

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CLAUDIA B. ALLGOOD

APPELLANT

VS.

CAUSE NO. 2009-CA-00858

DEFORREST R. ALLGOOD

APPELLEE

APPEAL FROM THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

BRIEF OF APPELLANT, CLAUDIA B. ALLGOOD

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

1. Honorable Edward C. Fenwick, Special Chancellor in this case and Chancellor for the Sixth Chancery Court District;
2. Deforrest R. Allgood, Plaintiff and Appellee;
3. Claudia B. Allgood, Defendant and Appellant;
4. Stephen T. Bailey, Evans & Bailey, PLLC, Attorney for Appellant; and
5. Jackson M. Brown, Attorney for Appellee.

Respectfully submitted,

CLAUDIA B. ALLGOOD, Appellant

BY:



STEPHEN T. BAILEY (Miss Bar No. 9938)

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BRIEF OF APPELLANT, CLAUDIA B. ALLGOOD

STATEMENT OF THE ISSUES

1. Whether the trial Court committed reversible error in the identification, classification and equitable division of the parties' property.
2. Whether the trial Court committed reversible error in failing to award alimony to the Appellant, Claudia B. Allgood.

STATEMENT OF THE CASE

A. Statement of the Proceedings.

De Forrest R. Allgood (hereinafter "De Forrest") filed a Complaint for Divorce against Claudia B. Allgood (hereinafter "Claudia") on March 29, 2007. (Record "R" at pp. 3-6). De Forrest's Complaint for Divorce alleged that irreconcilable differences had arisen between the parties and stated that De Forrest "anticipates that a written agreement for the full and final settlement of any and all property rights existing as well as making adequate and sufficient provisions for the custody and maintenance of their minor child will soon be filed." (R. at pp. 3-6).

Claudia filed an Answer to De Forrest's Complaint on July 18, 2008 and a Counter-Complaint seeking a divorce on the grounds of irreconcilable differences, child custody, child support, an equitable division of the parties' marital assets, both periodic and lump sum alimony and certain other relief (R. at pp. 42-51).

On October 3, 2008 the parties entered into a Consent to Divorce. (R. at pp. 60-63). The

Consent for Divorce provided that the parties agreed to a divorce on the grounds of irreconcilable differences. (R. at p. 60). The parties also agreed to share joint legal custody of their child, with Claudia to have physical custody and Deforrest to have reasonable rights of visitation (R. at p. 60). The Consent for Divorce also set forth nine (9) contested issues for resolution by the trial Court. (R. at pp. 60-63). One of the issues submitted to the trial Court was “whether Deforrest R. Allgood shall be required to pay alimony to Claudia B. Allgood, with each party being permitted to present any and all issues pertaining to alimony, and if an award of alimony is warranted.” (R. at pp. 60-61). Another issue relevant to this appeal that was submitted to the trial Court was “the identification of the parties separate and marital property, the equitable division of the marital assets, as well as the responsibility of each party for the payment of any outstanding indebtedness.” (R. at p. 62).

After a one day trial, the Special Chancellor entered an Opinion of the Court. (R. at pp. 65-78). The Opinion of the Court found that Deforrest was entitled to recoup eighty-two thousand two hundred fifty dollars (\$82,250.00) in inherited funds that he used to pay towards the mortgage on the marital residence. (R. at pp. 72-73). The Opinion of the Court also awarded approximately sixty-five percent (65%) of the total marital assets to Deforrest and the remaining thirty-five percent (35%) to Claudia. (R. at pp. 65-78). Some marital assets were not addressed at all by the trial Court. The Opinion of the Court also found that Claudia was not entitled to alimony. (R. at p. 78).

A Final Judgment was entered on May 1, 2009 in accordance with the trial Court’s Opinion of the Court. (R. at pp. 79-81). Claudia noticed her appeal of the trial Court’s judgment to this Court on May 28, 2009. (R. at pp. 82-83).

B. Statement of the Facts.

Deforrest and Claudia were married on June 17, 1978. (R. at pp. 3, 43, Transcript “T” at p.

136). Three children were born to the parties during the marriage. (R. at pp. 3, 43). The parties two oldest children were emancipated at the time of the trial. (R. at pp. 3, 43). Deforrest and Claudia separated on or about February 24, 2007. (R. at pp. 3, 43). The parties youngest child, Keller, was age sixteen (16) at the time of trial (R. at pp. 3, 43). The parties agreed that they would share the joint legal custody of Keller, with Claudia having physical custody of the child. (R. at pp. 60-63).

