

FILED

MAY 31 2018

CHOCTAW SUPREME COURT
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**IN THE SUPREME COURT
MISSISSIPPI BAND OF CHOCTAW INDIANS**

VIRGIE L. HENRY

APPELLANT

VS.

CAUSE NO. SC 2015-01

DALTON J. HENRY

APPELLEE

AND

DALTON J. HENRY

APPELLANT

VS.

CAUSE NO. SC2015-05

VIRGIE LEE BEARD HENRY

APPELLEE

OPINION AND ORDER

Virgie Lee Henry ("Virgie") and Dalton J. Henry ("Dalton") were married on 15 June 1974 in Lawrence, Kansas. The parties have two adult children. Over the course of their 37-year marriage, the parties accumulated limited marital property including two vehicles, and Dalton's vested federal retirement benefits. The final judgment granting divorce was entered 31 December 2014.

Dalton brought this appeal and Virgie cross-appealed from the 31 December 2014 Memorandum Opinion and Order ("December 2014 Order") challenging the amount of periodic alimony, attorney fees, and the lack of a lump sum award. The order granting the divorce was not appealed and therefore, became final on 31 December 2014.

PRELIMINARY LOWER COURT PROCEEDINGS

The December 2014 Order was the final trial court action in an arduously long chain of motions and interim court actions which resulted in long delays to the final decision of the lower court case, and then to the final submissions for resolution of the case before us. The following actions and orders delayed the hearing on the complaints for divorce:

- 2 February 2011: Dalton filed his Complaint for Divorce against Virgie;
- Multiple filings and actions were taken between 2 February 2011 and 1 July 2013 that are not pertinent to the current case before the Court;
- 1 July 2013: Supreme Court issued Judgment on Motion of Mississippi Band of Choctaws for Rehearing where this Court having found jurisdiction over the

pending subject matter and necessary parties to this litigation ordered that the Final Judgment of June 15, 2011 be set aside, and remanded the case for a full hearing and decision, and if a divorce is granted, an equitable division of marital assets along with a determination of any non-marital assets and other proper relief requested;

- 21 August 2013: Lower court issued Scheduling Order setting this case for trial on October 23, 2013 and also required all discovery to be propounded by August 28, 2013;
- 20 September 2013: Virgie filed Answer and Counter-Complaint for Divorce and other Relief;
 - 9 October 2013: Lower court granted Virgie's Motion for Temporary Relief filed 20 September 2013 and ordered Dalton to pay Virgie \$1000.00 for travel expenses;
- 11 October 2013: Dalton filed a Motion to Extend time from 11 October to 17 October to pay Virgie \$1000.00 for travel expenses;
- 14 October 2013: Virgie filed a Motion for Citation for Contempt for failure of Dalton to comply with 9 October 2013 order to pay her \$1000.00 and Virgie requested money damages in amount of \$1200 including attorney fees and court costs;
 - 16 October 2013: Court granted Virgie's Motion for Citation for Contempt and ordered Dalton to pay \$1200.00 to Virgie by 17 October 2013. The order did not specify whether the \$1200 award included the previously ordered travel expenses (\$1000) of 9 October or if the total award was for money damages as requested in the motion. The court received from Dalton a cashiers check in an amount of \$1200.00 made payable to Virgie on 17 October 2013;
- 21 October 2013: Virgie filed a Motion for Continuance due to an inability to serve a subpoena upon a witness living off the reservation.
 - The case was continued until November 13, 2013.
- 1 November 2013: Dalton filed an Amended Complaint for Divorce;
- 12 November 2013: Virgie filed a second Motion for Continuance one day before scheduled trial due to inability to serve a witness.
 - The Motion was granted and the case was set for trial on December 13, 2013;
- 11 December 2013: Virgie filed a third Motion for Continuance with a supporting affidavit from a process server confirming an inability to serve a witness.
 - The case was continued until January 22, 2014;
- 21 January 2014: Virgie filed a fourth Motion for Continuance based upon inability to serve a witness.
 - Motion was granted and required that any further motions must strictly comply with the Choctaw Rules of Civil Procedure regarding the time for filing motions and supporting affidavits. The hearing was reset to 26 February 2014;
- 6 February 2014: Virgie filed a Motion to Dismiss or Request for Immediate Temporary Relief;

