

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PRENTISS E. SELLERS

APPELLANT

V.

CAUSE NO. 2007-CA-01459

NANCY BRIDGES SELLERS

APPELLEE

REPLY BRIEF OF THE APPELLANT

APPEAL FROM THE CHANCERY COURT OF NESHOPA COUNTY, MISSISSIPPI

CAUSE NUMBER 2005-0332

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STATEMENT OF THE ISSUES

The Appellant herein, Prentiss E. Sellers, in his Brief for the Appellant, designated four (4) issues to be considered by this Court. These issues are repeated hereinbelow:

ISSUE I: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN AWARDING TO THE APPELLEE "LUMP SUM REHABILITATIVE ALIMONY" AFTER THE DIVISION OF MARITAL ASSETS OF THE PARTIES.

ISSUE II: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN THE DIVISION OF MARITAL ASSETS.

ISSUE III: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN THE DIVISION OF MARITAL ASSETS IN CONJUNCTION WITH THE AWARD TO THE APPELLEE OF "LUMP SUM REHABILITATIVE ALIMONY.

ISSUE IV: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN THE DETERMINATION OF CHILD SUPPORT TO BE PAID BY THE PARTIES.

In the Brief for the Appellant, Issues I, II, and III were considered together for convenience and economy of time in the discussion thereof, since the authorities and factors relative to those issues were similar. Although the Appellee discussed each of these three issues separately, the Appellant shall again discuss these issues together in this Reply Brief. Further, the Appellant shall again address Issue IV separately in this Reply Brief.

Fur purposes herein, the Appellant, Prentiss Edward Sellers, shall be cited as "Eddie" or "the Appellant". The Appellee herein, Nancy Bridges Sellers, shall be cited as "Nancy" or "the Appellee".

REPLY TO ARGUMENT OF APPELLEE

ISSUE I: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN AWARDING TO THE APPELLEE "LUMP SUM REHABILITATIVE ALIMONY" AFTER THE DIVISION OF MARITAL ASSETS OF THE PARTIES.

ISSUE II: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN THE DIVISION OF MARITAL ASSETS.

ISSUE III: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN THE DIVISION OF MARITAL ASSETS IN CONJUNCTION WITH THE AWARD TO THE APPELLEE OF "LUMP SUM REHABILITATIVE ALIMONY."

As previously cited hereinabove in the Statement of the Issues, the Appellant will present to this Court Issues I, II, and III for joint consideration, due to the similarity in factors to be considered. A preliminary matter is a reply to the matters raised by the Appellee regarding the standard of review.

A. Summary of Facts

As shown above, the matters raised by Eddie are not mere generalizations, but have a substantive basis in the caselaw of this State. A summary of the findings of the lower court illustrate the deficiencies of the decision.

Eddie's testimony, financial records, and Rule 8.05 figures were replaced with new figures from the chancellor. He revised Eddie's monthly expenses and income tax deductions to be more "reasonable", rounding upward the 401-K and total net income numbers, using a projected, pre-divestiture income for the karate school rather than the income tax loss or the post-divestiture income, and arbitrarily reducing some expenses to figures devised by the court. (CP194; 215-217; RE10; 31-33; Ex. GE3)

Nancy's figures were given full credit, despite testimony that she was working as a dental hygienist part-time, as a

secretary to an air conditioning company, as an assistant in a construction business, and with her father's tax sale business, and that she had access to a trust fund. (T218-219; 252-53; 323-326; 422; 442-445; 810-812; Ex. 22) The lower court accepted as true her Rule 8.05 report citing that her only monthly income was the court-ordered support of \$650.00 from Eddie and that her expenses were all reasonable, despite contradictory testimony of her father and her denial of having any funds. (CP217-219; RE33-35; Ex. GE2, 22; T218-219; 323-326; 422; 442-445; 810-812)

The chancellor denied Nancy's request for attorney's fees. He held that she was able to pay her own fees, having received assets through an equitable division of \$13,620.00 and a lump sum alimony award in excess of \$180,000.00, debt-free. (CP224; RE40) Despite this estate and her trust funds, (T442-445; Ex. 22) the Court found that Nancy had no income whatever. (CP195; RE11) Finally, Nancy was awarded the residence, even in light of allegations of cohabitation. (CP176)

