

IN THE SUPREME COURT OF STATE OF MISSISSIPPI

ROLAND DEWAYNE PALMER

APPELLANT

VERSUS

CASE NO. 2011-CA-01199

CEICLE GLYNN PALMER

APPELLEE

**ON APPEAL FROM THE CHANCERY COURT OF HANCOCK COUNTY,
MISSISSIPPI**

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

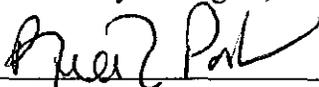
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MS BAR NO [REDACTED]**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record 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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible conflicts, disqualifications or recusal:

- | | | |
|----|--|---------------------------|
| 1. | ROLAND DEWAYNE PALMER | Appellant |
| 2. | CEICLE GLYNN PALMER | Appellee |
| 3. | Renee McBride Porter
Porter Law Firm, P.A.
P.O. Box 982
915 Main Street
Columbia, Mississippi 39429 | Attorney for
Appellant |
| 4. | Clement Stephen Benvenuti
Post Office Box 2718
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Appellee |
| 5. | Honorable Judge Carter Bise
Chancellor, 8 th District Chancery Court
P.O. Box 1542
Gulfport, Mississippi 39502 | Lower Court Judge |

Respectfully submitted, on this the 10th day of August, 2012.



Renee McBride Porter
MS [REDACTED]

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INTRODUCTION

Appellant Ronald Dewayne Palmer, hereinafter referred to as Roland, showed in his opening brief why the judgment in this case must be reversed. The trial court improperly categorized the property located at 10071 Chester Lee Road as marital property. The trial court did not properly analyze the Ferguson factors and erred in awarding fifty percent of the property at 10071 Chester Lee Road to Ceicle Palmer. The trial court did not properly consider alimony, and with the court's even division of the property located at 10071 Chester Lee Road, the court should have awarded alimony to Mr. Palmer. The court's decision is not equitable and must be reversed and remanded to do justice and equity.

For all of the reasons in Roland's opening brief and herein, the Judgement should be reversed.

ARGUMENT

I. The House Should not be Classified as a Marital Asset.

Roland's principal brief references several examples of Mississippi case law that support the finding that the property located at 10071 Chester Lee Road should be considered separate, not marital property. Ronald accumulated the property in full before his marriage to Ceicle. The property was deeded to him after his first wife's death. The parties agreed that the only contribution made to the house by Ceicle was a \$2,000.00 flooring contribution.

Ceicle's brief relies heavily on the concept of commingling of non-marital assets and the family use doctrine to argue that the property was correctly classified as marital property, but completely overlooks the decision of the court in *Brock v. Brock*, 906 So.2d 879 (Miss. 2005). The Brock court confirmed that Mississippi allows tracing to identify separate property:

‘When separate property and marital property are mixed to such a degree that the elements cannot be distinguished, i.e., that the separate element cannot be traced, then the entire property is considered marital property: the separate property has transmuted by commingling into marital property. Consequently, the key to determining when there has been transmutation by commingling is whether the marital interests can be identified, i.e., can be traced.’ In the present case, J.D. made a minimal number of repairs to the house, and his contributions to the home by paying property taxes are readily traceable.” Brock at 888 (quoting Laura W. Morgan & Edward S. Snyder, 18 J. Am. Acad. Matrim. Law 335, 341 (2003)). Ronald’s separate property can be traced, but this possibility is overlooked in the Appellee’s brief.

Ceicle’s brief cites cases in which the court determined non-marital assets were commingled and therefore became marital assets, but the brief fails to distinguish the facts of those cases from the case at hand. Ceicle’s brief cites Stewart v. Stewart, 864 So.2d 934 (Miss. 2003) in an argument that suggests because both Ronald and Ceicle paid household bills and contributed to maintaining the household, the classification of the home as marital property was correct. The Stewart case is significantly different than the case at hand, because in Stewart, the husband bought the house for the couple in anticipation of marriage, and the wife’s contributions to the home included considerable improvements such as substantial renovations/improvements to the home. Stewart at 936.

