct. App. 1999).....	18
<i>Cherry v. Cherry</i> , 593 So. 2d 19 (Miss. 1991)	12
<i>Cosentino v. Cosentino</i> , 912 So. 2d 1130 (Miss. 2005)	9, 21
<i>Crowe v. Crowe</i> , 641 So. 2d 1100 (Miss. 1994)	11
<i>Drumright v. Drumright</i> , 812 So. 2d 1021 (Miss. Ct. App. 2001).....	18
<i>Duncan v. Duncan</i> , 815 So. 2d 480 (Miss. Ct. App. 2002)	21, 22
<i>Ericson v. Tullos</i> , 876, So. 2d 1038 (Miss. Ct. App. 2004).....	18
<i>Fogarty v. Fogarty</i> , 922 So. 2d 836 (Miss. Ct. App. 2006).....	9, 19
<i>Ferguson v. Ferguson</i> , 639 So. 2d (921 Miss. 1994)	<i>passim</i>
<i>Hankins v. Hankins</i> , 866 So. 2d 508 (Miss. Ct. App. 2004).....	22
<i>Holleman v. Holleman</i> , 527 So. 2d 90 (Miss. 1988).....	12
<i>Hubbard v. Hubbard</i> , 656 So. 2d 124 (Miss. 1995)	9, 15, 16, 21
<i>In re Marriage of Smith</i> , 56 Cal. Rptr. 3d (Cal. Ct. App. 2007)	10
<i>Johnson v. Johnson</i> , 650 So. 2d 1281 (Miss. 1994)	6, 12, 21
<i>Jundoosing v. Jundoosing</i> , 826 So. 2d 85 (¶ 10) (Miss. 2002).....	6
<i>LaRue v. LaRue</i> , 172 W.Va. 158, 304 S.E.2d 312 (1983)	9, 21

<i>Massey v. Massey</i> , 475 So. 2d 802 (Miss. 1985)	13
<i>McEachern v. McEachern</i> , 605 So. 2d 809 (Miss. 1992)	12
<i>Thompson v. Thompson</i> , 894 So. 2d 607 (Miss. Ct. App. 2004)	22
<i>Tilley v. Tilley</i> , 610 So. 2d 348 (Miss. 1992)	12
<i>Voda v. Voda</i> , 731 So. 2d 1158 (¶ 8) (Miss. 1999)	20
<i>Wells v. Wells</i> , 800 So. 2d 1239 (¶ 8) (Miss. Ct. App. 2001)	12
<i>Williams v. Williams</i> , No. 2007-CA-01736-COA (Miss. Ct. App. 2009)	10
<i>Wood v. Wood</i> , 495 So. 2d 503 (Miss. 1986)	13

STATE STATUTES

Miss. Code Ann. § 93-5-23 (Supp. 1989)	13
--	----

BOOKS

Deborah H. Bell, <i>Bell on Mississippi Family Law</i> , § 9.04[5][a]	15
Deborah H. Bell, <i>Bell on Mississippi Family Law</i> , § 13.01[3][b]	16, 17, 21

FEDERAL STATUTES

10 U.S.C. § 1447-1455	10
10 U.S.C. § 1448 (b) (2), (3)	10
10 U.S.C. § 1450 (a)	10
10 U.S.C. § 1450 (f) (4)	10
10 U.S.C. § 1451	11
10 U.S.C. § 1452	10
I.R.C. § 152(e)(1) (Law. Co-op. 2005)	16, 17, 21

IV. STATEMENT OF THE ISSUES

- A. The court erred in its division of marital assets and liabilities.
- B. The chancellor erred in awarding Star Pierce periodic alimony.
- C. The chancellor erred in awarding Star use and possession of the marital home, with Martin Pierce paying the note, taxes and insurance thereon in the approximate amount of \$700.00 per month, until Star remarries or until her 11-year-old child from a previous relationship graduates from high school.

B. STATEMENT OF THE CASE
(Nature of the Case, Proceedings and Disposition)

On July 24, 2007, Martin Pierce obtained a divorce from Star Pierce in the State of Washington, where he was stationed as a member of the United States Air Force. (TR—5) (EX—1, 2). At the time of the divorce, the parties had been married for six years and had no children together. (TR—6). Of those six years, the parties lived together less than three years. (TR—55) (RE—0014). Because the Washington court lacked personal jurisdiction over Star Pierce, it made no provision for the disposition of property. (EX—2, p.8). On January 11, 2008, Martin Pierce filed a Complaint to Adjudicate Real and Personal Property Rights and for Eviction of Defendant in the Chancery Court of Harrison County, Second Judicial District. (CP—1). His Complaint essentially sought an equitable distribution of the assets and liabilities of the parties. On March 6, 2008, Star Pierce filed an Answer and Affirmative Defenses, which also included a Counterclaim, seeking equitable distribution, lump sum and periodic alimony, health insurance, a pro-rata share of military benefits, her former surname and attorneys' fees. (CP—16).