The marital residence and Eddie's karate school building, located upon the same parcel, were valued by the chancellor at \$100,000.00, with \$50,000.00 being assigned to each party. (CP210; RE26) Eddie's retirement fund was divided equally, leaving each party with \$81,000.00. (CP215; RE31) The court held that Eddie's separate estate was valued at \$137,500.00, while Nancy's separate estate was valued at \$13,620.00. (CP215; RE31)

The lower court divided the assets equally, assigning assets to the respective parties. (CP210-213; RE26-29) The

chancellor found that the total marital assets were valued at \$304,230.00 and that the total marital liabilities were assessed at \$18,250.00, for a net equity of \$285,980.00, leaving each party with \$142,990.00, with Eddie having been assessed the entire marital debt. (CP213-214; RE29-30)

Considering alimony, the chancellor, having discounted Eddie's testimony, Rule 8.05 form, and income tax records, assumed a disposable adjusted gross monthly income of \$3,950.00 and revised monthly expenditures of \$2,869.00. (CP216-217; RE 32-33) This included estimated income of \$200.00 per month from the karate school, despite its divestiture from Eddie, (CP194; 210; RE10; 26) over the wishes of both parties. (T241-242; Ex. GE1)

The chancellor awarded Nancy "lump sum rehabilitative alimony" in the amount of \$62,600.00 to help her to get reestablished. (CP222; RE38) Of this sum, the Court awarded to Nancy the \$50,000.00 interest of Eddie in the residence and karate building, thus granting the tract and both buildings to Nancy. (CP210; RE26) Eddie was ordered to pay the balance of \$12,600.00 of the "lump sum rehabilitative alimony" to Nancy in eighteen (18) installments of \$700.00 each. (CP223; RE39)

B. Standard of Review

As stated in the Brief for the Appellant, "[t]his Court will not disturb the findings of a chancellor unless we find an abuse of discretion, an erroneous application of law, or a manifest error." Ellzey v. White, 922 So. 2d 40, 41 ¶3 (Miss. App. 2006). "Thus, if we find substantial evidence in the record

to support the chancellor's findings, we will not reverse." Id. "This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his or her discretion, was manifestly wrong, clearly erroneous, or applied an erroneous legal standard." Long v. Long, 928 So. 2d 1001, 1002 ¶6 (Miss. App. 2006).

In her brief, Nancy asserts that "great deference to the Chancellor's opinions and findings and this deference remains unless and until there is **clear and indisputable evidence** presented that the Chancellor incorrectly exercised his discretion within this matter." *Brief for the Appellee*, p.6. (emphasis hers) She continues, asserting that "[t]his is a heavy burden to bear and is extremely difficult to accomplish." Id.

In support of this misstatement of the standard of review, Nancy cited Magee v. Magee, 661 So. 2d 1117, 1122 (Miss. 1995) and Brennan v. Brennan, 638 So. 2d 1320, 1323 (Miss. 1994). Both Magee and Brennan recite the rule, in terms similar to Ellzey and Long, above.

However, Nancy fails to mention one salient fact common in both Magee and Brennan -- the appeals court reversed the chancellor's decision, finding of the lack of substantial evidence supporting the decision. Despite Nancy's assertion that the "manifest error/substantial evidence" rule conferred a difficult and heavy burden upon an appellant, she managed to find, and cite, two cases in which that very result occurred. That this result occurred is not surprising, as there is no such

"burden" upon an appellant to carry in an appeal. The lack of substantial evidence appears from the very record itself on appeal, and is self-evident. No showing of clear and convincing proof to the contrary of the decision is required.

In the instant case, no evidence supported the chancellor's revised figures of Eddie's income. Thus, his rulings regarding alimony, child support, income of Eddie, and the award of the marital residence and karate school to Nancy, were in error. Also, the third element of the "manifest error/substantial evidence" rule, namely, the application of an incorrect legal standard, arises without any necessary analysis of the quantum of evidence in support thereof. If the standard is incorrectly applied, or if the incorrect standard is applied, then no amount of evidence can correct the situation. Such was the case below.

C. Marital Assets to Be Determined and Divided

Our jurisprudence requires a chancellor to distinguish between marital and non-marital assets and then consider the various factors in the equitable division of marital property and debt. Ferguson v. Ferguson, 639 So. 2d 921, 928 (Miss. 1994); Hemsley v. Hemsley, 639 So. 2d 9009, 915 (Miss. 1994). The divestiture of an interest in one asset will be compensated by the receipt of other assets or a monetary award. Fogarty v. Fogarty, 922 So. 2d 836, 840 ¶19 (Miss. App. 2006).