The Appellee’s brief is inadequate because it fails to address the concept of tracing, the key to determining whether property is separate or marital, as set forth by the court in Brock. The argument in Appellee’s brief, that commingling and family use convert separate property to marital property, is incomplete without recognizing the concept of tracing, which is clearly

applicable in the case at hand, because the home can easily be traced to Roland, as the home at issues has been shown to be solely attributable to Roland's separate estate prior to marriage.

II. The Trial Court did not Properly Analyze the Ferguson Factors.

In the event this Court affirms the decision that the property at 10071 Chester Lee Road was marital property, then the Chancery Court's analysis of the Ferguson factors is wrong, because it grants an inequitable windfall to Ceicle. This Court has said, "We acknowledge that 'equitable distribution does not mean equal distribution.'" *Seymour v. Seymour*, 960 So.2d 513, 519 (Miss. Ct. App. 2006) (quoting *Lauro v. Lauro*, 924 So.2d 584, 590 (Miss. Ct. App. 2006)). The Court is not required to distribute the assets equally, and they do not always do so, as demonstrated in the case of *Allgood v. Allgood*, 62 So.3d 442 (Miss. 2011) in which the chancellor properly exercised his discretion in considering the husband's significant contribution to the marital estate from his separate funds, and in doing so awarded him a larger share of the marital estate. With this in mind, it is hard to understand how the trial court decided to award Ceicle fifty percent of the state after analyzing the Ferguson factors.

The court found that Ceicle's only contribution to the home was \$2,000.00 in flooring, which did not increase the value of the home. Ceicle received a car (valued at \$20,000), cash and other marital assets. In determining the market value and emotional value of the assets subject to distribution, the court found that the house was valued at \$95,000 and a retirement account was valued at \$17,000. The court should have also considered the value of the house included the \$18,000 value of the acreage the house was located on, gifted by the first Mrs. Palmer's family. The court should have also considered that if Roland is forced to sell the home, he will be selling the home he shared with his first wife, who is now deceased. The court did not consider the fact

that Roland brought the home and cash into the marriage, a factor that should be considered and given weight.

The sixth Ferguson factor is “extent to which property division may be utilized to eliminate periodic payments and other potential sources of friction.” The court found that there was no testimony on the issue, but if Roland was awarded the home, it would eliminate his need for alimony. If he is forced to sell the home, he would be forced to pay rent due to his financial condition, which would warrant alimony.

In addressing the needs of the parties, the seventh Ferguson factor, the court recognized that Roland had a large share of the assets, but failed to recognize that he brought these assets into the marriage. Ceicle entered into the marriage with less than \$10,000.00, but was awarded over \$85,000.00, a windfall considering her minimal contributions . The court should also consider the fact that the property and home at issue was a prior owned asset, and no contribution was made to the value of it during the marriage. In the case of *Delk v. Delk*, 41 So.3d 738, 741-42 (Miss. Ct. App. 2010), this Court affirmed the lower court in not awarding fifty percent of a jointly titled asset, as it would be inequitable because the property at issue was owned prior to the marriage.

The Appellee’s brief does not respond to any of the arguments set forth in Roland’s principal brief, but rather only summarizes the Chancellor’s decision to award Ceicle fifty percent of the marital assets. The Appellee’s brief suggests that Roland could keep the home and get a reverse mortgage in order to pay Ceicle for “her half” of the home, which is inequitable because Roland would leave the marriage with debt while Ceicle leaves with a wind fall. The Appellee’s brief does not adequately address or respond to Roland’s second argument.

The Court should remand the case so that the Ferguson factors are properly considered in the division of the assets in order for Roland to receive a just and equitable outcome.

III. The Trial Court did not Properly Consider Alimony.

“If the marital assets, after equitable division and in light of the parties’ non marital assets, will adequately provide for both parties, then ‘no more need be done’ . . . if an equitable division of marital property, considered with each party’s non-marital assets, leaves a deficit for one party, then alimony should be considered.” *King v. King*, 760 So.2d 830, 835-36 (Miss. Ct. App. 2000). Roland was not provided for after the division of the marital assets, therefore, alimony was not properly considered. When the Armstrong alimony factors are considered, it is clear that Roland, who entered the marriage with a home that was paid for and other assets, is leaving with a deficit of over \$30,000, no place to live, and little money to afford rent. Additionally, Roland, at age 77 and in poor health, is now unable to adequately provide for himself. Therefore, the Court should reconsider the award of alimony and a lump sum to Mr. Palmer.