The matter came on for trial before the Honorable Carter O. Bise on September 26, 2008. On December 23, 2008, the court entered its Judgment awarding Star Pierce essentially all relief that she requested and awarding Martin essentially none of the relief that Martin requested. It is from this Judgment that Martin Pierce appeals.

STATEMENT OF FACTS

Martin and Star Pierce had a relatively short and childless six year marriage. Of those six years, the parties lived together less than three years. (TR—55) (RE—0014).

At the time of their marriage in October of 2000, Martin, who is an E-6 in the United States Air Force, had already served his country eight months. Martin's first duty assignments after marrying Star were in various locations where he could not take a dependent. (TR—7, 33-34). When Martin was transferred to Fallon, Nevada, Star and her daughter from a prior relationship, Kayla, joined him. (TR—7). However, after two years, Star and Kayla returned to Mississippi because Star was not happy, unable to find work, homesick and was not pleased that the closest medical facility was an hour from base. (TR—8). The parties decided that the cost of buying a home would be equal to or less than rental payments, so they purchased a home in Biloxi in 2004. (TR—10). From the time of the purchase of the home through the present, Martin's income has been used to make all payments on the home, though he never actually lived there. (TR—10-11, 67) (CP—32) (RE—0007).

About a year after Star moved back to Biloxi, Martin was transferred to Jacksonville, Florida for 11 months. (TR—8). Because the military discouraged having dependents while in flight training, Star did not join Martin at that duty station either, but he would make the 500-600 mile drive to Biloxi to visit with Star. (TR—37). Martin was next stationed in Whidbey Island, Washington. Star did not accompany Martin to Washington. (TR—9).

During the course of the marriage, Star made almost no financial contribution to the marriage. (TR—89) (CP—28, 32) (RE—0014). Prior to the marriage, she worked at Burger King and at a day care facility. (TR—90). In 2006, she began working at McDonald's and as a substitute teacher through Kelly Services, a temporary employment agency. Although Star has

Crohn's disease and kidney problems, health issues have not prevented her from working 32 hours a week at McDonald's earning \$8.50 an hour, and substitute teaching three or four days a week earning \$75.00 per day. (TR—65, 67, 101-02). During the course of the marriage, Martin encouraged Star to go to college or obtain some type of special training to increase her income potential, but she refused to do so. (TR—55). Martin testified that Star lacks ambition. (TR—55). According to Star's testimony, her only aspiration of bettering her income potential is to take a course through Kelly Services so that she can earn \$100.00 per day substitute teaching instead of \$75.00. (TR—101). When questioned as to why she did not try to find a better paying job than temporary work through Kelly Services, she simply stated that she liked being a substitute teacher. (TR—101).

While Martin was stationed in Washington, he filed for divorce from Star. Although Star was served with process, she did not appear. During the separation of the parties, Martin paid Star \$1,400.00 per month via deposit into their joint bank account. (TR—13, 113). Between the time of the parties' separation and the trial in Harrison County, Martin paid Star \$24,000.00 or more in temporary support. (TR—54). After the parties were divorced, Star withdrew and spent another \$4,000.00 that was erroneously deposited into the parties' former joint account by the military. (TR—14, 88, 113). At the time of the trial, Star had \$6,500.00 - \$7,000.00 in her savings account, which was money left over from when Star divided the parties' \$20,000.00 savings account 50/50 at the time of the divorce. (TR—91).

Following a trial on the merits, the trial court awarded Star essentially all relief that she requested, the specifics to be detailed herein.

VI. SUMMARY OF THE ARGUMENT

Martin Pierce appeals to this Court on the basis that the chancellor abused his discretion by being unduly generous to Star Pierce when considering the equitable distribution and alimony awards granted unto her. Viewed in their totality, the awards to the wife are excessive to the extent that they demonstrate a manifest abuse of discretion on the part of the chancellor. *Duncan v. Duncan*, 815 So. 2d 480 (Miss. Ct. App. 2002). Though the parties were married only six years, were childless, and the 32-year-old wife was employed and able to work, the chancellor awarded the wife well over 50% of the marital estate and \$500.00 per month in periodic alimony, together with additional alimony consisting of the cost of the note, taxes and insurance on the former marital home, which was \$700.00 per month as of the time of the trial, until Star remarries or her child from a prior relationship graduates from high school or moves from the home, events which may never occur. By designating the payment of the house note, taxes and insurance as well as alimony, but fixing its termination date on a child-related event, it seems apparent that the chancellor saddled the husband with a child support obligation for a child not of the marriage and called it alimony, which was clearly erroneous and manifestly in error.

It is apparent from a review of the testimony that the wife understated her income on her financial declaration. Using the understated figures that Star provided on her financial declaration, the chancellor awarded Star 40.8% of the alleged disparity between the parties' incomes. This equaled one-third of Martin's monthly net income.