Deforrest was the District Attorney for the Sixteenth Circuit Court District at the time of the trial. (T. at p. 6). Deforrest had been the elected District Attorney since 1989. (T. at p. 6). Since the time of his original election, Deforrest had been re-elected to serve five (5) full terms as District Attorney, having been re-elected in 1991, 1995, 1999, 2003 and 2007. (T. at p. 75). Prior to being elected as District Attorney, Deforrest had served as an Assistant District Attorney since July of 1978. (T. at p. 6). Deforrest was age 55 at the time of trial. (T. at p. 58).

Deforrest earned a gross monthly salary as District Attorney of seven thousand nine hundred eighty-three dollars (\$7,983.00). (T. at p. 68, Exhibit P1). He also had income of approximately one hundred twenty-one dollars and eighty-five cents (\$121.85) per month from dividends and interest on bank stocks. (T. at pp. 68-69, 172, Exhibit P1). Deforrest listed on his financial statement non-marital property totaling one hundred twenty-eight thousand nine hundred eighty-eight dollars and eighty-four cents (\$129,988.84). (T. at pp. 15-19, Exhibit P1). The majority of the non-marital property consisted of bank stock left to Deforrest by his family, along with land and personal property. (T. at pp. 15-19, Exhibit P1).

The largest marital assets owned by the parties were the marital residence valued at two hundred forty thousand dollars (\$240,000.00) and Deforrest's retirement and deferred compensation plan valued at a total of approximately two hundred twenty thousand thirty-five dollars and eighty-four cents (\$220,035.84). (T. at pp. 20-21, 142, Exhibit P1).

De Forrest admitted that he was fully vested with thirty plus years of service in the Mississippi Public Employees Retirement System at the time of trial. (T. at p. 75). He also stated that he could retire immediately as District Attorney and that he would lose only approximately thirty dollars (\$30.00) per month in pay. (T. at p. 76, Exhibit P1).

The 8.05 financial statement of De Forrest showed a net monthly pay of five thousand four hundred thirty-six dollars and twenty-eight cents (\$5,436.28), along with total monthly expenses of five thousand one hundred seventy-five dollars (\$5,175.00). (T. at pp. 45-49, 168). Included in De Forrest's listing of monthly expenses were monthly charitable deductions totaling nine hundred fifty dollars and thirty-three cents (\$950.33), which included an eight hundred dollar (\$800.00) per month tithe and one hundred fifty dollars and thirty-three cents (\$150.33) in other miscellaneous donations. (T. at p. 46, 93-94, Exhibit P1).

Since the time that Claudia left the marital residence, De Forrest had lived alone in the parties' 2,900 square foot marital home. (T. at p. 12). De Forrest testified that at the time of the trial that he engaged in hunting, kayaking and that he raised English Setter hunting dogs. (T. at pp. 80-81, 90-91, 94-95). De Forrest testified that he had not been required to curtail his leisure activities since the parties' separation. (T. at p. 91). He also testified that he had not been required to cut back on his spending during the separation. (T. at p. 96).

Claudia was residing in Fayetteville, Arkansas at the time of the trial. (T. at Exhibit D5, R. at p. 27). Claudia was employed as a seventh grade English teacher at Helen Tyson Middle School. (T. at p. 185, Exhibit D5). Claudia's gross monthly income was four thousand five hundred twelve dollars and thirty-three cents (\$4,512.33). (T. at p. 186, Exhibit D5). Claudia testified at trial that she moved to Arkansas in order to be closer to her ailing mother and to increase her earning capacity as a teacher. (T. at pp. 208-209). Claudia was age 52 at the time of trial. (T. at p. 81).

Testimony at trial indicated that Claudia had worked as a teacher during most of the parties' marriage, except for several years when she stayed home to care for the parties' three minor children when the children were small. (T. at pp. 186-189). During the period of time when Claudia was a stay at home mother, she supplemented the family income by keeping another child in the home and by cleaning houses. (T. at p. 188). Claudia testified that at Deforrest's request, she elected to teach for many years in various private schools so that her children could enjoy a private school education without having to pay tuition. (T. at p. 196). As a result of teaching for many years in the various private schools that her children attended, Claudia did not have enough time vested in the Mississippi Public Employees Retirement System to make her eligible for retirement. (T. at pp. 196-197). She also testified that she did not foresee herself having the ability to retire at any point in the future. (T. at pp. 197-198). Claudia also testified that she and Deforrest made the choice as a family for her to work in the private school system for free tuition for the children and that the parties agreed they would share in Deforrest's state retirement. (T. at pp. 196-198).

Claudia indicated that Deforrest frequently worked late hours in his job as District Attorney. (T. at p. 190). She also stated that she was primarily the party who cared for the children, cooked the meals and cleaned the marital home. (T. at p. 190).