- 19 February 2014: Virgie filed Motion for Continuance;
 - 25 February 2014: Order for continuance granted;
- 14 February 2014: Virgie filed a fifth Motion for Continuance stating that she was in bad health and unable to travel and attached a doctor's note;
 - 18 February 2014: Response to Motion to Dismiss or Request for Immediate Temporary Relief [filed 6 February 2014] and Order for Continuance [on Motion for Continuance filed 14 February 2014];
- 24 February 2014: Virgie filed First Request for Supplemental Discovery, Production of Documents and Request for Admissions;
 - 25 March 2014: Dalton filed Response to First Request for Supplemental Discovery;
- 13 March 2014: Virgie filed a sixth Motion for Continuance stating the she was in poor health and could not travel. Attached to the Motion was a letter dated 12 March 2014 from a physician stating Virgie should not make the trip at that time.
 - The case was reset for April 28, 2014.
- 2 April 2014: Virgie filed Motion to Compel Supplemental Discovery;
- 9 April 2014: Order Requiring Submission of Financial Declaration by each party and requiring sworn financial declaration to be submitted in compliance with Uniform Chancery Court Rule 8.05;
- 11 April 2014: Virgie filed a seventh Motion for Continuance stating that she is unable to travel due to poor health. In support, Virgie provided the same 12 March 2014 letter from the physician attached to prior motion for continuance. Virgie also states that she is still unable to subpoena the material witness for which five prior continuances were granted for lack of service, and that another witness was unavailable due to work duty;
 - 22 April 2014: Court denied Virgie's seventh Motion for Continuance and further denied request by Virgie for supplemental discovery;
- 23 April 2014: Virgie filed an Amended Motion for Continuance due to bad health and inability to subpoena an indispensable witness;
 - 29 April 2014: Court granted Amended Motion for Continuance;
- 11 June 2014: Dalton filed Motion to Strike Second Motion for Supplemental Discovery by Respondent [Attorney for Plaintiff signed submission on July 1, 2014];
- 11 June 2014: Dalton filed Plaintiff's Objections and Responses to Admission Propounded by Defendant [Attorney for Plaintiff signed submission July 1, 2014; court stamp date must be incorrect];
- 13 June 2014: Order for Continuance issued after hearing and trial date set for 9 June 2014 continued to 27 August 2014;
- 20 June 2014: Defendant's Second Request for Supplemental Discovery, Production of Documents and Request for Admissions;
- 25 June 2014: Virgie filed Notice of Service for Second Motion to Compel Supplemental Discovery and Second Complaint for Citation for Contempt;
- 30 July 2014: Virgie filed Motion for Emergency Hearing and Third Request for Temporary Relief;

- 5 August 2014: Agreed Order for Emergency Hearing and Third Request for Temporary Relief -- emergency hearing set for 13 August 2014;
 - 20 August 2014: Virgie's Motion (30 July 2014) Denied;
- 22 August 2014: Virgie filed a Motion for Continuance and to Vacate Order;
 - 27 August 2014: Order for Continuance – hearing is continued for new date in September 2014, status conference set for 3 September 2014;
- 3 September 2014: Order – case set for review and setting of new trial date on 1 October 2014;
- 21 October 2014: Order Setting Cause for Hearing – trial set for 21 November 2014;
- 21 November 2014: Lower Court Hearing and issuance of Temporary Order setting temporary maintenance for Virgie;
- 21 November 2014: Dalton submitted to court a cashiers check for \$500.00 payable to Virgie;
- **31 December 2014: Memorandum Opinion and Order – final judgment granting divorce to Virgie from Dalton on the grounds of adultery in accordance with Section 9-3-3(2) of the Choctaw Tribal Code.**

Following the lower court order granting Virgie a divorce from Dalton and awarding equitable division of property and other relief, the road to the hearing on appeal continued to be delayed:

- 9 January 2015: Dalton filed a Motion for Reconsideration;
- 29 January 2015: Virgie filed with the Supreme Court a Notice for Extension of Appeal requesting an additional 30 days to file appeal;
- 3 March 2015: Order allowing withdrawal of Virgie's attorney as counsel of record;
- 17 March 2015: Virgie filed *pro se* Notice for Extension of Appeal requesting the this Court to grant a six (6) month extension to file appeal due to lack of an attorney;
 - 20 March 2015: Supreme Court Order granting Virgie's motion for a 6 month extension to file appeal;
 - 30 April 2015: Virgie *pro se* filed a Response to Motion for Reconsideration and Motion to Strike with the lower court.
- 30 April 2015: Dalton filed Notice of Appeal;
- 8 May 2015: Order Granting [Virgie's/]Appellant's Motion in Part for Extension of Time in which to Obtain Legal Counsel and Denying Appellant's Motion in Part for Extension of Time in which to Obtain Legal Counsel [six (6) month extension requested; 30 days extension granted];
- 22 May 2015: Virgie filed Notice of Appeal;
- 22 May 2015: Virgie filed Motion for Leave to Proceed in *Forma Pauperis*;
 - 5 June 2015: Dalton filed Response to Motion for Leave to Proceed in *Forma Pauperis*;
- 5 June 2015: Dalton filed Motion to Consolidate Appeals;
- 5 June 2015: Dalton filed Motion to Stay Lower Court's Order

