

IN THE COURT OF APPEALS 05/07/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00882 COA

LUCIEN FREDERIC LEPOUTRE

APPELLANT

v.

ISABELLE REVILLION LEPOUTRE

APPELLEE

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

TRIAL JUDGE: HON. DENISE OWENS

COURT FROM WHICH APPEALED: HINDS COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

WILLIAM R. WRIGHT

ATTORNEYS FOR APPELLEE:

MARK A. CHIN, PATRICIA E. HERLIHY, AND NATALIE J. CRUTCHER

NATURE OF THE CASE: DOMESTIC RELATIONS-DIVORCE

TRIAL COURT DISPOSITION: DIVORCE ON GROUNDS OF ADULTERY AND LUMP SUM
ALIMONY, PERIODIC ALIMONY, AND CHILD SUPPORT GRANTED TO APPELLEE,
ISABELLE LEPOUTRE

BEFORE THOMAS, P.J., COLEMAN, AND McMILLIN, JJ.

COLEMAN, J., FOR THE COURT:

By its final judgment of divorce rendered on June 27, 1994, the Hinds County Chancery Court

granted unto Isabelle Revillion Lepoutre a divorce from Lucien Frederic Lepoutre on the ground of uncondoned adultery. Mr. Lepoutre appeals from this final judgment of divorce and seeks appellate review of the monetary awards which the chancellor granted Ms. Lepoutre in its final judgment of divorce. We quote from Mr. Lepoutre's brief to state the two issues which he argues require the reversal of the trial court's judgment:

I. The chancellor's departure from the child support award guidelines without written justification constituted reversible error as a matter of law.

II. The chancellor's total award of spousal and child support was against the overwhelming weight of the evidence and so excessive as to constitute an abuse of discretion.

The Appellee, Mrs. Lepoutre, rephrases the above issues in her own terms. Mrs. Lepoutre's version of these issues are as follows:

I. Whether or not this Court can conduct a de novo review to affirm the ruling of the chancellor regarding child support.

II. Whether or not a chancery court can make an award of child support and alimony based upon the payor having a large lump sum out of which to pay it where the payor has voluntarily chosen not to work at the time of trial and has not changed his own lifestyle.

Although Mrs. Lepoutre's issues were not properly raised by cross appeal, we nonetheless state them because an adjudication of Mr. Lepoutre's issues necessarily disposes of Mrs. Lepoutre's issues. We find merit in Mr. Lepoutre's argument on these two issues; thus we reverse the chancellor's final judgment of divorce and remand this case for further proceedings consistent with this opinion.

I. FACTS

In 1981, Frederic Lepoutre and his then fiancée, Isabelle Revillion, moved from France to Mississippi where Frederic procured a job with the Edward Hyman Company, a textile manufacturer which was operating a garment manufacturing plant in Hazlehurst. The couple married on August 8, 1981, in Hazlehurst. They have three children: Alex, age 10; Nicolas, age 7; and Thomas, age 5. The Lepoutres built a home in Jackson, Mississippi, in 1990 where they resided until their separation in 1993.

When they arrived in Mississippi, the Lepoutres' total assets amounted to \$1,000 in cash. When he began his employment in Hazlehurst, Mr. Lepoutre earned an initial salary of \$1,000 per month. Mr. Lepoutre's employer, the Edward Hyman Company, merged into the A. Lafont Company (A. Lafont) for which Mr. Lepoutre worked until November of 1993. Mr. Lepoutre became a shareholder in A.

Lafont in 1984 when he borrowed \$10,000 from his uncle to purchase stock in the company. Mr. Lepoutre's open and acknowledged adulterous relationship with a co-worker at A. Lafont provided his wife with a ground for divorce and cost him his job at A. Lafont. Under the terms of his employment contract with A. Lafont Mr. Lepoutre was required to sell his stock back to the company.