Additionally, when considering the totality of the circumstances, it was error for the chancellor to order Martin to assign unto Star his Survivor Annuity Benefit Plan considering that the parties were married for only six years of Martin's military career and he may only designate one beneficiary, thus prohibiting Martin from being able to designate his present wife or child.

Further, it was error for the chancellor to award Star 65% of Martin's military retirement for those years in which the parties were married.

VII. ARGUMENT

"In domestic relations cases the scope of review is limited by the substantial evidence/manifest error rule." *Jundoosing v. Jundoosing*, 826 So. 2d 85, 88 (¶10) (Miss. 2002). "Our review in domestic relations 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." *Id.* (quoting *Johnson v. Johnson*, 650 So. 2d 1281, 1285 (Miss. 1994)).

A. The court erred in its division of marital assets and liabilities.

In making an equitable distribution of marital assets, chancellors are directed to consider the factors set forth in *Ferguson v. Ferguson*.

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 to the acquisition of the property;
 - b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage; and
 - c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.
2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise;
3. The market value and the emotional value of the assets subject to distribution;

4. The 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;
5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution;
6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;
7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and,
8. Any other factor which in equity should be considered.

Ferguson v. Ferguson, 639 So. 2d 921, 928 (Miss. 1994).

The chancellor divided property, granted awards to Star, and imposed obligations upon Martin, as follows:

- a. The chancellor granted Star use and possession of the marital home with Martin Pierce paying the note, taxes and insurance thereon in the approximate amount of \$700.00 per month, until Star remarries or until her 11-year-old child from a previous relationship graduates from high school or moves from the home. If and when Star ever vacates the home, it is to be sold with the equity to be equally divided. (RE—0011).
- b. The chancellor awarded 32-year-old Star, and ordered Martin to pay, periodic alimony in the amount of \$500.00 per month until Star's death or remarriage. (RE—0016).
- c. The chancellor awarded Star 65% of Martin's military retirement accumulated during the course of the marriage. (CP—32) (RE—0011).
- d. The chancellor ordered that Martin assign unto Star his military Survivor Annuity Benefit Plan, meaning that should Star outlive Martin, she would receive 55% of his base retirement pay to the exclusion of Martin's dependents. (RE—0011).

- e. The chancellor awarded Star one-half of Martin's military Thrift Savings Plan. (RE—0011).
- f. The chancellor ordering that Martin pay certain credit card debt incurred by Star in the approximate amount of \$3,000.00. (RE—0011).
- g. The chancellor awarded Star the Ford Focus vehicle and ordered her to be responsible for the note and insurance thereon. The note is \$317.76 per month. (EX—6, p.4) (RE—0011).
- h. The chancellor ordered that Star pay her post-divorce credit card debt. (RE—0011).
- i. The chancellor ordered Martin to pay Star the sum of \$2,000.00 as compensation for her attorney's services. (RE—0017).
- j. Martin sought and was granted only two items of personal property (some Infinity stereo speakers and an automotive fuel injection system, both of which were missing with whereabouts unknown), thus leaving Star to implicitly retain all household goods and furnishings in her possession, which she valued on her financial declaration at \$19,035.00. (EX—6 (see attachment to financial statement, pages 1-5)) (CP—32) (RE—0009).

It is apparent that Star walked away with the vast majority of the marital assets. She retained exclusive use and possession of the home with Martin footing the bill, and if and when the home is ever sold, Martin would be entitled to only 50% of the proceeds from the sale even though he would have paid 100% of the monthly notes, taxes and insurance on the home. (RE—0007, 0011). Star was awarded 65% of Martin's military retirement accumulated during the course of the marriage, his Survivor Benefit Plan in its entirety, half of Martin's Thift Savings Plan, and seemingly all of the household goods and furnishings valued in excess of \$19,000.00,

the value of which was not even considered by the chancellor or mentioned in his opinion. Even though Martin did not request that he be awarded the household goods and furnishings, the value of same to Star should certainly have been taken into consideration during the equitable distribution and alimony analysis.

The chancellor also failed to consider that between the time of the parties' separation and the trial in Harrison County, Martin paid Star \$24,000.00 or more in temporary support. (TR—54). Further, the chancellor failed to consider that after the parties were divorced by the Washington court but prior to the trial in this matter, Star wrongfully withdrew and spent another \$4,000.00 of Martin's post-divorce earnings that were erroneously deposited into the parties' former joint account by the military. (TR—14, 88, 113). Thus, before the chancellor made any award at all unto Star, she had already enjoyed receipt of at least \$28,000.00 from Martin since the separation of the parties, which should have been taken into account in the equitable distribution and alimony analysis, but was not even considered or mentioned by the chancellor in his opinion. See *Fogarty v. Fogarty*, 922 So. 2d 836 (Miss. Ct. App. 2006) (considering amount of temporary support paid to wife during equitable distribution and alimony analysis.) All awards to a spouse must be considered together when deciding whether they are equitable and fair. *Hubbard v. Hubbard*, 656 So. 2d 124, 130 (Miss. 1995) (citing *Ferguson*, 639 So. 2d at 929). Equitable distribution and alimony are parts of the same issue. *Cosentino v. Cosentino*, 912 So. 2d 1130 (Miss. 2005) (citing *Ferguson v. Ferguson*, 639 So. 2d 921, 929 (Miss. 1994)). Together, they command the entire field of financial settlement of divorce. *Id.* "Where one expands, the other must recede." *Ferguson v. Ferguson*, 639 So. 2d 921, 929 (Miss. 1994) (quoting *LaRue v. LaRue*, 172 W.Va. 158, 304 S.E.2d 312, 334 (1983) (Neely, J., concurring)).

