

**IN THE COURT OF APPEALS 03/26/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-01159 COA**

**KAREN W. BORRIES**

**APPELLANT**

**v.**

**KENNETH ROY BORRIES**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. WILLIAM H. MYERS

COURT FROM WHICH APPEALED: CHANCERY COURT OF JACKSON COUNTY

ATTORNEY FOR APPELLANT:

GARY L. ROBERTS

ATTORNEY FOR APPELLEE:

WILLIAM T. REED

NATURE OF THE CASE: DIVORCE

TRIAL COURT DISPOSITION: IRRECONCILABLE DIFFERENCES DIVORCE GRANTED;  
WIFE AWARDED PERIODIC AND LUMP-SUM ALIMONY; WIFE AWARDED CUSTODY  
AND CHILD SUPPORT

BEFORE BRIDGES, P.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Karen and Kenneth Borries were granted an irreconcilable differences divorce after eleven years of marriage. Karen was awarded both periodic and lump-sum alimony; custody of the parties' three minor children; and child support. Feeling aggrieved, Karen appeals arguing: (1) \$400.00 per month periodic alimony is inadequate and that the chancellor erred in arbitrarily setting a termination date on the periodic alimony; and (2) \$5,000.00 per year lump-sum alimony is inadequate, especially in light of the fact that Karen was not awarded any interest in the family businesses. Kenneth cross-appeals claiming that he should have been awarded custody of the three children, or at least joint custody of them. Finding the need for clarification of the chancellor's termination date of the periodic alimony award, we remand in part and affirm as to all other issues raised on appeal.

#### STATEMENT OF THE FACTS

On January 20, 1984, Karen and Kenneth Borries were married. At the time of their marriage, Karen was eighteen years of age, and Kenneth was thirty-six years of age. Kenneth worked in the marine-construction business and owned a fishing camp. Prior to the marriage, Karen worked as a waitress at a steak house. After the parties married, Karen worked as homemaker and devoted her time and efforts toward making a home for the parties and rearing their three children.

The parties separated in January of 1993. After ten years of marriage, Karen and Kenneth agreed to a divorce on the ground of irreconcilable differences. The parties asked the chancellor to decide all other issues in dispute including the matters of alimony, child custody, and child support. The matter was heard by the chancellor on January 7, 1994. Each party sought custody of the three minor children, ages four, six, and seven at the time of trial. The chancellor heard testimony that Karen was the primary care giver to the children. Karen bathed, clothed, fed, and otherwise cared for the children as a stay-at-home mom. Kenneth worked in the marine construction business which often required periods of absences from the home.

In July of 1993, Karen began working on a degree in elementary education. At the time of trial, Karen was in her second semester at Mississippi Gulf Coast Community College. The two older children were of school age, and the youngest child was placed in day care until early afternoon while Karen attended college.

The chancellor granted the parties an irreconcilable differences divorce. Karen was awarded \$400.00 per month in periodic alimony to terminate in July 1998; \$5,000.00 per year in lump-sum alimony for ten years; and full use and possession of the 4000 square-foot family home. Karen was awarded the primary custody of the three minor children and \$300.00 per child per month in child support. Kenneth was ordered to pay the house note, taxes, insurance, all household utilities (except telephone), and maintenance costs of the family home as additional child support. In addition to the alimony and child support, Kenneth was ordered to pay all medical and dental expenses of the children as well as provide health insurance coverage for the children. Kenneth was also ordered to maintain a \$200,000.00 life insurance policy on himself, with Karen and each of the three children to be listed as beneficiaries, until such time as the children were emancipated. Karen was awarded her 1993 Corsica sedan. Kenneth was ordered to pay Karen \$5,000.00 toward her attorney's fees. Kenneth was further ordered to pay all outstanding medical bills. Karen was not granted any interest in Kenneth's marine construction business or fishing camp. Kenneth was awarded standard visitation rights and allowed to claim the children as dependants for tax purposes.

## STANDARD OF REVIEW

"Our scope of review of an alimony award is well-settled. Alimony awards are within the discretion of the chancellor, and his discretion will not be reversed on appeal unless the chancellor was manifestly in error in his finding of fact and abused his discretion." *Ethridge v. Ethridge*, 648 So. 2d 1143, 1145-46 (Miss. 1995) (quoting *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993) (citation omitted)). "This Court will not disturb a chancellor's ruling if the findings of fact are supported by credible evidence in the record." *Ethridge*, 648 So. 2d at 1146 (citations omitted). "In the case of a claimed inadequacy or outright denial of alimony, we will interfere only where the decision is seen as so oppressive, unjust or grossly inadequate as to evidence an abuse of discretion." *Armstrong*, 618 So. 2d at 1280 (citation omitted).