The purchase price of Mr. Lepoutre's stock was \$987,758. A. Lafont agreed to make the buy out payment in three installments. A. Lafont made the first payment of \$345,715 to Mr. Lepoutre on January 5, 1994; and A. Lafont executed a promissory note bearing interest at the prime rate for the balance of \$642,042. The note required the balance of the debt to be paid in two installments, the first of which, \$345,715, became due on January 4, 1995, and the second of which, \$296,327.40, became due on January 4, 1996.

Between his termination at A. Lafont in November of 1993 and June of 1994, Mr. Lepoutre received unemployment compensation in the amount of \$165 per week. In January of 1994, six months before trial, Mr. Lepoutre formed a company called PCI, Inc. (PCI), which he formed to be a broker in the apparel business and to manufacture small quantities of either clothing or textile products. Because he had no manufacturing facility, Mr. Lepoutre used two sewing machines at his residence to manufacture products. Through April 1994, PCI experienced a net loss of \$11,169 from net revenues of \$7,625; Mr. Lepoutre received no salary from his company. Mr. Lepoutre's income at A. Lafont had been \$159,238 in 1991; \$196,405 in 1992; and \$112,457 in 1993.

Pursuant to an Agreed Order Granting Temporary Relief on October 12, 1993, Mr. Lepoutre was ordered: (1) to pay \$1,800 per month in child support to Mrs. Lepoutre, (2) to provide all tuition for the children's private school, (3) to maintain the family's medical insurance, and (4) to continue any existing life insurance policy. As for alimony, (1) Mr. Lepoutre was ordered to pay \$900 per month to Mrs. Lepoutre; (2) Mrs. Lepoutre was entitled to exclusive use and possession of the Lepoutre residence; and (3) Mr. Lepoutre was to pay the house notes, insurance, and taxes. Mr. Lepoutre was ordered to continue to maintain the stock and pay dues at River Hills Country Club for Mrs. Lepoutre and their children.

After he moved out of the marital residence, Mr. Lepoutre then provided a residence in Hazlehurst for himself, Teresa Squires, and her three children. Ms. Squires was identified as the woman with whom Mr. Lepoutre had engaged in adultery.

II. TRIAL

At trial, Mr. Lepoutre testified that he had sufficient qualifications to be a plant manager of a sewing factory where his income would be approximately \$35,000 to \$40,000 per year. However, to regain the kind of income he made while at A. Lafont (over \$100,000 per year), Mr. Lepoutre testified that he would have to be in an ownership position and, therefore, he would require a significant cash investment. Mr. Lepoutre then testified as to three different projects he could pursue to place himself in an ownership position which would thereby enable him to earn an income in excess of \$100,000 per year. Mrs. Lepoutre corroborated Mr. Lepoutre's testimony by testifying that she did not believe Mr. Lepoutre could earn as much as \$100,000 a year unless he was in an ownership position. Of Mr. Lepoutre's three proposed projects to establish an ownership position, he estimated that investments of not less than \$160,000 nor more than \$300,000 would be necessary to accomplish any one of

these three investments. Hope must have sprung eternally from within Mr. Lepoutre's psyche because despite his "projected" future earning capacity of \$100,000 per year, he remained unemployed at the time of trial.

The evidence at trial showed that Mr. Lepoutre's monthly expenses were \$3,557. Mrs. Lepoutre's financial statement showed her reasonable living expenses to be \$3,113.95 per month or \$4,088 per month were she to pay \$975 per month for the mortgage on the marital residence. Mr. Lepoutre testified that based on an annual income of \$100,000 a year, he was prepared to pay total monthly support to Mrs. Lepoutre in the amount of \$3,448. Mr. Lepoutre calculated this amount as follows:

Periodic Alimony \$1,000

Child Support 1,200

Private School 800

Health Insurance \$430

TOTAL MONTHLY SUPPORT \$3,448

Mr. Lepoutre predicated his willingness to pay the above amount on what he expected to earn in the future.

There was little testimony adduced at trial as to Mrs. Lepoutre's earning capacity. However, the evidence does show that Mrs. Lepoutre does not have a college education and that she earned only minimum wage from her limited employment since her marriage. There was no testimony that Mrs. Lepoutre had any income other than from Mr. Lepoutre's support.