Inexplicably, the chancellor further ordered Martin to assign Star as the sole beneficiary of his Survivor Benefit Plan. In the recently decided opinion of *Williams v. Williams*, the Court of Appeals quoted *In re Marriage of Smith*, 56 Cal. Rptr. 3d 341 (Cal. Ct. App. 2007), for a useful description of the military's Survivor Benefit Plan. The description from *Smith* reads as follows:

The military retirement scheme does not include a death benefit but military retirees may participate in the [Survivor Benefit Plan] (10 U.S.C. §§ 1447-1455), which provides benefits in the form of an annuity payable to a designated beneficiary upon the death of the retiree[.] (10 U.S.C. § 1450(a)). The cost of participation is withheld from the member's monthly retirement pay. (10 U.S.C. § 1452). . . . An eligible participant may elect to name a former spouse as the [Survivor Benefit Plan] beneficiary. (10 U.S.C. § 1448(b)(2), (3)). And federal law allows state courts to order military service members to participate in the [Survivor Benefit Plan] and to designate a former spouse as beneficiary as part of a dissolution agreement. (10 U.S.C. § 1450(f)(4)).

Williams v. Williams, No. 2007-CA-01736-COA (Miss. Ct. App. 2009) (quoting *In re Marriage of Smith*, 56 Cal. Rptr. 3d 341, 348 (Cal. Ct. App. 2007)).

The chancellor erroneously ordered that Martin assign Star as the sole beneficiary of his Survivor Benefit Plan despite the fact that the parties were married for only six years of Martin's military career, and at the time of trial Martin was remarried and expecting his first child (RE—0015). This was an abuse of discretion and manifestly in error in that, should Star outlive Martin, she will be awarded 55% of Martin's base retirement pay while his present wife and child will be left with no Survivor Benefit Plan income whatsoever. See 10 U.S.C. § 1451. In the next assignments of error, it will be argued that it was error to award 32-year-old Star Pierce periodic alimony after only a six year marriage when she is capable of maintaining gainful employment. Certainly it was error to order Martin to support Star from beyond his grave, thus impeding his ability to care for his dependents at the time of his death. In the Mississippi Supreme Court case of *Crowe v. Crowe*, this court held that it was error for the chancery court to

have ordered that the husband to refrain from removing his wife as the recipient of the survivor benefit under his pension absent a finding that the wife had contributed to the accumulation of the asset. *Crowe v. Crowe*, 641 So. 2d 1100 (Miss. 1994) (citing *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994)). In the present case, the chancellor specifically found that Martin's military retirement, and thus the Survivor Benefit Plan, was entirely attributable to Martin's efforts. (CP—28) (RE—0007). Thus, pursuant to the holding in *Crowe*, the chancellor committed reversible error by awarding Star the Survivor Benefit Annuity while simultaneously finding that she made no contribution to the acquisition of the asset. *Id.* Certainly Star should not be entitled to receive 55% of Martin's base retirement pay for a six year marriage to the exclusion of his present wife or child. See 10 U.S.C. § 1451.

Further, despite the chancellor's finding that Martin's military retirement was entirely attributable to Martin's efforts, he awarded Star Pierce 65% of Martin Pierce's military retirement accumulated during the marriage. (CP—32) (RE—0011). While Martin concedes that the military retirement accumulated during the marriage is a marital asset subject to equitable distribution, certainly, it does not seem equitable for Star to be awarded a greater share of Martin's military retirement accumulated during the course of the marriage than Martin, particularly considering the generosity of the other awards to Star. The chancellor simply abused his discretion.

B. The chancellor erred in awarding Star Pierce periodic alimony;

and

C. The chancellor erred in awarding Star use and possession of the marital home, with Martin Pierce paying the note, taxes and insurance thereon in the approximate amount of \$700.00 per month, until Star remarries or until her 11-year-old child from a previous relationship graduates from high school.

To avoid redundancy, discussion of the last two issues—both involving alimony awards—will be combined.