In her brief, Nancy complained of "generalizations" cited by Eddie in contending that the lower court used "lump sum rehabilitative alimony" as an "equalizer". *Brief for the*

Appellee, p.11. Nancy accused Eddie of using "generalizations" on several occasions, particularly in reference to the use of the correct standard in applying "lump sum rehabilitative alimony". *Brief for the Appellant*, pp. 9-10, 12, 16-17. The Appellee stated that such "generalizations" by Eddie "can lead to erroneous statements". Id. at 10.

However, the principles enunciated by the appellate courts of this State cannot be dismissed merely as "generalizations". As noted in the *Brief for the Appellant*, lump sum alimony is often used as a property transfer mechanism, providing support, but also providing "an unalterable distribution of property". Miller v. Miller, 874 So. 2d 469, 472 ¶9 (Miss. App. 2004). "When lump sum alimony is paid as an 'equalizer', it is because the property distribution has left one spouse's assets out of balance to the other in such a way as to be inequitable." Id. at ¶10. *Brief for the Appellant*, pp. 21; 24-25.

This description of the office of lump sum alimony was not a word device crafted by the Appellant. It was announced by the Court of Appeals. Further, it accurately reflects the result of the use of lump sum alimony after the division of assets.

D. Determination of Award of Alimony

Once the marital asset division has been made, it is necessary to consider whether a party is left with a deficit. If so, alimony is to be considered. Armstrong v. Armstrong, 618 So. 2d 1278, 1281-82 (Miss. 1993). If the divided assets will adequately provide for both parties, nothing else is to be done.

However, if the division leaves one party with a deficit, alimony based upon non-marital assets may be considered. Johnson v. Johnson, 650 So. 2d 1281, 1287 (Miss. 1994). The division, support, and alimony elements comprise settlement of a divorce and, if one expands, the other contracts. Lauro v. Lauro, 847 So. 2d 843, 848-49 ¶13 (Miss. 2003).

Four (4) types of alimony are recognized in Mississippi; these are periodic, lump sum, rehabilitative, and reimbursement. Smith v. Little, 834 So. 2d 54, 57 ¶9 (Miss. App. 2002). Smith stated that lump sum alimony is fixed, irrevocable, and may be used as either alimony or property division, Id. at 58 ¶10, and that rehabilitative alimony is a monthly payment which is modifiable, has a fixed termination date, and is designed to help the recipient reenter the workforce. Id. at ¶11. A court "must look past labels and into the substance" thereof. Id.

In determining whether to award "lump sum alimony", certain factors are to be considered. These include:

- (1) substantial contribution to accumulation of total wealth of the payor either by quitting a job to become a housewife, or by assisting in the spouse's business;

- (2) a long marriage;

- (3) where recipient spouse has no separate income or the separate estate is meager by comparison;

- (4) without the lump sum award the receiving spouse would lack any financial security.

Cheatham v. Cheatham, 537 So. 2d 435, 438 (Miss. 1988). The single most important factor in the cases leading to the Cheatham recitation was the disparity in the separate estates. Id.

"Rehabilitative alimony" was first declared in Hubbard v. Hubbard, 656 So. 2d 124, 130 (Miss. 1995). The Supreme Court noted that lump sum alimony was a non-modifiable award granted for a distinct purpose and that rehabilitative alimony is modifiable, is of limited duration, and is intended to make the recipient self-supporting during the interim, without facing destitution. Id. at 129-30.

In Miller v. Miller, 874 So. 2d 469 (Miss. App. 2004), the Court of Appeals observed that the Cheatham factors help little unless the reviewer keeps in focus the fundamental question of whether, after equitable distribution, an "equalizer" is needed. Id. at 472 ¶8. Miller also stated that lump sum alimony provides support as does other alimony, but also makes "an unalterable distribution of property as does equitable distribution." Id. at ¶9. In Miller, no "equalizer" was needed because the recipient had received a favorable division and the non-modifiable award of lump sum alimony was not equitable. Id. at 474 ¶¶14-15.

Rehabilitative alimony is not considered during equitable distribution, but, rather, is awarded to those who have put on hold their careers. Lauro v. Laura, 847 So. 2d 843, 849 ¶15 (Miss. 2003). Unlike lump sum alimony, it is not intended as an equalizer of equitable distribution. Id.