Deforrest and Claudia maintained separate checking accounts throughout most of the marriage. (T. at pp. 100-101, 204-205). The parties did maintain a joint savings account where marital funds were deposited. (T. at pp. 101-102, Exhibit D3).

In addition to working and caring for the children, the testimony at trial indicated that Claudia acted as the general contractor during the construction of the parties' marital residence, saving them a large sum of money. (T. at pp. 32, 126-127, 191-192).

Claudia also assisted Deforrest in his career as District Attorney by helping him campaign.

(T. at pp. 117-118, 198). The testimony showed that at the time of trial, Deforrest had eight thousand seven hundred two dollars and twenty-seven cents (\$8,702.27) in "Campaign Funds" that were accumulated during the course of his political career. (T. at pp. 23-24, Exhibit P1). The Court made no disposition of these "Campaign Funds" in its final ruling. (R. at pp. 65-68).

Claudia testified that since the separation that her lifestyle had changed substantially. (T. at pp. 203-204, 220). Specifically, she stated that she had gone from living in a 2,900 square foot home to a 750 square foot apartment. (T. at pp. 203-204). She also stated that prior to the separation she had money to travel and a maid to clean the home twice per month. (T. at pp. 203-204). Finally, Claudia testified that she did not always have sufficient funds each month to meet her financial obligations. (T. at p. 220).

Claudia also testified that the biggest economic disparity between the parties was the fact that Deforrest could retire immediately with almost no loss of income, while she could likely never retire. (T. at pp. 196-198, 220-221).

Claudia asked the Court to award her a fifty/fifty split in the marital assets. (T. at p. 219). She also asked the Court to award her one thousand five hundred dollars (\$1,500.00) per month in periodic alimony and twenty thousand dollars (\$20,000.00) in lump sum alimony. (T. at pp. 219-220).

One of the major issues at trial was whether Deforrest would be entitled to more than a fifty percent (50%) interest in the marital home due to inherited funds that he used to pay off the mortgage on the property. Deforrest testified that in 2003 that he put ninety-three thousand dollars (\$93,000.00) from funds that he inherited into the parties' joint savings account. (T. at pp. 27-30, 101-105, Exhibit P2, Exhibit P3, Exhibit D3). Thereafter, in January 2005 Deforrest transferred sixty thousand dollars (\$60,000.00) from the joint savings account and used the funds to make a

lump sum payment on the mortgage on the marital residence. (T. at pp. 27-30, 101-105). In 2006, Deforrest took twenty-two thousand two hundred forty-nine dollars (\$22,249.00) out of the joint savings account and used those funds to pay off the mortgage. (T. at pp. 27-30, 101-105, Exhibits P2, P3, D3).

The testimony showed that Claudia's family also made significant financial contributions to the parties' and their children. (T. at pp. 182-184). Specifically, Claudia testified that her parents gave them ten thousand dollars (\$10,000.00) to twelve thousand dollars (\$12,000.00) as a down payment on their first home. (T. at p. 183). In addition, Claudia's parents gave the parties a down payment for a car, and gave a car to the parties' children. (T. at pp. 183-184).

Despite the clear evidence regarding the commingling of inherited funds by Deforrest, and the evidence of Claudia's efforts in building the marital home, the trial Court found that Deforrest was entitled to recoup his inherited funds in the amount of eighty-two thousand two hundred fifty dollars (\$82,250.00) from the marital home. (R. at pp. 73-74). Claudia was awarded only the sum of seventy-eight thousand eight hundred seventy-five dollars (\$78,875.00) for her interest in the marital home, representing one-half ($\frac{1}{2}$) of the equity in the home after deducting eighty-two thousand two hundred fifty dollars (\$82,250.00) for Deforrest's mortgage payments from inherited funds. (R. at pp. 73-74).

The Court also made an award of the remaining marital assets, after deducting Deforrest's inherited funds, that gave Deforrest approximately two hundred seventy-two thousand six hundred ninety dollars (\$272,690.00) of the marital assets and Claudia the sum of one hundred eighty-nine thousand twenty-two dollars (\$189,022.00) of these assets. (R. at p. 74). This represented a split of approximately fifty-nine percent (59%) of the remaining marital assets to Deforrest, and forty-one percent (41%) of the marital assets to Claudia.

The Court did not even address some of the parties' marital property, such as Deforrest's campaign fund account. (T. at pp. 23-24, Exhibit P1, R. at pp. 65-78). Disregarding the parties thirty year marriage, the three thousand five hundred ninety-two dollars (\$3,592.00) disparity in the parties' monthly income, and the lack of retirement security for the wife, the Court did not award any periodic alimony to Claudia. (T. at p. 172, R. at pp. 75-78). The Court did not even address Claudia's request for lump sum alimony. (R. at pp. 65-78).