If after the equitable distribution of the marital property, both parties have been adequately provided for, then an award of alimony is not appropriate. *Johnson v. Johnson*, 650 So. 2d 1281, 1287 (Miss. 1994). Likewise, should the division of marital property leave one of the parties with a deficiency, then consideration of an award of alimony is appropriate. *Id.*

A chancellor has substantial discretion in fashioning relief for equitable distribution and alimony and the appellate court's authority to disturb such an award must be based on the conclusion that the chancellor has abused that broad discretion. *Wells v. Wells*, 800 So. 2d 1239, 1243(¶ 8) (Miss. Ct. App. 2001). The Mississippi Supreme Court has, to some extent, placed some limits on the chancellor's discretion in this field by itemizing a list of factors that the chancellor must consider in determining whether periodic alimony is appropriate and, if so, what amounts are appropriate. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993).

The review of a chancellor's award of alimony is well settled. Awards of alimony are within the discretion of the chancellor, *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993) (citing *McEachern v. McEachern*, 605 So. 2d 809, 814 (Miss. 1992)), and the amount of alimony to be awarded is a matter also committed to the discretion of the chancery court because of the chancellor's opportunity to evaluate the equities of the particular situation. *Tilley v. Tilley*, 610 So. 2d 348 (Miss. 1992); *Cherry v. Cherry*, 593 So. 2d 13, 19 (Miss. 1991); *Holleman v. Holleman*, 527 So. 2d 90 (Miss. 1988).

The Mississippi Supreme Court has stated that the touchstone which should guide a chancellor when awarding alimony is as follows:

Alimony, if allowed, should be reasonable in amount, first deducting the resources of the wife and then finding an amount commensurate with the wife's

accustomed standard of living, and considering the ability of the husband to pay. As long as the chancellor follows this general standard, the amount is largely within his discretion. *Wood v. Wood*, 495 So. 2d 503, 5C6 (Miss. 1986); Miss.Code Ann. § 93-5-23 (Supp.1989). The chancellor should consider the reasonable needs of the wife and the right of the husband to lead as normal a life as possible with a decent standard of living. *Massey v. Massey*, 475 So. 2d 802, 803 (Miss. 1985).

Brendel v. Brendel, 566 So. 2d 1269, 1272 (Miss. 1990).

When considering whether or not to award alimony, the chancellor is required to consider the *Armstrong* factors:

1. The income and expenses of the parties;
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 support order;
10. Fault or misconduct;
11. Wasteful dissipation of assets by either party; or
12. Any other factor deemed by the court to be "just and equitable" in connection with the setting of spousal support.

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

1. **The income and expenses of the parties:**

Martin's monthly net income from the air force is \$3,663.00. (EX—3-4). His own monthly expenses total approximately \$2,864.00.¹

Star's financial statement showed gross salary and wages of only \$800.00 per month and net income of \$628.00 per month. (EX—6). However, her own testimony indicates that her

¹ Martin's financial declaration shows monthly expenses of \$5,494.00. However, this figure is in error as it calculates the Mississippi house note and the Washington house payments twice. The corrected figure of \$2,864.00 allows for Martin's Washington house payment, but does not include the \$700.00 Mississippi house note that he is presently ordered to satisfy.

claimed income is understated. According to Star's testimony, she is working two jobs, one at McDonald's where she is earning \$8.50 per hour working up to 32 hours per week, which would total earnings of \$1,178.67 per month. (TR—67-68). Star further testified that she works a second job as a substitute teacher 3-4 days a week at the rate of \$75.00 per day, with a possibility of being raised to \$100.00 per day. (TR—64-65, 67, 101-02). If she works as a substitute teacher three days per week at \$75.00 per day, she would bring in an additional \$1,000.00 per month, and if she substituted four days per week, she would have an additional \$1,333.33 per month during the school year. Each of these sums taken alone, \$1,178.67 from McDonald's or \$1,000.00-1,333.33 from substitute teaching, is more than the \$800.00 per month Star reported on her financial declaration for working both jobs, although she testified that she does in fact work both jobs. Star's financial declaration shows monthly expenses of \$2,563.76. The expenses shown on Star's financial declaration are clearly for both her and her daughter, Kayla, who is not a child of the marriage, as there are expenses listed for children's allowance and school expenses.

2. The health and earning capacities of the parties:

Martin's health is excellent. Martin is a member of the United States Air Force, and thus his income potential is determined by the United States government.

Star has been diagnosed with Crohn's disease and kidney problems and takes prescription medication for those conditions. However, Star's health has not precluded her from maintaining gainful, steady employment. Star testified that she has typing skills, which would indicate that she would be qualified to seek and obtain employment more lucrative than working at McDonald's and substitute teaching. Very likely, she could obtain a clerical position with

benefits if she would only try. However, from Star's own testimony, it appears that she is not interested in pursuing a better paying job with benefits. (TR—101).

3. The needs of each party:

Martin's own monthly expenses total approximately \$2,864.00.² (EX—3). Star's monthly expenses, which include Kayla's expenses, too, total \$2,563.76. (EX—6).