Both lump sum and rehabilitative alimony may share characteristics when not paid all at once. The two concepts are "distinguishable in their modifiability, respective purposes, and by the intent for which the chancellor grants them." Hubbard v.

Hubbard, 656 So. 2d 124, 129 (Miss. 1995). (emphasis added) See Miller v. Miller, 874 So. 2d 469, 473 ¶13 (Miss. App. 2004).

E. Application of Correct Legal Standard

The Appellee declares the various alimony pronouncements of our appellate courts to be "generalizations". However, these principles are specific legal standards to be applied correctly by the chancellors. Such was not done in the instant cause.

In Haney v. Haney, 907 So. 2d 948, 952 ¶15 (Miss. 2005), the Supreme Court held that, in light of Ferguson, lump sum alimony is nothing more than a tool in the equitable distribution of marital assets and "a method of dividing property under the guise of alimony" and transferring assets to a spouse without title, but who added to the accumulation of assets of the marriage. Id. at ¶¶15-17. Pre-Ferguson, this was the means used to transfer such assets. Since Ferguson, chancellors directly divide the assets, reducing the use of lump sum alimony as the means of such division. Id. at ¶23.

The Haney opinions observed that the Cheatham factors regarding lump sum alimony were prior renderings of the Ferguson factors. Lump sum alimony now is essentially equitable distribution in the form of cash rather than an equitable share of property which cannot be equitably divided. Haney, 907 So. 2d at 955 ¶26. Haney also stated that no case provided for the use of either mechanism to reach non-marital assets simply because of the need of one spouse and the ability of the other to pay. Id.

at ¶28. In Haney, nothing remained to be divided, making an award or division unnecessary. Id. at 957 ¶40.

In Yelverton v. Yelverton, 961 So. 2d 19 (Miss. 2007), the Supreme Court has declared that the Ferguson factors are mandated as a prerequisite to the determination of an award of lump sum alimony. Id. at 25 ¶8. Thus, "*the chancery court was obligated to apply the appropriate factors necessary to determine whether [the wife] was entitled to lump sum alimony, i.e., the Cheatham-Ferguson factors.*" Id. (emphasis added) The case was reversed due to the failure of the chancellor to apply either of the Cheatham or Ferguson factors to the determination of lump sum alimony and to make findings of fact and conclusions of law consistent with Ferguson. Id. at 26 ¶¶10-11. See Thompson v. Thompson, 894 So. 2d 603 (Miss. App. 2004) (chancellor required on remand to consider each of Cheatham factors in determining lump sum alimony award).

The chancellor below analyzed in-depth the Ferguson factors in dividing the marital assets, but did not do so in the decision to award lump sum rehabilitative alimony. This failure, under Yelverton, is reversible error. This is not a generalization, but a point required by the Supreme Court; it was not followed below.

F. Lump Sum Rehabilitative Alimony

Nancy infers that "lump sum rehabilitative alimony" is a proper legal standard. She decried Eddie's "lengthy general recitation of the different types of alimony recognized by this State and contends that 'lump sum rehabilitative alimony' is not among those types of alimony." *Brief for the Appellee*, p.14.

Nancy trumpeted two (2) cases for the proposition that the appellate courts have recognized "lump sum rehabilitative alimony". Id. However, there is one discordant note struck by these two cases: **neither** addressed in any way this concept.

Nancy cites both Gray v. Gray, 909 So. 2d 108 (Miss. App. 2005) and Caldwell v. Caldwell, 805 So. 2d 659 (Miss. App. 2002) for recognizing "lump sum rehabilitative alimony". While indicative of poor wording, neither case recognizes this concept.

In Caldwell, there is but one mention of "lump sum rehabilitative alimony", and it appears in the summary of the lower court proceedings: "He also awarded her \$8,500 in lump sum rehabilitative alimony." Id. at 662 ¶6. The appeal addressed two (2) issues, neither of which addressed the award of alimony; rather, the issues involved a lien on the residence and a default judgment against one spouse. Id. at 662-63 ¶¶12, 14.

In Gray, the Court of Appeals reversed the lower court's ruling for its failure to analyze the Ferguson factors in making a property division, Id. at 112 ¶14, and remanded for specific findings of fact and conclusions of law on the issues of "equitable division, lump sum alimony, periodic alimony, and child support." Id. at 112 ¶¶17-18. The only passing mention of "lump sum rehabilitative alimony" was in the recitation of the wording of Issue II in the case. Id. at 112 ¶14. No mention at all was made of "rehabilitative alimony".