SUMMARY OF THE ARGUMENT

Mississippi is an equitable division state. To make a proper equitable division of marital assets, the trial Court must first classify assets as either marital property or separate property, then value the assets and finally divide the assets according to the Ferguson factors. Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994). The trial Court's first reversible error in this case was in treating Deforrest's inherited funds used to retire the mortgage on the jointly owned marital property as a separate, non-marital asset. The Chancellor first listed the marital residence as "marital property", but treated the inherited funds paid towards the mortgage by Deforrest as his separate property. The evidence showed that the marital residence was built in 1994, largely due to the efforts of Claudia acting as the general contractor. The parties resided in the marital residence until their separation in 2007. Deforrest deposited his inherited money into a joint savings account containing marital funds, then used a portion of the funds to pay off the balance on the mortgage. Undoubtedly, the parties had a large amount of equity in the property due to the efforts of Claudia in building the home prior to the payment made by Deforrest. The monthly mortgage payments on the home, although paid by Deforrest, were paid with marital funds. The money and effort contributed by both parties to the accumulation of equity in the marital residence were so intertwined that Deforrest's separate inherited funds became commingled so as to lose their identity as separate property.

The Court also committed reversible error by failing to even address Deforrest's campaign fund account of eight thousand seven hundred two dollars and twenty-seven cents (\$8,702.27). These funds were accumulated during the marriage. In addition, the campaign funds were listed on Deforrest's financial statement as a marital asset. Claudia should have received one-half (1/2) of the aforesaid campaign funds.

The trial Court further committed reversible error by making a sixty-five percent (65%) to thirty-five percent (35%) division in favor of Deforrest, of the marital assets without any explanation as to the reason for the discrepancy. The proof showed that Deforrest earned more money than Claudia throughout the marriage. However, the proof also showed that Claudia made numerous non-economic contributions to the family, such as staying home to care for the children, cooking, cleaning, working in Deforrest's campaigns, teaching in private schools so the children could attend tuition free, and helping to build the marital residence.

In Hemsley v. Hemsley, 639 So. 2d 909, 915 (Miss. 1994), the Supreme Court noted that a homemaker's non-economic contributions are presumed to be equal to those of a wage earning spouse. The trial Court's failure to recognize the value of Claudia's non-economic contribution requires reversal.

Finally, after a thirty year marriage, Claudia was not awarded any alimony by the trial Court. The trial Court did not adequately consider the fact that Deforrest earned more than three thousand five hundred dollars (\$3,500.00) per month more than Claudia. The trial Court also did not take into account that Deforrest gave more than nine hundred fifty dollars (\$950.00) per month to charity. In addition, the trial Court did not address the fact that Deforrest was in a position to retire immediately with almost no loss of income, while Claudia could not likely ever retire. The Chancellor also failed to adequately provide Claudia with the means to maintain the lifestyle that she had been accustomed

to, which included frequent travel, a 2900 square foot home and a maid to clean her home. The trial Court's failure to award both periodic alimony and lump sum alimony requires reversal by this Court.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE IDENTIFICATION, CLASSIFICATION AND EQUITABLE DIVISION OF THE PARTIES' PROPERTY.

A. Standard of Review.

It is well settled that the appellate Courts of this state will not reverse a Chancellor's decision on classification and division of marital and separate property unless it is manifestly wrong, clearly erroneous, or an improper legal standard was employed. Arthur v. Arthur, 691 So. 2d 997, 1001 (Miss. 1997).

B. The trial Court committed reversible error in determining that inherited funds used to pay off the mortgage on the jointly titled marital residence were the separate property of the husband.

At the time of trial, the marital home was valued at two hundred forty thousand dollars (\$240,000.00). (T. at pp. 20-21, Exhibit P1, R. at pp. 65-68). The trial Court discussed the marital residence under its' analysis of the Ferguson factors. (R. at pp. 65-78). However, the trial Court determined that DeForrest should first receive his inherited funds in the amount of eighty-two thousand two hundred fifty dollars (\$82,250.00) that he invested in the marital residence by paying off the mortgage, and that the remaining one hundred fifty-seven thousand seven hundred fifty dollars (\$157,750.00) should be equally divided between the parties. (R. at pp. 72-74). In essence, the trial Court treated the inherited funds invested in the marital residence as his separate property, not as marital property. The trial Court relied on the cases of Wilson v. Wilson, 820 So. 2d 761

(Miss. Ct. App. 2002) and Brock v. Brock, 906 So. 2d 879 (Miss. Ct. App. 2005) to determine that DeForrest should receive the inherited funds that he paid towards the mortgage. (R. pp 72-74).