## ARGUMENT AND DISCUSSION OF THE LAW

### I. THE CHANCELLOR'S AWARD OF \$400.00 PER MONTH IN PERIODIC ALIMONY IS INADEQUATE SO AS TO CONSTITUTE AN ABUSE OF DISCRETION AND ARBITRARILY TERMINATING THE ALIMONY ON JULY 1998 IS MANIFESTLY ERRONEOUS.

Karen argues that the periodic alimony award is inadequate and an error on the part of the chancellor. We disagree. Essentially, Karen was awarded \$400.00 per month to pay her own personal expenses with housing and utilities being separately paid by Kenneth. Karen was awarded exclusive use and possession of the family home. The \$400.00 per month alimony plus the \$900.00 per month in child support (for a total of \$1300.00 per month) are very close to the projected figure of expenses submitted by Karen in the amount of \$1360.00 per month. We cannot say that the chancellor's decision is so oppressive, unjust, or grossly inadequate as to evidence an abuse of discretion. On the record before us, the amount of the periodic alimony award does not appear to be an abuse of discretion by the chancellor.

Karen also argues that the chancellor's placement of a termination date on the periodic alimony award was error. The Mississippi Supreme Court has made it clear that it is manifest error to set a termination date on periodic alimony. *Cleveland v. Cleveland*, 600 So. 2d 193, 197 (Miss. 1992). In *Cleveland*, the chancellor awarded \$50,000 in lump-sum alimony and \$600.00 per month in periodic alimony for a period of seven years or until such time as the wife remarried, died, or until further court order, which clearly subjects the award to the contingencies historically applied to periodic alimony. *Cleveland*, 600 So. 2d at 196. In reversing the chancellor's termination of the periodic alimony award after seven years, the court stated "[t]here was nothing about the circumstances of this case or the situation of the parties which required a fixed termination date of the alimony payments . . . . All periodic alimony is subject to change, depending upon the condition of the parties, in any event." *Id.* at 197.

The Mississippi Supreme Court has again recently recognized with approval its decision in *Cleveland* in the case of *Hubbard v. Hubbard*, 656 So. 2d 124 (Miss. 1995). In *Hubbard*, the Mississippi

Supreme Court carved out a new equity tool available to chancellors in divorce situations called "rehabilitative periodic alimony" where a chancellor may place a time limitation on periodic alimony *for rehabilitative purposes*. *Hubbard*, 656 So. 2d at 129 (emphasis added). In *Hubbard*, the chancellor denied lump-sum alimony, but awarded periodic alimony in the amount of \$600.00 per month for thirty-six months and approximately one-half of the wife's attorney's fees. *Id.* at 126. In affirming the chancellor, the court defined "rehabilitative periodic alimony" as "an equitable mechanism which allows a party needing assistance to become self-supporting without becoming destitute in the interim." *Id.* at 130. The court determined that "the Chancellor clearly indicated that the thirty-six month award was for the purpose of allowing [the wife] to have some financial assurance until she could get back on her feet and become self-supporting, i.e. rehabilitative in nature." *Id.* It appears that the supreme court's ruling is fact specific to the circumstances presented in *Hubbard*.

Also in 1995 and prior to *Hubbard*, the Mississippi Supreme Court decided *Creekmore v. Creekmore*, 651 So. 2d 513 (Miss. 1995). In *Creekmore*, the chancellor awarded the wife "child support, \$12,000.00 lump sum alimony, and \$12,000.00 *periodic alimony* to be paid in \$500.00 increments for 24 months or until [the husband's] death, whichever came first. *Creekmore*, 651 So. 2d at 516 (emphasis added). The chancellor's provision that the "periodic alimony" award was to cease upon the death of the payor spouse is a contingency historically applied to periodic alimony. In looking to the substance of the award of limited duration, the Mississippi Supreme Court determined that it was actually a lump-sum award, thus making the total lump-sum award in the amount of \$24,000. *Id.* at 519. The court, however, did reverse and remand for reconsideration the awards of lump-sum alimony after determining that the total lump-sum alimony award was grossly inadequate. *Id.* at 520.

In *Dufour v. Dufour*, 631 So. 2d 192 (Miss. 1994) the court affirmed a thirty month award of "periodic transitional alimony". In *Dufour*, there was no lump-sum alimony award made by the chancellor. *Id.* at 193. The court, in looking to the substance of the award, determined that the "periodic transitional alimony" was "in actuality a lump sum form of payment-payable in fixed periodic installments." *Id.* at 195.

In 1993, the Mississippi Supreme Court decided *Armstrong v. Armstrong*, 618 So. 2d 1278 (Miss. 1993). In *Armstrong*, the Mississippi Supreme Court reversed a chancellor who declined to award periodic alimony, and awarded "rehabilitative" alimony in the amount of \$175 per month for two years. *Armstrong*, 618 So 2d. at 1279. *Armstrong* involved a twenty-one-year marriage where the wife was awarded primary custody of the two minor children. The wife had little formal education or job experience. The supreme court determined that "equity requires more than the time-limited award." *Id.* at 1281.