The Appellee states that Gray was "reversed not on 'award grounds', but on 'the brevity of the Chancellor's order'

preventing the Appellate Court from reviewing" the factors used by the lower court in awarding alimony. *Brief for the Appellee*, p.12. The Appellee attempts to create an impression that lump sum rehabilitative alimony was at issue. Such was not the case.

The Gray opinion noted that there were no findings or legal authority supporting the final judgment, including alimony. Id. at 112 ¶18. Immediately preceding the foregoing, the Court had stated that the lower court would have to consider the equitable division of assets, thus requiring the revisiting of all other elements in marital dissolution, including alimony. Id. at 112 ¶¶16-17. The concept of lump sum rehabilitative alimony was never addressed as an issue. Id. at 112 ¶¶15-18.

Contrary to the position espoused by the Appellee, this state clearly has enunciated the forms of alimony recognized herein. As cited above, Smith v. Little, 834 So. 2d 54, 57 ¶9 (Miss. App. 2002) detailed the four (4) forms of alimony recognized by the appellate courts in Mississippi. None of these is "lump sum rehabilitative alimony". Id.

Further, lump sum alimony and rehabilitative alimony are distinguishable concepts, with the former being non-modifiable and the latter being modifiable. Hubbard v. Hubbard, 656 So. 2d 124, 129 (Miss. 1995); Miller v. Miller, 874 So. 2d 469, 473 ¶13 (Miss. App. 2004). Lastly, the former is essentially a property-division tool, while the latter is designed to assist the recipient in reentering the work force. Hubbard, 656 So. 2d at 129; Miller, 874 So. 2d at 473 ¶13.

Being distinguishable, simultaneous use thereof is not possible. Lump sum alimony is based upon factors announced in Cheatham, whereas rehabilitative alimony follows the Armstrong analysis. Finally, as per Miller, lump sum alimony is used as an equalizer, while, as per Lauro, rehabilitative alimony is not.

The failure of the chancellor below to address the Ferguson and Cheatham factors prior to determining lump sum alimony, or, at minimum, the transfer of the marital residence and karate school, to Nancy constituted reversible error, as per Yelverton. Lastly, Nancy states that Armstrong factors apply to all forms of alimony. *Brief for the Appellee*, p.16. However, as cited above, Cheatham and Ferguson apply to lump sum determinations.

Thus, the chancellor used a legal standard not recognized by the courts of this State, as per Smith, et al. **Either** defect justifies reversal; **both** defects demand reversal.

G. Application to Decision of Lower Court

In his prior brief, Eddie noted that the lower court had created a mechanism for the post-equitable distribution transfer of assets. *Brief for the Appellant*, p.28. Both Eddie and Nancy agree that the courts look to substance, not the label. *Brief for the Appellant*, p.28; *Brief for the Appellee*, p.17. **See Elliott v. Rogers**, 775 So. 2d 1285, 1288 ¶14 (Miss. App. 2000) (court refused to join in a "tyrannical exercise in labeling").

The creation by the chancellor below of the "lump sum rehabilitative alimony" award would have the effect of transferring assets, post-division, in contravention of

established principles stated above. This policy has not been countenanced by the appellate courts of this State.

The chancellor made a Herculean effort in addressing the Ferguson/Armstrong factors in the contexts of periodic alimony and equitable distribution. However, he did not consider the Cheatham/Ferguson factors in light of a lump sum alimony award.

Nancy tries to bootstrap the Armstrong/Ferguson analysis onto the award of "lump sum rehabilitative alimony", notwithstanding its not being recognized by state law. *Brief for the Appellee*, p. 9. However, the two concepts, as noted above, are clearly distinguishable. Lump sum alimony is not modifiable and is not intended to smooth one's transition back into the work force. Rehabilitative alimony is just the opposite -- modifiable and designed to ease one back to work. The award cannot be both simultaneously. The Armstrong/Ferguson analysis was not appropriate in this context.

There is no "generalization" in applying the above principles. The lower court erred in its award of \$62,000.00 in "lump sum rehabilitative alimony" to Nancy, specifically in divesting Eddie of the \$50,000.00 interest in the marital assets, and in awarding the remaining \$12,600.00 to Nancy. Aside from mixing incompatible legal principles, the award of the house as a means of rehabilitation and support had no basis.

