

**IN THE COURT OF APPEALS 04/09/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CA-00445 COA**

**JIMMY RAY SHARP**

**APPELLANT**

**v.**

**DOROTHY SHARP**

**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:

WILLIAM T. REED

OSWALD & REED

ATTORNEY FOR APPELLEE:

NONE

NATURE OF THE CASE: DOMESTIC RELATIONS: ALIMONY

TRIAL COURT DISPOSITION: IRRECONCILABLE DIFFERENCES DIVORCE GRANTED  
AND ALIMONY AND PROPERTY SETTLEMENT ORDERED

BEFORE THOMAS, P.J., BARBER AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Dorothy and Jimmy Sharp were granted an irreconcilable differences divorce by the Jackson County Chancery Court. Mr. Sharp appeals, contending that the chancery court's order failed to consider his financial situation and did not leave him with a reasonable standard of living. We reverse and remand.

Dorothy Sharp has failed to file a brief in this appeal. Such a failure has been termed "tantamount to confession of error." *Price v. Price*, 430 So. 2d 848, 849 (Miss. 1983) (citations omitted). "Automatic reversal is not required," however. *Muhammad v. Muhammad*, 622 So. 2d 1239, 1242-43 (Miss. 1993) (citations omitted). If we can say with confidence that there was no error below, reversal does not result from the failure to file a brief. *Queen v. Queen*, 551 So. 2d 197, 199 (Miss. 1989) (citations omitted). Four justices dissented on the merits in *Queen* and two in *Muhammad*. So whatever it means to "say with confidence" that no error occurred, the mere fact several judges believe there was error may not be enough to remove the majority's confidence that there was none. In effect, the supreme court has researched the legal issues despite the quasi-confession of error and written on the case as if an appellee's brief were filed. We will do the same.

As a part of the judgment of divorce, the marital residence was ordered sold and its equity divided equally between the parties. Mr. Sharp was ordered to pay alimony of \$250.00 per month for three years, \$200.00 per month for the three years following, and then \$150.00 per month for the next four years. In addition, he was ordered to pay the family's debts, maintain health insurance for his minor child, pay half of medical expenses for the child exceeding \$25.00, and he was ordered to pay court costs. He was ordered to pay \$70.00 in weekly child support. Lastly, Mr. Sharp was ordered to pay one half of his military pension to his ex-wife upon his retirement. The trial court did not indicate whether he considered this to be periodic or lump-sum alimony. Initially the court ordered the payment of alimony "until further order by this court," which indicates the award was of periodic alimony. Later the court amended the order to terminate alimony after ten years, which is more akin to lump sum, payable in installments, or even that rare creature, rehabilitative alimony. In the same paragraph that dealt with alimony in the court's original opinion, the court also held that "when the Defendant's (Mr. Sharp's) military retirement becomes payable," Mrs. Sharp would receive half of that money. When the court amended the award there was no attempt to explain the change as being tied to the start of the retirement payments. Thus we have no explanation for the award.

An award of periodic alimony should be guided by the principles restated in the supreme court's opinion in *Magee v. Magee*, 661 So. 2d 1117 (Miss. 1995). The court explained:

In other words, in determining the amount of [periodic] 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.' '[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 sources 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*, 661 So. 2d at 1125 (quoting *Brabham v. Brabham*, 226 Miss. 165, 84 So. 2d 147, 153 (1955)).

If the alimony is actually a lump sum, payable in installments, as alleged by Mr. Sharp, the chancellor certainly did not initially treat it as such. The original order required indefinite continuation of the payments. The amended order never suggests there is a total sum determined by the chancellor to be correct, to be paid out over ten years. Nonetheless, since we are reversing and remanding for further proceedings, the nature of the alimony award can then be explained and justified. We need not set out when a lump sum award is appropriate, as the issue can be addressed on remand. See *Retzer v. Retzer*, 578 So. 2d 580, 591-592 (Miss. 1990).

The parties in this case submitted financial declarations outlining their income and expenses. The difficulty lies in the apparent impact of alimony on the parties' discretionary income. During their separation, Mr. Sharp had an approximate monthly discretionary income for eight months of the year of \$450.00, but during the other four, it was \$250.00 per month. This averages to approximately \$378.00 per month. Mrs. Sharp had a little over \$100.00 in discretionary income. As a result of the chancellor's order of alimony, and using the figures in the respective financial statements, Mr. Sharp will during the first three years have discretionary income of approximately \$128.00 per month, while Mrs. Sharp will have \$369.00. In addition she will receive \$301.00 per month in child support. Since these financial statements include the monthly living expenses, we discern no reason for the ex-spouse's respective discretionary incomes to be so different.

Part of the problem in reviewing the chancellor's award is that Mr. Sharp was making payments totaling \$472.00 per month on installment notes. One of the notes is due to be paid off at \$41.00 per month in October, 1997. The payoff dates of the two largest notes do not appear in the record. If the chancellor was factoring in an improvement in Mr. Sharp's financial situation because of payoffs of one or more of those notes, there is no evidence in the record to support that.

In support of what the chancellor ordered, the evidence demonstrated that Mrs. Sharp was employed in a minimum wage job with no serious prospects, educationally or otherwise, for immediate improvement of her condition. Mr. Sharp on the other hand received a gross monthly income from Ingalls shipyard of \$2,713.00, and additional money for part-time teaching. The fact remains that after all monthly expenses of each former spouse were paid, Mrs. Sharp was left with substantially more income than was Mr. Sharp. No justification for that appears in the record.

After review of this record, we cannot "say with confidence" that the chancellor properly "consider[ed] the reasonable needs of the wife and the husband's right to lead a normal life with a decent standard of living." *Magee*, 661 So. 2d at 1125. The chancellor's decree is handicapped on appeal by the fact the Appellee filed no brief. We reverse and remand for further proceedings on the issue of alimony. The amount of any subsequent award of alimony, even the same amount as in the

original decree, would be more easily reviewed if findings regarding the award were stated in the record. We must know if any alimony awarded after remand is periodic (which continues indefinitely and may be modified), lump sum (which is not affected by death or remarriage), or rehabilitative (which continues for a definite period and meets the applicable criteria).

**THE JUDGMENT OF THE JACKSON COUNTY CHANCERY COURT IS AFFIRMED AS TO ALL ASPECTS EXCEPT FOR THE AWARD OF ALIMONY, WHICH IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. THE PARTIES ARE TO BEAR THEIR RESPECTIVE COSTS OF THIS APPEAL.**

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