The Wilson and Brock cases are easily distinguishable from the case at bar. In Wilson, the evidence clearly showed that the husband paid for the marital home in its entirety with funds he obtained from sale of assets before the parties' short marriage. Wilson, 820 So. 2d at 763. Likewise, in Wilson the wife could show no contributions of any kind towards the marital property during the parties' short five year marriage. Id.

In the Brock case, the wife's father deeded a home to the wife and retained a life estate in the property. Brock, 906 So. 2d at 880. The parties in Brock only lived in the marital home deeded to the wife by her father from approximately February 26, 1992 until 1993. Brock, 906 So. 2d at 880-881. The wife's father in the Brock case then deeded his life estate in the home to both parties on December 6, 1993. Id. The trial Court judge ultimately awarded the husband in Brock a one-half (½) interest in his former father-in-law's life estate, which was affirmed by the Court of Appeals. Brock, 906 So. 2d at 887-888. The Court of Appeals upheld the trial Court's decision in the Brock case primarily because the home in question was clearly intended as a gift to the wife from her father and because the husband made no meaningful contributions to the home. Brock, 906 So. 2d at 887-888 (citing Wilson v. Wilson, 820 So. 2d 761, 762 (Miss. Ct. App. 2002)).

In the case at bar, it could not be said that Claudia did not make a substantial contribution to the equity in the marital residence. According to the testimony of both parties, Claudia acted as the general contractor for the construction of the marital residence for almost a year at the time that the home was built. (T. at pp. 32, 126-127, 191-192). Due to Claudia acting as the contractor the parties saved a large amount on the construction of the home, which led to the home appraising for double the cost of construction when it was built. (T. at pp. 32, 126-127, 191-192).

This Court has previously recognized the doctrine of commingling of separate funds by investing them into a home that served as a marital residence. In the case of Ory v. Ory, 936 So. 2d 405,412 (Miss. Ct. App. 2006), the trial Court was found to have erred by crediting the wife for sixteen thousand dollars (\$16,000.00) in personal injury funds invested in the marital residence. In Fogarty v. Fogarty, 922 So. 2d 836,840 (Miss. Ct. App. 2006), the Chancellor was affirmed in finding that the home owned by the husband prior to the marriage had become marital property by virtue of the parties residing in it after the marriage and due to improvements made to the property. In Dobbs v. Dobbs, 912 So. 2d 491,492-493 (Miss. Ct. App. 2005), the husband's argument that he should be credited with mortgage payments before the marriage was rejected because the parties lived in the home after the marriage.

In the instant case, any inherited funds of Deforrest were first commingled when he deposited them in the parties joint savings account. (T. at pp. 101-105, Exhibit P2, Exhibit P3, Exhibit D3) Johnson v. Johnson, 650 So. 2d 1281, 1286 (Miss. 1994). See Oswalt v. Oswalt, 981 So. 2d 993 (Miss. Ct. App. 2007) (holding husband's separate property commingled into joint account were properly classified as marital property). Thereafter, the funds were further commingled when he used them to pay off the existing mortgage on the jointly titled marital residence where the parties had lived since 1994 and continued to live until their separation in 2007. Ory v. Ory, 936 So. 2d 405,412 (Miss. Ct. App. 2006); Fogarty v. Fogarty, 922 So. 2d 836,840 (Miss. Ct. App. 2006); Dobbs v. Dobbs, 912 So. 2d 491,492-493 (Miss. Ct. App. 2005).

Separate property loses its separate identity when it is so commingled with the marital property that the owner of the separate property cannot trace the separate funds. Deborah H. Bell, Bell On Mississippi Family Law (2005) §6.04 [2][b] at 165-167. In this case, Deforrest's inheritance was commingled with marital funds and then those funds were again commingled with

the existing equity in the jointly titled marital residence. Therefore, it was reversible error for the Court to find that Deforrest was entitled to the eighty-two thousand two hundred fifty dollars (\$82,250.00) that he paid on the mortgage on the grounds that it was his separate property.

C. The trial Court committed reversible error in failing to make an equitable division of Deforrest's campaign funds.

The testimony showed that at the time of trial that Deforrest had the sum of eight thousand seven hundred two dollars and twenty-seven cents (\$8,702.27) in a bank account designated as "Campaign Funds". Deforrest testified that these funds were contributed during the marriage by his political supporters for use in his re-election efforts (T. at pp. 23-24, Exhibit P1). Deforrest's financial statement listed these funds as a marital asset. (T. at pp.23-24, Exhibit P1).

The trial Court made no mention of the "Campaign Funds" of eight thousand seven hundred two dollars and twenty-seven cents (\$8,702.27) in its Opinion of the Court (R. at pp. 65-78).