- 16 June 2015: Order Staying Lower Court Order In Part, Denying In Part, and Directing Certain Payments Be Made Into Escrow Pending Outcome of Appeal;
- 11 August 2015: Dalton filed Motion to Amend the Supreme Court's Order Staying Lower Court Order In Part, Denying In Part, and Directing Certain Payments Be Made Into Escrow Pending Outcome of Appeal;
 - 21 August 2015: Motion to Amend Order Denied, noting Motion was filed without a Supreme Court cause number and was misdirected to wrong court;
- 9 October 2015: Briefing Schedule - Appellant's brief due 11 November 2015 and Appellee's brief due 11 December 2015;
- 6 November 2015: Dalton filed Brief of Appellant;
- 11 December 2015: Virgie *pro se* filed Motion to Continue [to File Brief of Appellant/Appellee];
 - 11 December 2015: Order Granting Appellant/Appellee Virgie L. Beard Henry's Request, A Motion to Continue to File Brief of Appellant/Appellee;
- 12 January 2016: Virgie filed Entry of Appearance and Motion For Enlargement of Time;
 - 13 January 2016: Order Granting Motion for Enlargement of Time to prepare appeal on behalf of Virgie L. Henry;
 - 27 January 2016: Amended Order granting Motion for Enlargement of Time;
- 16 February 2016: Order Granting Appellant/Appellee's Request For a Second Extension of Time To File Brief of Appellant/Appellee, Virgie L. Henry after receipt by email of said request on same day;
- 17 March 2016: Virgie filed Motion For Extension of Time due to health of attorney;
 - 17 March 2016: Order Granting Appellant/Appellee's Request for a Third Extension of Time to File Brief of Appellant/Appellee Virgie L. Henry;
- 18 April 2016: Virgie filed her Response and Cross-Appeal;
- 28 April 2016: Dalton filed Rebuttal Brief; and
- 28 July 2016: Oral Argument before Supreme Court.

FACTUAL FINDINGS AND DETERMINATIONS OF THE LOWER COURT

The parties present a long term, thirty-nine year marriage. Virgie was sixty-one years old and Dalton was sixty-eight years of age. Dalton held various positions with the Bureau of Indian Affairs and the parties moved several times primarily as a result of job promotions or job changes for Dalton. In 1996, the parties relocated to the Washington DC area where they lived for seventeen years until 2008 when Dalton accepted a position [a two-year assignment from the Bureau of Indian Affairs (BIA)] with the Mississippi Band of Choctaw Indians (MBCI) and moved to Choctaw. The parties' account of the effect of this move on the marriage is in dispute. The following facts are undisputed: Virgie and Dalton never cohabitated as husband and wife after March 2008 when Dalton moved to MBCI on assignment from the BIA; by

letter dated June 16, 2008, Virgie wrote to Doug Weaver, Director of Finance, MBCI, stating that she would be unable to relocate and join Dalton in Choctaw; Dalton informed Virgie in October 2008 that he was involved in an extramarital affair; Dalton and Virgie shared Thanksgiving holiday as a family with their adult children in 2009 in California.

Dalton stipulated that he had an affair in 2008 that was not condoned by Virgie, thereby entitling her to divorce based upon Choctaw Tribal Code Section 9-3-3(2). In addition, the parties have lived apart without cohabitation for a period of three consecutive years, and thereby a divorce could be granted in accordance with Section 9-3-3(8).

Between 1974 and 2008, Dalton was the primary earner in the family with both parties being usually employed in the early years of the marriage. Prior to the marriage, Dalton obtained an Associate degree from Haskell Jr. College in Kansas. After Dalton and Virgie married, they returned to Choctaw where Dalton continued his education -- he obtained a Bachelor's degree in 1976 or 1978 and a Masters of Public Administration in the 1980's both from Mississippi State University. Dalton testified that he received a stipend from the Tribe while he was in school at Mississippi State, and that the stipend paid all school and related expenses.