The Appellee’s brief argues that because Roland is not necessarily forced to sell his home, he failed “to prove that the Chancellor was manifestly wrong, clearly erroneous, or applied the wrong legal standard in denying the alimony.” (Appellee’s Br. 12). This argument falls short. Roland’s principal brief does not merely argue that because he would be forced to sell his home he should receive alimony. The argument that he should receive alimony is based on consideration of all of the Armstrong factors, including the assets Roland brought into the marriage and the fact that he is leaving with a deficit. The Appellee argues that Roland cannot demonstrate that the Chancellor was manifestly wrong in denying the alimony, yet the court in

Cheatham v. Cheatham, 537 So.2d 435, 440 (Miss. 1988) determined lump sum alimony was warranted based on the facts of the case and found that “proof does not support the amount of lump sum alimony awarded. In this he was manifestly wrong.” The *Cheatham* court remanded the case.

The Appellee’s brief fails to consider or address all of the factors that contribute to Mr. Palmer’s need for an award of alimony. When the *Armstrong* factors are considered as a whole as applied to Mr. Palmer’s case, the proof supports an award of lump sum alimony.

IV. The Court’s Decision is not Equitable and Must be Reversed and Remanded to do Justice and Equity.

This Court should consider the financial and emotional effect this decision will have on Roland. This court has stated that “equitable distribution is a fair division of marital property based on spouse[s] contribution to [the] assets during the marriage.” *Spahn v. Spahn*, 959 So.2d 8, 14 (Miss. Ct. App. 2006). However, the assets were not divided based on the spouses’ contribution to assets during the marriage in Mr. Palmer’s case. The distribution was not equitable or fair. The decision in the case at hand leaves Roland without a home or sufficient means to afford housing accommodations. He entered the marriage with a fully paid for home and additional assets, but is leaving with very little. This is an inequitable result that Mr. Palmer asks this Court to reverse.

In addressing Roland’s final argument, the Appellee’s brief describes the loss of Roland’s home as causing “some discomfort.” (Appellee’s Br. 12). The brief fails to acknowledge the disparity of the assets Roland brought into the marriage, compared to what he is leaving with in light of the Chancellor’s decision. If the home is categorized as a marital asset based on the

Family Use Doctrine, Roland is at the very least entitled to alimony, as the Chancellor's decision leaves him with less than adequate means to live on, an inequitable result. Roland is left with more than "some discomfort," as described by the Appellee. Roland is losing virtually everything he entered the marriage with as a result of the Chancellor's decision. Roland therefore reasserts his demand for a reversal of the Chancellor's decision.

CONCLUSION

The Appellant, Ronald Palmer, requests that this Court must correct this manifest injustice the Court can:

5. Find that the home is not a marital asset and divide the marital assets equally.
6. Reverse the Judgement Upon Motion for Reconsideration and reinstate the Judgement entered on December 2, 2010. This result with an award of costs to Roland would still be a windfall to Ceicle but would not be more just.
7. Award Roland lump sum alimony or periodic alimony.

Appellant requests for this Court to reverse and render as above set forth.

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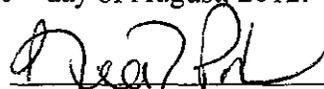
CEICLE GLYNN PALMER

APPELLEE

CERTIFICATE OF SERVICE

This is to certify that I, Renee McBride Porter, on the 13th day of August, 2012, furnished a true and correct copy of the above and foregoing **BRIEF OF APPELLANT** to the Honorable Judge Carter Bise, Chancellor, 8th District, Post Office Box 1542, Gulfport, Mississippi 39502, by placing same in the United States Mail, postage prepaid, and mailing it to his usual office address of Post Office Box 1542, Gulfport, Mississippi 39502 and to Honorable Clement Stephen Benvenuti, Attorney for Defendant, at his usual business address of Post Office 2718, Bay St. Louis, Mississippi 39521.

Respectfully submitted, on this the 10th day of August, 2012.



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