At trial, Mr. Lepoutre introduced a schedule of his tax liabilities from the sale of his A. Lafont stock which indicated a total tax bill of \$346,581 for the period 1994 through 1997. The amount of taxes that Mr. Lepoutre presented reflects only the tax on his capital gains which he realized from the sale of his common stock in A. Lafont. This schedule contained no amount for taxes payable on Mr. Lepoutre's income from any future employment.

Following the conclusion of the trial, the chancellor entered a final judgment of divorce in which, as we have already noted, she granted to Mrs. Lepoutre a divorce from Mr. Lepoutre on the ground of uncondoned adultery. The chancellor also adjudicated that out of the funds realized from the sale of the stock, Mrs. Lepoutre would take \$290,000 over a three-year period as lump-sum alimony and that she would take this sum of money without its being taxable as income to her. The chancellor awarded Mrs. Lepoutre the exclusive use and occupancy of the former marital domicile as a form of alimony; but she further ordered Mrs. Lepoutre to make the monthly mortgage payments of \$975 on the home. The chancellor ordered Mr. Lepoutre to pay \$1,041.67 per month per child for total child support of \$3,125 per month. In addition to the previously ordered income-tax-free lump-sum alimony in the amount of \$290,000, the chancellor ordered Mr. Lepoutre to pay Mrs. Lepoutre \$1,875 per month as permanent periodic alimony. The chancellor continued this largess from Mr. Lepoutre for the benefit of Mrs. Lepoutre by ordering Mr. Lepoutre to provide all health and medical

insurance for Mrs. Lepoutre and their three minor children and to be personally liable for all medical expenses in excess of \$1,000 which were not covered by the health and medical insurance. The chancellor ordered Mr. Lepoutre to continue his present life insurance policy in the sum of \$350,000 with Mrs. Lepoutre as beneficiary. Finally, the chancellor ordered Mr. Lepoutre to pay the private school tuition, registration fees and expenses for the three minor children which amounts to \$818 per month. In response to the judgment of the lower court, Mr. Lepoutre appealed.

III. STANDARD OF REVIEW

Our standard of review concerning a chancellor's findings is well established. The Mississippi Supreme Court has held that an appellate review of a chancellor's findings of fact will not be disturbed if substantial evidence supports those factual findings. *Brooks v. Brooks*, 652 So. 2d 1113, 1124 (Miss. 1995) (citations omitted). Our appellate scope of review dictates that this Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong or clearly erroneous, or if an erroneous legal standard was applied. *Steen v. Steen*, 641 So. 2d 1167, 1169 (Miss. 1994) (citations omitted). This is particularly true "in the areas of divorce and child support." *Brennan v. Brennan*, 638 So. 2d 1320, 1323 (Miss. 1994).

IV. ISSUES AND THE LAW

I. The chancellor's departure from the child support award guidelines without written justification constituted reversible error as a matter of law.

Concerning child support award guidelines, section 43-19-101 states:

(1) The following child support award guidelines shall be a rebuttable presumption in all judicial or administrative proceedings regarding the awarding or modifying of child support awards in this state:

Number of Children Percentage of Adjusted Gross Income

Due Support That Should Be Awarded For Support

1 14%

2 20%

3 22%

4 24%

5 or more 26%

(2) The guidelines provided for in subsection (1) of this section apply unless the judicial or

administrative body awarding or modifying the child support award *makes a written finding or specific finding on the record* that the application of the guidelines would be unjust or inappropriate in a particular case as determined under the criteria specified in Section 43-19-103.

Miss. Code Ann. §43-19-101 (1972).(emphasis added).

As previously noted, the lower court ordered Mr. Lepoutre to pay \$3,125 per month in child support for his three children. Additionally, Mr. Lepoutre was ordered to provide all health and medical insurance coverage for his three children as well as pay \$818 per month for the children's private school tuition. Because all economic issues pertaining to child support "include but are not necessarily limited to: insurance, both hospitalization and life insurance and any matter that impacts on child support," we find it appropriate to consolidate all of Mr. Lepoutre's monetary obligations to his children which the chancellor imposed upon him as "part and parcel of the issue and amount of child support." *Brennan*, 638 So. 2d at 1325.