With the directives provided by the above discussed case law, we now turn to the case before this Court. In the present case, we do not have the benefit of a clear indication of the chancellor's intent of awarding any type of rehabilitative award. This Court declines to expand the newly created "periodic rehabilitative alimony" as outlined in *Hubbard* to the present set of circumstances absent clarification by the chancellor. Additionally, the chancellor's separate award of lump-sum alimony suggests that the alimony in question is not merely mislabeled. However, *Creekmore* indicates that the possibility should not be dismissed. Any such determination on our part would be mere

speculation. Thus, we are compelled to remand this specific matter of \$400 a month alimony for five years to the chancellor solely for the purpose of an on-the-record clarification of his termination of the periodic alimony award.

The chancellor may find that the alimony award of \$400.00 per month for five years was "periodic alimony" with its traditional attendant requirements of possibility of modification, cessation upon the death of either the ex-husband or the ex-wife, and no fixed termination date. If the chancellor finds that the award is not "periodic", then the chancellor has two choices: (1) he should designate the award as "rehabilitative periodic alimony" for a period of five years from the date of the divorce if it was intended as rehabilitative in nature as in *Hubbard*; or (2) he should designate the award as lump-sum alimony if the award was, in fact, mislabeled supplemental lump-sum alimony as in *Creekmore*.

II. THE LUMP-SUM ALIMONY AWARD OF \$5,000.00 PER YEAR FOR TEN YEARS IS SO INADEQUATE AS TO CONSTITUTE AN ABUSE OF DISCRETION, PARTICULARLY CONSIDERING THAT THE APPELLANT WAS AWARDED NO INTEREST WHATSOEVER IN ANY OF THE FAMILY ENTERPRISES.

Karen argues that the chancellor's lump-sum alimony award in the amount of \$5,000.00 per year for a period of ten years is inadequate. Lump-sum alimony is allowable in either a single lump-sum or fixed periodic payments. *Armstrong*, 618 So. 2d at 1281. Lump-sum alimony vests in the payee [Karen] upon final judgment. *Id.* (citations omitted). We are instructed that "[i]n the final analysis, all awards should be considered together to determine that they are equitable and fair." *Hubbard*, 656 So. 2d at 130. Karen was awarded \$50,000.00 lump-sum alimony award to be paid at a rate of \$5,000.00 per year for ten years, a 1993 vehicle, use of the family home and surrounding acreage, \$900.00 per month on child support, and \$400.00 per month in periodic alimony. Kenneth was allowed to retain the ownership in the businesses owned by him prior to the marriage. We cannot say that the chancellor's decision is so oppressive, unjust or grossly inadequate as to evidence an abuse of discretion. We find this issue to be without merit.

*KENNETH'S CROSS-APPEAL*

STANDARD OF REVIEW

The Mississippi Supreme Court has stated the well-settled rule that, "[t]he standard of review in child custody cases is quite limited. A chancellor must be manifestly wrong, clearly erroneous, or applying an erroneous legal standard in order for this Court to reverse. This Court will affirm decisions of the chancellor, whenever based on credible evidence." *Williams v. Williams*, 656 So. 2d 325, 330 (Miss. 1995) (citations omitted).

DISCUSSION

I. THE COURT ERRED IN FAILING TO AWARD KENNETH R. BORRIES PRIMARY CARE, CUSTODY AND CONTROL OF THE MINOR CHILDREN OF THE PARTIES, OR IN THE ALTERNATIVE MORE EXTENSIVE VISITATION.

Kenneth argues that he should have been awarded custody of the couple's three minor children. The

chancellor heard testimony that Karen was the primary care giver to the children. Karen bathed, clothed, fed, and otherwise cared for the children as a stay-at-home mom. Kenneth worked in the marine construction business which often required periods of absences from the home. We cannot say that the chancellor erred in awarding custody of the children to Karen, who has been the primary care giver to the children since their birth. We find this issue to be without merit.

**THE JUDGMENT OF THE CHANCERY COURT OF JACKSON COUNTY IS AFFIRMED ON DIRECT APPEAL EXCEPT THAT WE REMAND FOR THE LIMITED AND SPECIFIC PURPOSE OF REQUIRING THE CHANCELLOR WITHIN 30 DAYS OF THIS DECISION TO MAKE AN ON-THE-RECORD CLARIFICATION OF THE INTENDED NATURE AND PURPOSE OF THE FIVE-YEAR, \$400.00 PER MONTH AWARD OF "PERIODIC ALIMONY" TO THE APPELLANT CONSISTENT WITH THE GUIDELINES SET OUT IN PART I OF THIS OPINION. THE JUDGMENT IS AFFIRMED ON CROSS APPEAL. ALL COSTS OF THIS APPEAL ARE ASSESSED ONE-HALF TO APPELLANT AND ONE-HALF TO APPELLEE.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.**