This court has repeatedly held that a Chancellor's failure to classify and address assets constitutes reversible error. Smith v. Smith, 856 So. 2d 717,719 (Miss. Ct. App. 2003); Hopkins v. Hopkins, 703 So. 2d 849,850 (Miss. 1997); Redell v. Redell, 696 So. 2d 287,288 (Miss. 1997); Thompson v. Thompson, 894 So. 2d 603,607 (Miss. Ct. App. 2004). Due to the Chancellor's failure to address the classification and division of the "Campaign Funds" account, this case should be reversed and remanded for further proceedings.

D. The trial Court committed reversible error by awarding sixty-five percent (65%) of the marital assets to Deforrest and thirty-five percent (35%) of the marital assets to Claudia.

The Opinion of Court entered in this matter awarded Deforrest the sum of two hundred seventy-two thousand six hundred ninety dollars (\$272,690.00) in marital assets and awarded Claudia one hundred eighty-nine thousand twenty-two dollars (\$189,022.00) in marital assets. (R.

at pp. 65-78). That division represents a split of the remaining marital assets of approximately fifty-nine percent (59%) for De Forrest and forty-one percent (41%) for Claudia. (R. at pp. 65-78). This does not even include De Forrest's campaign funds or his "separate funds" awarded to him from the marital residence.

In the Opinion of the Court, the Chancellor did address the guidelines set forth in Ferguson v. Ferguson, 639 So. 2d 921,927-928 (Miss. 1994). (R. at pp. 65-68). However, the Chancellor made no mention of Claudia's non-economic contributions to the parties' marriage.

The testimony at trial indicated that Claudia made numerous non-economic contributions to her family throughout the parties' marriage. For example, the testimony showed that Claudia did the cooking and cleaning in the marital residence. (T. at p. 190). Claudia also sacrificed her chance at a vested retirement in the Mississippi PERS system by teaching in private schools so that the children could attend tuition free at those schools. (T. at pp. 196-198). Claudia also stayed at home for several years with her children when they were very small. (T. at p. 188). The proof showed that Claudia also worked to advance De Forrest's career by actively campaigning for him when he was running for District Attorney. (T. at pp. 117-118, 198). Finally, Claudia helped the parties accumulate substantial equity in their marital residence by acting as the general contractor on the construction project. (T. at pp. 32, 126-127, 191-192).

The trial Court in its Ferguson analysis seemed pre-occupied with De Forrest's inherited funds that he invested in the marital residence and with the fact that De Forrest earned more money than Claudia throughout the marriage. (R. at pp. 65-78). Although Claudia's family made economic contributions to the parties, no mention of their contributions was made by the trial court. (T at pp. 65-78). De Forrest's contribution to the marital residence in the form of his inherited funds of eighty-two thousand two hundred fifty dollars (\$82,250.00) that he used to pay off the mortgage was

mentioned by the Chancellor under the Ferguson factor of “any other factor which in equity should be considered”. (R. at pp. 72-73). However, the trial Court ultimately treated Deforrest’s inherited funds paid towards the mortgage as his separate property and did not consider those funds in the ultimate final division of the marital property. (R. at pp. 73-74).

If the eighty-two thousand two hundred fifty dollars (\$82,250.00) of inherited funds used to pay off the mortgage is added back, the total value of marital property actually divided by the Court was five hundred forty-three thousand nine hundred sixty-two dollars (\$543,962.00), which is closer to the total value of marital property listed by the trial Court in its Opinion of the Court. (R. at pp. 69,73-74). This means that of the total marital property of five hundred forty-three thousand nine hundred sixty-two dollars (\$543,962.00), Deforrest received approximately three hundred fifty-four thousand nine hundred forty thousand dollars (\$354,940.00), or sixty-five percent (65%), and Claudia received only one hundred eighty-nine thousand twenty-two dollars (\$189,022.00), or thirty-five percent (35%). This calculation does not include Deforrest’s campaign funds.

The Mississippi Supreme Court has regularly instructed the Chancellors to follow the Hemsley and Ferguson approach and to presume that a spouse’s domestic contributions “are equally as valuable” as the contributions of the wage earning spouse. Johnson v. Johnson, 650 So. 2d 1281, 1285-86 (Miss. 1994); Hankins v. Hankins, 729 So. 2d 1283, 1287-88 (Miss. 1989). In this case the Chancellor placed too much weight on the fact that Deforrest earned more money during the marriage. (R. at pp. 65-78). The Chancellor gave no credit to Claudia for her domestic and non-economic contributions to the marital relationship. (R. at pp. 65-78). As such the Chancellor’s division of property constituted an abuse of discretion which must be reversed by this Court. Owen v. Owen, 798 So. 2d 394,399-400 (Miss. 2001); Owens v. Owens, 950 So. 2d 202, 212-213 (Miss. Ct. App. 2006).