Because Mr. Lepoutre has three children, Section 43-19-101(1) of the Mississippi Code dictates that 22% of Mr. Lepoutre's adjusted gross income should be awarded for their support. Section 43-19-101(3)(a) of the Mississippi Code of 1972 establishes the appropriate manner of calculating the "adjusted gross income" on which the determination of the amount of child support depends pursuant to section 43-19-101(1) of the Mississippi Code of 1972:

Determine gross income from all potential sources that may reasonably be expected to be available to the absent parent including, but not limited to, the following: wages and salary income; income from self employment; income from commissions; income from investments, including dividends, interest income and income on any trust account or property; absent parent's portion of any joint income of both parents; workers' compensation, disability, unemployment, annuity and retirement benefits, including an individual retirement account (IRA); any other payments made by any person, private entity, federal or state government or any unit of local government; alimony; any income earned from an interest in or from inherited property; any form of earned income.

Miss. Code Ann. § 43-19-101(3)(a) (1972). At the time of trial, Mr. Lepoutre was unemployed and, therefore, had no reliable source of income. Although Mr. Lepoutre started his own company, he received no salary, and the company experienced net losses. The only steady source of income that Mr. Lepoutre was receiving before trial was from unemployment compensation, which was in the amount of \$165 per week.

We are fully cognizant that Mr. Lepoutre earned in excess of one hundred thousand dollars per year while he was an employee at A. Lafont and that he received a substantial sum from the forced buy out of his A. Lafont stock. However, Mr. Lepoutre's past income is not a determinative factor of his present ability to pay child support. As to the proceeds of the stock buy out, Mr. Lepoutre was ordered to pay \$290,000 to Mrs. Lepoutre as lump-sum alimony; furthermore, Mr. Lepoutre's tax

burden on this capital gain amounts to \$346,581. Granted, Mr. Lepoutre's remaining portion of the proceeds is a significant amount of money; however, the lower court's award of child support is neither reflective of the statutorily prescribed percentage of this money nor did the chancellor make "a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate" *Id.* § 43-19-101(2).

We note that "an award of child support is a matter within the discretion of the chancellor[,] and we will not reverse that determination unless the chancellor was manifestly wrong in his finding of fact or manifestly abused his discretion." *Gillespie v. Gillespie*, 594 So. 2d 620, 622 (Miss. 1992). Furthermore, "[t]he process of weighing evidence and arriving at an award of child support is essentially an exercise in fact-finding, which customarily significantly restrains this Court's review." *Id.* In the case at bar, however, the facts from the record do not validate the chancellor's award of child support. Because Mr. Lepoutre was in the unique position at the time of trial by not having a measurable source of steady income and yet receiving a sizeable sum from the stock buyout, his adjusted gross income was difficult to determine. Under such circumstances we point to the fact that "a chancellor can depart from the guidelines with written findings of their inappropriateness." *Johnson v. Johnson*, 650 So. 2d 1281, 1288 (Miss. 1994) (citing *McEachern v. McEachern*, 605 So. 2d 809, 813-14 (Miss. 1992)). However, like the case at bar, "[w]ithout a written justification, such a departure is error by law and reversible." *Id.* at 1288.

All total, Mr. Lepoutre's obligation in child support as ordered by the lower court falls in the range of \$5,000 per month. Even assuming that Mr. Lepoutre procured a job earning \$100,000 per year as he anticipated that he would by his testimony, the amount ordered by the lower court, nonetheless exceeds that prescribed by the statutory guidelines. For the lower court's order of child support to represent 22% of Mr. Lepoutre's adjusted gross income, he would have to earn in excess of \$24,000 per month. Clearly, this award of child support is erroneous and must be reversed.

II. The trial court's total award of spousal support and child support was against the overwhelming weight of the evidence and so excessive as to constitute an abuse of discretion.