4. The obligations and assets of each party:

Martin's monthly expenses total \$2,864.00. Star's monthly expenses total \$2,563.76. At the time of trial, Star had \$6,500.00 - \$7,000.00 in savings. Martin and his present wife had savings of \$16,872.91. (EX—5, 6). Credit card debt accumulated during the marriage totaled approximately \$3,000.00. Household goods and furnishings retained by Star were valued by Star at \$19,035.00. (EX—5, 6). Additional assets consisted of Martin's military retirement (which will not be vested for another 12 years), as well as Martin's Thrift Savings Plan and his Survivor Benefit Plan.

5. The length of the marriage:

The parties had a short marriage lasting only six years, during which they lived together for less than three years. (TR-55) "Length of the marriage may be the most critical factor in determining whether a disparity should be remedied by alimony." Deborah H. Bell, *Bell on Mississippi Family Law*, §9.04[5][a]. The Mississippi Supreme Court has often cited brevity of a marriage as a significant factor in denying alimony or awarding rehabilitative alimony rather than periodic alimony. *Id.* In the case of *Hubbard v. Hubbard*, the court found that

² Martin's financial declaration shows monthly expenses of \$5,494.00. However, this figure is in error as it calculates the Mississippi house note and the Washington house payments twice. The corrected figure of \$2,864.00 allows for Martin's Washington house payment, but does not include the \$700.00 Mississippi house note that he is presently ordered to satisfy.

rehabilitative alimony, rather than permanent alimony, was appropriate after a four year marriage. *Hubbard v. Hubbard*, 656 So. 2d 124, 130 (Miss. 1995).

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:**

Star and Martin have no children together. Star has an 11-year-old daughter, Kayla, from a prior relationship, who is not a child of the marriage and is who is legally irrelevant to these proceedings. Star's own counsel even pointed out to Star during the trial that Martin had no moral or legal obligation to support Kayla and Star admitted that. (TR—82). However, the chancellor erroneously considered the needs of Kayla throughout his opinion. Specifically, the chancellor noted in his opinion that if the court “were to order the sale of the marital home as sought by Martin Pierce, that Kayla would have no place to live.” (CP—31) (RE—0010). The chancellor made a finding that Star “receives no support from Kayla’s father, who, according to Star, is a convicted felon in the Alabama penal system.” (CP—36) (RE—0015). Finally, the chancellor ordered Martin pay the note, taxes and insurance on the marital home, as alimony,

until Star remarries or until Kayla graduates from high school or moves from the home. (CP—32) (RE—0011). These findings by the chancellor certainly make it appear as though he is

saddling Martin with a child support obligation and calling it alimony, which is clearly erroneous. In fact, pursuant to the Internal Revenue Code, where a support payment is designated as alimony, but terminates upon a child related event, it will be treated as child support. Deborah H. Bell, *Bell on Mississippi Family Law*, §13.01[3][b] (citing I.R.C. § 152(e)(1) (Law. Co-op. 2005).

7. **The age of the parties:** At the time of the trial, Star was 32 and Martin was 39.

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

The parties lived a very modest, middle class lifestyle. The marital home cost approximately \$85,848.00. (EX—3, 6). The parties did not vacation or travel except to visit family. (TR—93).

9. **The tax consequences of the spousal support order:** There was no testimony regarding this factor. Generally speaking, alimony awarded to Star would be income to her and deductible to Martin. However, pursuant to the Internal Revenue Code, where a support payment is designated as alimony, but terminates upon a child related event, it will be treated as child support. Deborah H. Bell, *Bell on Mississippi Family Law*, §13.01[3][b] (citing I.R.C. § 152(e)(1) (Law. Co-op. 2005)).

10. **Fault or misconduct:** The chancellor found that Martin was at fault for the break-up of the marriage and enumerated various faults of Martin. (CP—35) (RE—0014). However, it is also true that Star chose not to live with Martin for a year when he was stationed in Nevada. Certainly the fact that the parties lived apart for three years of their six year marriage—which was in part caused by Star's choice to move from Nevada to Mississippi because was not happy, unable to find work, homesick and was not pleased that the closest medical facility was an hour from base—could not have helped the stability of the relationship. (TR—8) (RE—0014).

11. **Wasteful dissipation of assets by either party:** Neither party alleged the other was guilty of wasteful dissipation of assets.

12. **Any other factor deemed by the court to be "just and equitable" in connection with the setting of spousal support.** The chancellor did not enumerate anything for this factor. However, it seems very pertinent that during the separation of the parties and up until the trial in this matter, Martin paid Star \$24,000.00 or more in temporary support. (TR—54).