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO AWARD ALIMONY TO THE APPELLANT CLAUDIA B. ALLGOOD.

A. Standard of Review.

In order to obtain a reversal for a failure to award alimony, the trial Court's decision must be seen as "so oppressive, unjust or grossly inadequate as to evidence an abuse of discretion." Armstrong v. Armstrong, 618 So. 2d 1278, 1280 (Miss. 1993).

B. The trial Court committed reversible error by failing to award Claudia lump sum alimony.

The factors to be considered in award of lump sum alimony are set forth in the case of Cheatham v. Cheatham, 537 So. 2d 435, 438 (Miss. 1988). Those factors are (1) substantial contribution to accumulation of the payor's assets by quitting work to become a homemaker or assisting in business; (2) a long marriage; (3) the recipient spouse has no separate income or the separate estate is meager by comparison; and (4) the recipient would lack financial security without the lump sum award. Id.

In this case, Claudia asked the trial Court to award her twenty thousand dollars (\$20,000.00) in lump sum alimony. (T. at p. 219-220).

The Appellant would show that she met all of the requirements under Cheatham for an award of lump sum alimony. Claudia contributed to DeForrest's assets by acting as a stay at home mother to the parties' minor children for several years and by working in DeForrest's election campaigns. (T at pp. 117-118, 186-189; 198). The parties in this case were married for thirty (30) years at the time of trial, which is an extremely long marriage. (T at pp. 136) Although Claudia has a separate estate with the Court's award, her separate estate is meager compared to DeForrest because she only received a total of approximately thirty-five percent (35%) of the parties' marital assets. Finally,

Claudia lacks financial security without an award of lump sum alimony because at age 52, she has no real possibility of retirement, while DeForrest can retire at any time with no real loss in income. (T at pp. 75-76, 196-197). All of the assets awarded Claudia can be easily exhausted by purchasing her own residence.

The Court's failure to award Claudia lump sum alimony constitutes reversible error.

C. The trial Court committed reversible error by failing to award Claudia periodic alimony.

The trial Court made a cursory review of the factors set forth in Armstrong v. Armstrong, 618 So. 2d 1278 (Miss. 1993) and then elected to award no alimony to Claudia (R. at pp. 75-78).

The following is a discussion of the Chancellor's findings under Armstrong as applied to this case.

The Chancellor correctly noted that DeForrest earned ninety-six thousand dollars (\$96,000.00) per year as District Attorney and that Claudia earned fifty-four thousand dollars (\$54,000.00) per year as a school teacher. (R. at p. 75). The Chancellor also correctly noted that DeForrest had five thousand one hundred seventy-five dollars (\$5,175.00) in monthly expenses and five thousand four hundred thirty-six dollars (\$5,436.00) in monthly income. (R. at p. 75). Further, the Chancellor incorrectly noted that Claudia had three thousand eight hundred two dollars (\$3,802.00) per month in net income, and three thousand five hundred fifty dollars (\$3,550.00) in expenses. (R. at p. 75). In determining that Claudia had three thousand eight hundred two dollars (\$3,802.00) in net income the Chancellor included the seven hundred fifty dollars (\$750.00) in temporary child support per month being received by Claudia (T. at p. 186, Exhibit D5). In Buckley v. Buckley, 815 So. 2d 1260, 1263 (Miss. Ct. App. 2002), the Court held that it can be fatal error to combine a party's income with child support for analytical purposes.

The Chancellor also did not take into account that Deforrest included in his monthly expenses nine hundred fifty dollars (\$950.00) in charitable contributions. (T. at pp. 46, 93-94, Exhibit P1). If Deforrest's charitable contributions were added back in, he would have well over one thousand dollars (\$1,000.00) per month with which to pay alimony to Claudia.

In considering the expenses of the parties, the Chancellor also did not adequately take into account the lifestyle of the parties prior to their separation and their lifestyle at the time of the divorce. Claudia testified that the parties lived in a 2,900 square foot home prior to the separation and that she had a maid twice per month (T. at pp. 203-204). She also testified that she was accustomed to traveling frequently before the separation. (T. at pp. 203-204). At the time of the trial Claudia indicated that she and her daughter lived in a 750 square foot apartment, that she could not afford a maid and that she could not meet her expenses in some months. (T. at pp. 203-204, 220). Deforrest testified that he had not been required to cut back on any expenses and that his leisure activities were the same as prior to the divorce. (T. at p. 96). Although the Chancellor mentioned the difference in Claudia's post separation lifestyle, he did not discuss at all how his meager financial award would help Claudia maintain the accustomed standard of living. (R. at p. 65-78).