Because we have already determined that the lower court's award of child support was erroneous and, therefore reversible, we focus on the trial court's award of spousal support. A review of the lower court's judgment shows that Mr. Lepoutre was ordered to pay Mrs. Lepoutre periodic alimony in the amount of \$1,875 per month and lump-sum alimony in the amount of \$290,000 which was not to be taxable to her as income. Concerning the issue at hand, the Mississippi Supreme Court has articulated a set of controlling principles. The court explains:

[I]n the ordinary case . . . the right to an award of periodic alimony flows from the duty of the husband to support his wife. The husband is required to support his wife in the manner to which she has become accustomed, to the extent of his ability to pay. The value of the wife's assets and income should be determined in order to ascertain her needs to maintain her position in life to which she had become accustomed, and such value is considered by the trial court in assessing both alimony and support.

In other words, in determining the amount of alimony . . . '[t]he chancellor should consider the reasonable needs of the wife and the husband's right to lead a normal life with a decent standard of living.' We are ever mindful of the rule that '[w]hether to award alimony, and the amount to be awarded, are largely within the discretion of the chancellor.' This is true, as stated previously, because of the chancery court's 'peculiar opportunity to sense the equities of the situation before it.' [citations omitted]. '[T]he chancellor is the judge of the weight and worth of the testimony' in a divorce proceeding . . .

We have long recognized there are certain factors which are to be considered by the chancellor in fixing alimony amounts

The lower court should award reasonable sums for alimony . . . in light of conditions as they now prevail, including (1) the health of the husband and his earning capacity; (2) the health of the wife and her earning capacity; (3) the entire source of income of both parties; (4) the reasonable needs of the wife; (5) the reasonable needs of the child; (6) the necessary living expenses of the husband; (7) the estimated amount of income taxes the respective parties must pay on their incomes; (8) the fact that the wife has free use of the home furnishings and automobile; and (9) such other facts and circumstances bearing on the subject that might be shown on the evidence.

Magee v. Magee, 661 So. 2d 1117, 1125 (Miss. 1995) (alteration in original) (quoting *Brabham v. Brabham*, 226 Miss. 165, 176, 84 So. 2d 147, 153 (1955)).

Pursuant to the above mentioned factors, we note the following: First, there was no evidence that the health of either Mr. Lepoutre or Mrs. Lepoutre was impaired. Secondly, Mr. Lepoutre's earning capacity appeared to be directly related to the portion of the proceeds from his sale of the A. Lafont stock that were available for investment purposes. He testified that he anticipated earning approximately \$100,000 per year in his next employment if he were able to procure an "ownership position." Before trial, Mrs. Lepoutre's sole source of income came from the award of temporary support provided through the Agreed Order entered while Mr. Lepoutre was employed at A. Lafont, where he earned in excess of \$100,000 per year. As already stated, Mrs. Lepoutre testified, via her budget, that her reasonable needs in alimony and child support would require \$4,088 per month in support, including the \$975 per month mortgage payment on the marital residence. By projecting his future income at \$100,000 per year, Mr. Lepoutre testified that he would be willing and able: (1) to pay \$400 per child per month; (2) to pay \$1,000 per month in periodic alimony; (3) to provide health insurance for Mrs. Lepoutre and the children; and (4) to pay the children's private school tuition. Nevertheless, the chancellor awarded Mrs. Lepoutre support for both her children and her in an

amount of approximately \$7,000 per month.

We reiterate that Mr. Lepoutre sustained an income tax burden of \$346,581 on his capital gain from the sale of his stock in A. Lafont. Moreover, Mrs. Lepoutre was granted exclusive use and possession of the marital domicile. That she was ordered to pay the mortgage installments is of no consequence because the support that the chancellor ordered Mr. Lepoutre to pay more than covered those the monthly mortgage payment of \$975. On the assumption that Mr. Lepoutre was to earn \$100,000 per year, the evidence at trial demonstrated that his additional income tax burden from this income would be approximately \$30,983 per year. Mr. Lepoutre's payment of \$30,983 in income tax would leave \$69,017 per year from which to pay child and spousal support and to provide for his necessary living expenses. Moreover, Mr. Lepoutre had a right to lead a normal life with a decent standard of living. Mr. Lepoutre testified that his necessary living expenses were \$3,557 per month.