The ruling of the lower court essentially left Eddie with his non-marital assets of the Sellers family farm and with the marital debt, while transferring to Nancy the entire marital

estate, the karate school, and a large portion of Eddie's monthly income. Eddie thus took from the marriage nothing but what he otherwise would have had outside the marriage, along with the debt from the marriage and lingering payments for the marriage.

The divestiture of the karate school reduced Eddie's income by at least \$200.00 per month. Eddie could end the business or find new premises; neither option would support the income level applied by the chancellor.

The chancellor declared an equal division of assets and liabilities of \$142,990.00 each. The shift of the marital residence and school to Nancy nets her a total of \$192,990.00, compared to Eddie's reduced share of \$92,990.00. Adjusting for the \$12,600.00 in total monthly payments ordered by the court, the division is altered to \$205,590.00 for Nancy and \$30,390.00 for Eddie. This fact was acknowledged by the chancellor's denial of attorney's fees to Nancy, noting that she would have assets of \$180,000.00, free and clear. (CP224; RE40) This also leaves Eddie with the \$18,250.00 of marital debt.

According to the chancellor, Eddie's adjusted monthly disposable income was \$3,950.00 and his adjusted monthly living expenses were \$2,869.00. (CP217; RE33) Using the chancellor's arbitrary figures, Eddie's net disposable monthly income would be \$1,081.00, from which Eddie is to pay \$1,190.00 in child support and "lump sum rehabilitative alimony" for eighteen (18) months.

In Cheatham, the lump sum award was not supported by evidence, and the payor had no practical manner in which to

comply. 537 So. 2d at 440. In this cause, the chancellor based an award without predicate facts for a purpose not recognized by law. Ignoring tax returns subject to perjury and sworn Rule 8.05 forms and testimony, the chancellor made his ruling from figures not supported by credible evidence.

Further, the award of "lump sum rehabilitative alimony" in the amount of \$62,600.00 is not recognized in Mississippi. Lump sum alimony, now considered part of equitable distribution, is used to balance equities where there is more to be done after the division of assets and is not modifiable. Rehabilitative alimony is modifiable and is used to permit the recipient to return to the workforce after a long absence.

The lower court apparently meant to ease Nancy Sellers back into the workforce. However, it did so in the form of a tangible, non-liquid asset, divesting from Eddie his entire interest in the marital residence and karate school and diminishing his income.

If the chancellor awarded to Nancy "lump sum alimony", the lower court failed to apply properly the Cheatham and Ferguson factors. If the award was "rehabilitative alimony", then an award of realty would not provide the liquidity needed by someone in need of such alimony, and the Armstrong factors were not applied. In either event, the proper standard was not followed.

This Court should reverse the division of assets and award of "lump sum rehabilitative alimony". This Court should remand the cause for further consideration of the proper standards and in light of the evidence.

ISSUE IV: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR IN THE DETERMINATION OF CHILD SUPPORT TO BE PAID BY THE PARTIES.

In response to the Brief of the Appellee, the Appellant would incorporate the foregoing analysis of the standard of review of such cases. The manifest error/substantial evidence rule likewise applies to child support determinations.

As noted in the foregoing section, the chancellor based his determination of support upon figures not supported in the record. Rather, the award of child support was based upon revised figures calculated by the chancellor. The chancellor added to Eddie's monthly income a projected monthly income of \$200.00 from the "Eddie Sellers Karate School" after the school building was ceded to Nancy. The lower court also added to the monthly income a voluntary retirement deduction, gave a credit of an unstated amount for hospitalization insurance paid by Eddie, and allowed no credit for the parties' son Austin while in Eddie's custody. The revised monthly adjusted gross income of \$3,500.00 was not supported by substantial evidence. (CP194; RE10)

The credit for insurance was an unexplained deviation from the statutory guidelines and was not fully supported by findings and evidence. Further, the loss of the school would either reduce income or increase expenses. Neither condition increased income.

Tax returns are subject to penalties for perjury and Rule 8.05 forms are certified. The revised numbers had no testimony or evidentiary basis to substantiate them. The effect thereof was to establish amounts of disposable income for Eddie which was not supported by credible evidence.