The short, childless marriage of the parties, combined with 32-year-old Star's ability to maintain gainful employment—two jobs even—certainly do not favor hefty awards of alimony, and certainly not periodic alimony. Since the dawning of the *Ferguson/Hemsley/Armstrong* analysis in Mississippi domestic law, the Mississippi Supreme Court has allowed very few awards of periodic alimony in marriages lasting less than 10 years, and it is not appropriate in the case *sub judice*. Similar fact patterns have seen very different results.

In the case of *Drumright v. Drumright*, the parties had a five year childless marriage, with the husband earning \$8,000.00 per month (which is substantially higher than Martin's gross earnings of \$4,662.00 per month) and the wife earning \$1,300.00 per month which is comparable to Star's earnings. *Drumright v. Drumright*, 812 So. 2d 1021 (Miss. Ct. App. 2001). In *Drumright*, the Mississippi Supreme Court held that rehabilitative alimony of \$150.00 per week for 60 months was appropriate.

In *Burnham-Stephoe v. Steptoe*, the parties were married for four years, though unlike the Pierces, they had two children together. *Burnham-Stephoe v. Steptoe*, 755 So. 2d 1225 (Miss. Ct. App. 1999). The husband earned an estimated \$33,000.00 per year. The wife's earnings were unclear, though it appeared from the opinion that she was not self-supporting. The court denied wife's claim for periodic alimony, instead awarding her \$300.00 per month in rehabilitative alimony for two years, as well as two years of car payments. The court based its decision to deny the wife's request for periodic alimony in part, on the brevity of the marriage. *Id.* at 1230.

In the case of *Ericson v. Tullos*, the parties were married for nine years with no children. The 47-year-old wife earned \$87,000.00 per year, while the completely disabled and quadriplegic husband had income of \$27,000.00 per year. Citing a short marriage with no

children, the court denied all alimony to the husband. *Ericson v. Tullos*, 876, So. 2d 1038, 1041 (Miss. Ct. App. 2004).

In the case of *Fogarty v. Fogarty*, the parties were married for 12 years and had no children. The husband ran a body shop and the wife was disabled. The court deemed it appropriate to award the wife rehabilitative alimony in the amount of \$200.00 for 24 months as well as to be able to live rent free in the marital home for two years, with an estimated monthly rental value of \$400.00 per month. The court also noted that the wife had received significant sums in temporary support. *Fogarty v. Fogarty*, 922 So. 2d 836 (Miss. Ct. App. 2006). In the case *sub judice*, Star received \$24,000.00 or more in temporary support, which certainly should be taken into consideration. (TR—54).

The case of *Burcham v. Burcham* also bears some likeness to the present case, though it is one of the rare cases where periodic alimony was awarded in a marriage lasting less than 10 years. *Burcham v. Burcham* 869 So. 2d 1225 (Miss. Ct. App. 2004). The Burchams were married for seven years but, unlike the Pierces, they had one child together and the wife had been a stay-at-home mother who left her career as a cosmetologist to stay at home with the parties' child. Mr. Burcham earned \$72,000.00 per year and Mrs. Burcham earned \$12,000.00 per year. The court held that an award of periodic alimony in the amount of \$400.00 was appropriate. To put the sums awarded in the *Burcham* case into greater perspective, Martin Pierce earns \$55,944.00 per year to Mr. Burcham's \$72,000.00 per year. Mrs. Burcham earned \$12,000.00 per year while Star's claimed earnings are \$9,600.00 per year, though her testimony indicates that she actually earns substantially more than that. While Mr. Burcham was ordered to pay \$400.00 in alimony when earning \$72,000.00 per year, Mr. Pierce was ordered to pay \$1,200.00 per month in alimony when earning \$55,944.00 per year.

In the present case, the chancellor's award to Star of periodic alimony in the amount of \$500.00 per month until Star's death or remarriage, as well as granting Star use and possession of the marital home with Martin Pierce paying the note, taxes and insurance thereon in the approximate amount of \$700.00 per month until Star remarries or until her 11-year-old child from a previous relationship graduates from high school or moves from the home, was an abuse of discretion. The chancellor awarded Star one-third of Martin's monthly net income, or 40.8% of the alleged disparity between their incomes. The appellate court must "consider the totality of the chancellor's awards upon the divorced parties, including the benefit to the payee spouse and the concomitant burden placed upon the payor spouse." *Brooks v. Brooks*, 652 So. 2d 1113, 1121 (¶10) (Miss. 1995). The chancellor's awards of alimony to Star and the concomitant burden placed upon Martin are unfair.

While the disparity in the parties' incomes and the fact that Star had only recently re-entered the workforce may have warranted some form of short term rehabilitative alimony, it was error to grant periodic alimony to Star considering the brevity of the marriage, the fact that Star is only 32 years old and capable of maintaining full-time employment, and had already received \$24,000.00 or more in temporary support. "Rehabilitative alimony provides for a party who is trying to become self-supporting and prevents that party from becoming destitute while searching for a means of income." *Voda v. Voda*, 731 So. 2d 1152, 1155 (¶8) (Miss. 1999). Moreover, "[t]he primary purpose of rehabilitative alimony is to give the former spouse the opportunity to enter the work force." *Alex v. Tarver*, 879 So. 2d 1078, 1080 (¶7) (Miss. Ct. App. 2004).