The Mississippi Supreme Court has dealt with a similar set of circumstances in the case of *Tilley v. Tilley*, 610 So. 2d 348 (Miss. 1992). In *Tilley*, the wife was awarded: (1) full use and possession of the marital home, (2) \$1,500 in monthly child support for three children, (3) full hospitalization coverage for the divorced couple's minor children; (4) payment of the children's private school tuition and college education, (5) \$1,500 monthly periodic alimony, and (6) \$150,000 as lump-sum alimony. *Id.* at 353. In addition, the chancellor ordered the husband to maintain life insurance policies and to pay all debts from the marriage. *Id.* According to the record in the *Tilley* case, the husband was supposed to pay \$11,038.34 per month under the terms of the judgment, yet he had a monthly net income of \$7,306 per month. *Id.* at 354. In response to the lower court's judgment, the Mississippi Supreme Court stated:

[The wife] and the children deserve to enjoy a nice standard of living with many amenities of life. But the blunt truth is that now two families will have to live on the same salaries that once supported one family. There is no way the standard of living can remain as high as it once might have been.

Id.

The supreme court concluded that the chancellor in *Tilley* was either punishing the husband or ignoring his income resources and reversed the lower court's judgment. The supreme court observed that the husband had "not even been left enough monthly income for a standard of living, much less a reasonable one." *Tilley*, 610 So. 2d at 354. Similarly, we find that the chancellor in the case at bar left Mr. Lepoutre unable to enjoy a reasonable standard of living by the excessive amounts of child and spousal support that the chancellor ordered him to pay. We find that the chancellor's award of child and spousal support was against the overwhelming weight of the evidence and thus so excessive as to constitute an abuse of discretion.

V. Conclusion

The following quotation from *Tilley* constitutes an appropriate conclusion for this opinion:

We find the chancellor abused [her] discretion in ordering [the husband] to pay aggregate monthly support beyond his means. As such, we reverse and remand to the trial court for determination of a more equitable judgment of support, including both periodic alimony and lump sum alimony, in line with this opinion and this state's law.

Tilley, 610 So. 2d at 354.

THE JUDGMENT OF THE CHANCERY COURT OF HINDS COUNTY IS REVERSED AND REMANDED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.

FRAISER, C.J., THOMAS, P.JJ., BARBER, DIAZ, KING, McMILLIN AND SOUTHWICK, JJ., CONCUR. BRIDGES, P.J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY FRAISER, C.J., THOMAS, P.J., BARBER AND SOUTHWICK, JJ. PAYNE, J., DISSENTS IN PART AND CONCURS IN PART WITH SEPARATE WRITTEN OPINION.

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BRIDGES, P.J., CONCURRING:

Although I agree with the majority in the conclusions it has reached, I feel the need to add an additional caveat by way of instruction for chancellors in this state to follow when ruling on issues of

child support.

At the time of trial, Mr. LePoutre remained unemployed. He did project his own future earning capacity to be in the range of \$100,00.00 per year. He testified at trial that he was willing to pay \$3,448.00 per year to Mrs. LePoutre based on his expected income. The chancellor awarded \$3,125.00 a month in child support to Mrs. LePoutre. The majority found that an award of \$3,125.00 per month in child support was excessive since the award was based on Mr. LePoutre's projected income based on his past income. The majority correctly found that Mr. LePoutre's past income is not determinative of his present ability to pay child support. The majority stated, "The facts in the record do not validate the chancellor's award of child support." The majority was concerned with the chancellor's failure to make findings according to the customary child support guidelines as imposed by statute and the chancellor's failure to state why those guidelines do not apply.