This State's Appellate Court's have previously required a husband to support his ex-wife in the manner "in which she has become accustomed". Brennan v. Brennan, 638 So. 2d 1320, 1324 (Miss. 1994); Weeks v. Weeks, 832 So. 2d 583, 587-88 (Miss. Ct. App. 2002). Since no provisions was made by the Court to provide for Claudia's accustomed standard of living, this Court should reverse the trial Court.

The trial Court found that there was no significant differences in the needs of each party. (R. at pp. 75-76). In making this finding, the trial Court once again did not properly take into account the standard of living of the parties at the time of trial as compared to when they were living

together. (T. at pp. 203-204, 220). The Court did correctly note Claudia's need for a more permanent living arrangement. (R. at pp. 75-76). However, the Court's opinion would require Claudia to expend all of her property settlement funds received in the divorce to obtain suitable housing. (R. at pp. 65-68). The Chancellor ultimately concluded that after receipt of the sum of one hundred forty-four thousand eight hundred seventy-five dollars (\$144,875.00) as her portion of the marital property, that Claudia should have no need for alimony, even though he acknowledged that these funds would have to be used to obtain housing. (R. at p. 78). The Chancellor's findings about Claudia's property settlement being sufficient to provide for her needs are speculative and not factually supported by the record. (R. at pp. 65-78).

The most important factor that the trial Court did not adequately address in its' Armstrong analysis was the fact that De Forrest had a fully vested retirement, while Claudia had none. This factor alone should require an award of alimony to Claudia to give her some financial security. The wife's lack of a retirement plan has been considered previously by the Appellate Courts in reversing a trial Court's refusal to grant alimony. Sanderson v. Sanderson, 824 So. 2d 623, 627 (Miss. 2002).

Finally, the length of the marriage of these parties, combined with the disparity in their incomes, requires reversal of the trial Court's failure to award alimony. In her treatise Bell on Mississippi Family Law (2005), Professor Deborah Bell noted that at the time of the publication of her book, in appellate cases from this state that she reviewed, alimony had been awarded in sixty-eight percent (68%) of marriages twenty (20) years and over. Deborah H. Bell, Bell on Mississippi Family Law (2005) §9.06[2] at 265.

Professor Bell further noted that in cases involving marriages of over twenty (20) years, some form of alimony was awarded in every case of significant financial disparity. Deborah H. Bell, Bell on Mississippi Family Law (2005) §9.06[2][a] at 266.

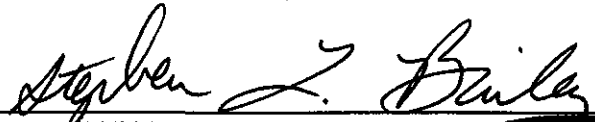

Considering the financial disparity between these parties, the length of the marriage and the huge disparity in the parties' abilities to retire, the trial Court's denial of alimony was so oppressive, unjust or grossly inadequate as to evidence an abuse of discretion. Armstrong v. Armstrong, 618 So. 2d 1278, 1280 (Miss. 1983).

CONCLUSION

The Chancery Court's identification, classification and equitable division of marital property contained clearly erroneous findings of fact, improperly applied the Ferguson factors and was a clear abuse of discretion. Further, the Chancery Court's refusal to award lump sum and periodic alimony contained clearly erroneous findings of fact, improperly applied the Cheatham and Armstrong factors and was a clear abuse of discretion. Therefore, this Court should reverse the judgment of the Chancery Court and remand this cause for further proceedings.

Respectfully submitted, on this the 14th day of December, 2009.

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CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE

This will certify that I, Stephen T. Bailey, attorney for the Appellant, have this day filed the original Brief of the Appellant and three copies thereof by placing the original brief and the copies in the United States Mail, postage prepaid addressed to Ms. Cathy Gillis, Clerk of the Supreme Court, at her customary mailing address of Post Office Box 249, Jackson, Mississippi 39205-0249.

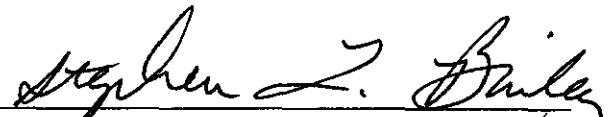
This will further certify that I have on this date served a true and correct copy of the Brief of the Appellant by United States mail, postage prepaid, on the following individuals at the following addresses:

Honorable Edward C. Fenwick
Special Chancellor
230 West Washington Street
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Jackson M. Brown, Esquire
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Starkville, MS 39759-0057

THIS the 14th day of December, 2009.

BY:


STEPHEN T. BAILEY (Miss Bar No. [REDACTED])