Further, it was an abuse of discretion and manifest effort to hold Martin financially responsible for the support of Star's daughter, Kayla, to the tune of a \$700.00 per month house

note, while labeling it alimony. Where the chancellor specifically made findings that (a) if the court “were to order the sale of the marital home as sought by Martin Pierce, that Kayla would have no place to live”; and (b) that Star “receives no support from Kayla’s father, who, according to Star, is a convicted felon in the Alabama penal system”; and (c) ordered Martin to pay the note, taxes and insurance on the marital home, as alimony, until Star remarries or until Kayla graduates from high school or moves from the home (events which may never occur should Kayla drop out of school and continue living with her unmarried mother), it is clear that the chancellor abused his discretion and was manifestly in error. (CP—31-32, 36) (RE—10, 11, 15). This award of “alimony” is, according to the Internal Revenue Code, in the nature of child support and to be treated as child support. Deborah H. Bell, *Bell on Mississippi Family Law*, §13.01[3][b] (citing I.R.C. § 152(e)(1) (Law. Co-op. 2005)). See also *Johnson v. Johnson*, 650 So. 2d 1281, 1284, 1288 (Miss. 1984) (ordering husband to make mortgage payments until children’s majority as form of child support). The award was an abuse of discretion and clearly erroneous. These awards to the wife are excessive to the extent that they demonstrate a manifest abuse of discretion on the part of the chancellor and requires reversal. *Duncan v. Duncan*, 815 So. 2d 480 (Miss. Ct. App. 2002).

Equitable distribution and alimony are parts of the same issue. *Cosentino v. Cosentino*, 912 So. 2d 1130 (Miss. 2005) (citing *Ferguson v. Ferguson*, 639 So. 2d 921, 929 (Miss. 1994)). Together, they command the entire field of financial settlement of divorce. *Id.* All awards to a spouse must be considered together when deciding whether they are equitable and fair. *Hubbard v. Hubbard*, 656 So. 2d 124, 130 (Miss. 1995) (citing *Ferguson*, 639 So. 2d at 929). **"Where one expands, the other must recede."** *Ferguson v. Ferguson*, 639 So. 2d 921, 929 (Miss. 1994)

(quoting *LaRue v. LaRue*, 172 W.Va. 158, 304 S.E.2d 312, 334 (1983) (Neely, J., concurring) (emphasis added)).

In the present case, there was much expanding, but no receding. Star got it all. Clearly the chancellor abused his discretion and was manifestly in error.

VIII. CONCLUSION

The chancellor abused his discretion by being unduly generous to Star Pierce when considering the equitable distribution and alimony awards granted unto her. Viewed in their totality, the awards to the wife are excessive to the extent that they demonstrate a manifest abuse of discretion on the part of the chancellor. Because financial awards in divorce are linked, reversal of property division requires reversal of alimony and attorneys' fees. *Thompson v. Thompson*, 894 So. 2d 607 (Miss. Ct. App. 2004); *Hankins v. Hankins*, 866 So. 2d 508, 511-12 (Miss. Ct. App. 2004). Likewise, reversal of a substantial alimony award requires reversal of the court's division of marital assets. *Duncan v. Duncan*, 815 So. 2d 480, 484 (Miss. Ct. App. 2002). Martin Pierce would therefore request that this court reverse and remand to the trial court for an appropriate and equitable analysis of all issues relating to property division, alimony, and attorneys' fees.

Respectfully submitted on this the 10 day of August, 2009.


WENDY C. HOLLINGSWORTH

CERTIFICATE OF FILING AND SERVICE

I, WENDY C. HOLLINGSWORTH, of the LAW OFFICE OF WENDY HOLLINGSWORTH PLLC, do hereby certify that I have mailed this day, first-class postage prepaid, a true and correct copy of the Brief for Appellant and Record Excerpts for Appellant to the following at their usual mailing address:

Supreme Court of Mississippi (original and three copies)
Post Office Box 249
Jackson, MS 39205-0249

Chancellor Carter O. Bise
Harrison County Chancery Court
Post Office Box 1542
Gulfport, MS 39502-1542

William E. Tisdale, Esq.
P.O. Box 548
Biloxi, MS 39533

SO CERTIFIED that I have deposited the Brief for Appellant and Record Excerpts for Appellant in the United States mail on this the 10 day of August, 2009.


WENDY C. HOLLINGSWORTH

WENDY C. HOLLINGSWORTH, MSB [REDACTED]
LAW OFFICES OF WENDY HOLLINGSWORTH
2900 Government Street, Suite D
Ocean Springs, MS 39564
Phone: (228) 875-7530
Fax: (228) 875-7531