The majority went on to hold that the chancellor failed to make "a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate." Miss Code Ann. § 43-19-1-1(2) (1972). This was a proper finding by the majority. However, I believe that although a chancellor makes a written finding that the guidelines are inapplicable, the chancellor must still take into consideration the appropriate factors which affect the standard of living of the parties involved and their children. Those findings must be stated in the record. A chancellor cannot simply depart from the child-support guidelines and then fail to make specific findings as to his or her determination of the child support award. *He or she must make a specific finding in the record that the application of the guidelines would be unjust or inappropriate and make these findings according to the criteria set out in section 43-19-103 of the Mississippi Code. Johnson v. Johnson*, 650 So. 2d 1281, 1288 (Miss. 1994) (emphasis added). Even in cases where the chancellor applies the guidelines, he cannot apply the guidelines to the exclusion of the individual factors affecting the former spouse and the parties' children. *Thurman v. Thurman*, 559 So. 2d 1014, 1017 (Miss. 1990).

Once again, although the majority arrived at the proper conclusion, I believe that the majority incorrectly failed to stress the above points in its opinion.

FRAISER, C.J., THOMAS, P.J., BARBER, AND SOUTHWICK, JJ., JOIN THIS SEPARATE WRITTEN OPINION.

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PAYNE, J., CONCURRING IN PART, DISSENTING IN PART:

Although I can agree with the majority that the child support and periodic alimony awards granted by the chancellor are in excess of the statutory guidelines and need to be revisited, I cannot agree that the division of marital assets granted herein was so excessive as to constitute an abuse of discretion. Thus, I am compelled to dissent as to that portion of the majority's opinion requiring reversal of the chancellor's division of marital assets.

"Our scope of review in domestic relations matters is limited under the familiar rule that this Court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard." *Johnson v. Johnson*, 650 So. 2d 1281, 1285 (Miss. 1994) (citing *McEwen v. McEwen*, 631 So. 2d 821, 823 (Miss. 1994)).

The division of marital assets is now governed by the guidelines set forth by the Mississippi Supreme Court in *Hemsley v. Hemsley*, 639 So. 2d 909 (Miss. 1994) and *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994). See *Johnson*, 650 So. 2d at 1287.

First, the character of the parties' assets, i.e., marital or nonmarital, must be determined pursuant to *Hemsley*. The marital property is then equitably divided, employing the *Ferguson* factors as guidelines, in light of each parties' nonmarital property. *Ferguson*, 639 So. 2d at 928. If there are sufficient marital assets which, when equitably divided and considered with each spouse's nonmarital assets, will adequately provide for both parties, no more need be done. If the situation is such that an equitable division of marital property, considered with each party's nonmarital assets, leaves a deficit for one party, then alimony based on the value of nonmarital assets should be considered.

Johnson, 650 So. 2d at 1287. "Upon dissolution of a marriage, the chancery court has the discretion to award periodic and/or lump sum alimony, divide real and personal property, including the divesting of title, and may consider awarding future interests to be received by each spouse." *Ferguson*, 639 So. 2d at 929. "In the final analysis, all awards should be considered together to determine that they are equitable and fair." *Id.*

With these principles in mind, I turn to the present case. The majority addresses the chancellor's award as "spousal support" grouping together the discussion of periodic and lump-sum alimony. In reversing the chancellor, the majority evaluates the chancellor's "spousal support" award under the factors to be considered in evaluating a *periodic* alimony award. However, in looking to the chancellor's judgment, it is clear that the \$290,000 award to Mrs. Lepoutre is, in fact, *equitable distribution* and not lump-sum alimony as the majority assumes. Thus, it is necessary to evaluate the

\$290,000 award under the proper analysis.