Nancy was not required to pay child support, due to her inability to pay. However, Nancy's father was in control of her settlement funds and a trust fund, and the chancellor ignored three (3) jobs that Nancy admitted to having and her working part-time with her father. (CP200; T218-219; 252-253; 323-326; 422; 442-445; 810-812; Ex. 22) Finally, the chancellor had noted that Nancy enjoyed substantial debt-free assets over \$180,000.00 and a separate estate of \$13,620.00. (CP222,224; RE38,40)

In her brief, Nancy likewise ignores these matters and continues to plead poverty. *Brief for the Appellee*, p.22. She claims she cannot pay child support for her older son. Id.

Also in her brief, Nancy asserts that the authorities cited by Eddie

indicate that child support is based upon income, not upon assets. If assets were to be utilized in determining child support, then Eddie's assets would likewise come into play and his child support would be substantially higher than awarded by the Trial Court.

Brief for the Appellee, pp. 22-23. Oddly, Nancy willingly accepts the notion that she may support **herself** with assets such as realty and buildings, but not **Austin**. The chancellor held that she had means by which to pay her counsel. However, these assets may support her, but not Austin. The contradiction is clear.

Mississippi Code Annotated §93-5-23 (1972), as amended and revised, provides that, "where proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability

Section 43-19-101(6)(b) permits credit for health insurance coverage for the children. Eddie is supporting both children, since Nancy was exempted from so doing. No figure was cited for that credit cited by the chancellor. (CP194; RE10)

The \$3,500.00 figure should have been reduced to reflect the insurance coverage via Eddie's employer and the loss of the karate school income. Further, by terms of the Opinion, Isaac was getting a debt-free home, a debt-free vehicle, and a mother with an estate of almost \$200,000.00, while Eddie was required to make substantial adjustments to his lifestyle.

The excess payment from Eddie and the exemption for Nancy were not supported by specific findings. Mississippi Code Annotated §43-19-101(2) (1972), as amended and revised. Failure to do so renders the award inappropriate. Moses v. Moses, 879 So. 2d 1043, 1048 ¶14 (Miss. App. 2004). See Ellzey v. White, 922 So. 2d 40, 42 ¶¶7-8 (Miss. App. 2006) (no substantial evidence to explain how the chancellor arrived at the said figure as income).

This Court should find manifest error in the lack of applying the proper standard in setting support from Eddie and in exempting Nancy from any payment. Further, this Court should hold that there is no substantial evidence to support the chancellor's determination of \$3,500.00 as the adjusted gross income, particularly in light of the tax return of Mr. Sellers. This Court should reverse this finding and remand for further proceedings before the trial court.

CONCLUSION

This Court should rule manifest error in the award of "lump sum rehabilitative alimony" against the Appellant, due to the application of incorrect legal standards and the failure to apply the correct standards. Further, this Court should find that the award, even if properly considered, was not supported by substantial evidence.

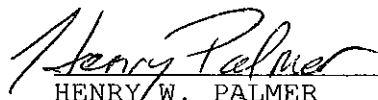
The use of such an award caused an inequitable result in the misalignment of assets after the division of marital assets. This disruption was also caused by both the improper award and the improper concept.

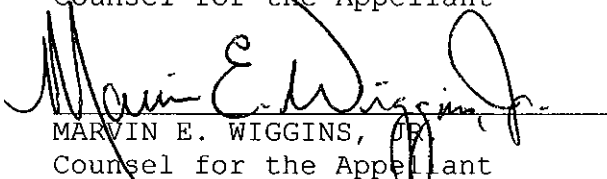
Finally, this Court should find that the application of the guidelines for child support was not proper and was manifestly wrong. Further, the determination of the income of the Appellant was not supported by substantial evidence and was reversible, and the exemption of the Appellee from paying support was error.

This Court should reverse the judgment below. Further, this Court should remand this cause for a new trial on all issues.

SUBMITTED on this, the 2nd day of October, 2008.

Respectfully,


HENRY W. PALMER
Counsel for the Appellant


MARVIN E. WIGGINS, JR.
Counsel for the Appellant

CERTIFICATE OF SERVICE


This is to certify that true and correct copies of the above and foregoing document have been served upon each of the following:

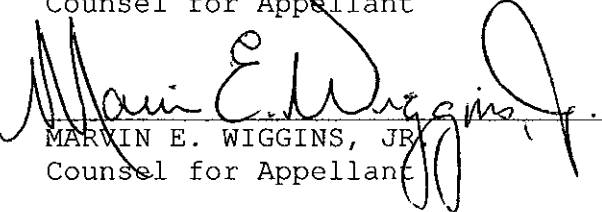
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Certified on this, the 2nd day of October, 2008.


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