The Mississippi Supreme Court has long recognized that chancellors have the authority to order an equitable division of the property accumulated through the joint efforts of both husband and wife in a divorce action. *Ferguson*, 639 So. 2d at 934. To complete an equitable division of such property, the chancery court has the authority to divest title to real estate. *Id.* (citing *Draper v. Draper*, 627 So. 2d 302, 305 (Miss. 1993)). Additionally, the matter is within the chancellor's discretion, considering all the equities and other relevant facts. *Id.* (citing *Bowe v. Bowe*, 557 So. 2d 793, 794 (Miss. 1990)). The chancery court "has the authority to order an equitable division of jointly accumulated property and in doing so to look behind the formal state of title." *Ferguson*, 639 So. 2d at 935 (quoting *Johnson v. Johnson*, 550 So. 2d 416, 420 (Miss. 1989)). However, we are reminded "that non-marital property is not subject to equitable division." *Ethridge v. Ethridge*, 648 So. 2d 1143, 1145 (Miss. 1995). The Mississippi Supreme Court has stated:

We define marital property for the purpose of divorce as being any and all property acquired or accumulated during the marriage. Assets so acquired or accumulated during the course of the marriage are marital assets and are subject to an equitable distribution by the chancellor. We assume for divorce purposes that the contributions and efforts of the marital partners, whether economic, domestic or otherwise are of equal value.

Hemsley, 639 So. 2d at 915. "A spouse who has made a material contribution toward the acquisition of property which is titled in the name of the other may claim an equitable interest in such jointly accumulated property incident to a divorce proceeding." *Ferguson*, 639 So. 2d at 935 (quoting *Jones v. Jones*, 532 So. 2d 574, 580 (Miss. 1988) (citations omitted)).

The Mississippi Supreme Court set guidelines to be considered by the chancery courts when attempting to effect an equitable division of marital property:

1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:
 - a. Direct or indirect economic contribution to the acquisition of the property;
 - b. Contribution to the stability and harmony of the martial and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage; and
 - c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.
2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.
3. The market value and the emotional value of the assets subject to distribution.
4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;

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

Ferguson, 639 So. 2d at 928. The court also noted that this list is not exclusive. *Id.*

In the present case, the couple came to Mississippi with assets of \$1,000. After thirteen years of marriage, with Mrs. Lepoutre spending most of that time as a homemaker raising three children, the couple's financial situation changed substantially. When Mr. Lepoutre's company bought his stock, he was paid \$987,758, on which he owed \$346,581 in taxes leaving a total of \$641,177 net worth. After he pays \$290,000 to Mrs. Lepoutre, Mr. Lepoutre would still have \$351,177, a hefty sum. I do not believe that under *Hemsley v. Hemsley* and *Ferguson v. Ferguson*, any court would deny this to be an equitable distribution. The fact that it would take an investment of \$300,000 to get him to a place of ownership making \$100,000 a year in the future is conjecture (even if his wife agrees to its probability) and does not mean that the wife must be the investor, leaving him with funds in excess of that investment to the tune of some \$350,000. The equities would require that she share in the proceeds from the sale of stock.

I am alarmed at what seems to be a trend in domestic relations cases where the affluent spouse who finds a more desirable mate impoverishes himself so as to have a low or non-existent basis on which to determine alimony and child support knowing that he first, has to be provided a "normal life with a decent standard of living," regardless of the drastic reduction in standard of living for the first wife and children. Mr. Lepoutre testified that his monthly living expenses were \$3,557 per month or \$42,684 annually in take-home pay. His new business left him with a net loss of \$11,169 for the year of the trial. Sympathy for the gentleman is assuaged somewhat when one notes that he made \$159,238 in 1991; \$196,405 in 1992; and \$112,457 in 1993. The fact that his income is only \$165 a month in unemployment compensation, must be considered in context. Mr. Lepoutre was able to pay for numerous trips (including trips to the Bahamas, New Orleans, the Gulf Coast, and two trips to France) for himself and his girlfriend, not to mention his being able to pay for his girlfriend's breast augmentation. Mr. Lepoutre has also contributed to his girlfriend's support and that of her three children in that they resided with him at the time of trial and had done so for some time prior. The relationship that brought him to financial ruin and domestic heartache is not to be rewarded by deprivation of the wife and children of his marriage.

I believe that the majority is giving the wrong impression on remand for the chancellor to re-work the entire division of marital assets. There was no error in the equitable distribution of the marital assets and I would affirm as to the award to Mrs. Lepoutre in the amount of \$290,000.