Virgie was employed during the time in which Dalton was in school at Mississippi State and her income helped support the family. During this time, Virgie worked as a class aid, a clerk and an administrative assistant while they lived in the Bogue Chitto Community for about three and a half years, leaving Choctaw in 1979.

During the early years of their marriage, both parties were usually employed, with Dalton holding various positions with the BIA that required the parties to move several times as a result of job changes within the Bureau. In 1996, the parties relocated to the Washington, DC region where they lived for seventeen years.

In December 2008, Virgie moved to California and the testimony is conflicting as to whether Dalton was involved in that decision. Dalton was working in Choctaw under a two-year contract and did not move to California. During the course of the marriage the parties maintained a joint account and Dalton's paycheck was deposited into said account while Virgie lived in the Washington DC area. Virgie stated that she has not received any support from Dalton since August 2010. Virgie testified that she was evicted from her California home in December 2010 and had a \$10,000 judgment rendered against her.

At the time of trial, Virgie was sixty-one years old, having received cancer treatments. Virgie stated that she had benign tumors removed. Virgie states that she is unable to work, receives \$200 per month in food stamps from the state of Oklahoma, and has to rely on friends and family for a place to stay. Virgie testified that during the later years of marriage, she and Dalton would generally rent a house in the range of \$1,100 to \$1,500 per month.

Dalton, at the time of trial, was sixty-eight years of age and appeared to be in good health other than from problems associated with back surgery. Dalton, at the time of trial, was employed by the MBCI as the Director of Choctaw Regional Transportation starting in May 2014 earning \$92,000 per year. From the time Dalton moved to Choctaw in 2008, Dalton earned \$175,000 per year in 2008-2010. In June 2010 the salary was reduced to \$125,000 and reduced again in October 2011 to \$52,000. In January 2012, Dalton's salary was increased to \$68,000 per year.

Dalton retired from the BIA with thirty-two years of service in 2010 and received his first monthly federal retirement benefits check in June 2011.

Dalton's reported earnings for 2008 were \$160,000; 2009 - \$177,403; 2010 - \$158,699; 2011 - \$121,240; 2012 - \$140,944; and 2013 - \$129,735.

LOWER COURT ACTIONS AND RULINGS

The trial court granted Virgie a divorce from her husband Dalton on the grounds of adultery in accordance with Section 9-3-3(2) of the Choctaw Tribal Code, and the judge equitably divided the marital estate and awarded:

- ownership and possession of the 2005 Cadillac to Virgie;
- ownership and possession of the 2005 GMC Sierra truck to Dalton; and
- half of Dalton's federal retirement account to Virgie to be paid on a monthly basis.

The Court further ordered Dalton to:

- maintain all existing life insurance policies currently in place with Virgie being listed as a 50% beneficiary on those policies;
- pay health insurance benefits for 18 months from the date of the order;
- pay Virgie \$1500.00 per month as periodic alimony; and
- pay reasonable attorney's fees to Virgie in the amount of \$3,500.00.

INTERIM SUPREME COURT ACTIONS

Dalton filed a Motion to Stay Lower Court's Order on 5 June 2015; the Court denied the motion in part to avoid manifest injustice. However, the Court did direct those portions of ordered payments relating to the disputed award for attorney's fees and the payment of federal retirement benefit monies to be paid into an escrow account pending the outcome of this appeal.

ISSUES ON APPEAL

Before identifying the issues on appeal, it is imperative that the Court restate that the *order of divorce* granted to Virgie from Dalton on 31 December 2014 on the grounds of adultery in accordance with Section 9-3-3(2) of the Choctaw Tribal Code *is NOT on appeal*.

Issues appealed as filed by Appellant Dalton Henry:

- I. The learned Judge erred by awarding alimony to Virgie as she was made whole by the property division. There were sufficient assets for each party therefore nothing more should be done.
- II. The learned Judge erred by ordering Dalton to pay Virgie's attorney's fees without the proper testimony or other proof in the record in violation of *McKee v. McKee*.

Issues cross-appealed as filed by Appellee Virgie Henry:

- I. The trial court was correct in awarding periodic alimony unto Virgie Lee Henry but the amount of the award is insufficient to meet her needs and the disparity of the income between the parties.
- II. The trial court erred in not awarding a lump sum alimony payment unto appellant, Virgie Lee Henry.

STANDARD OF REVIEW

"In domestic relations cases, this Court's scope of review is limited by the substantial evidence/manifest error rule. This Court will not disturb the chancellor's opinion when supported by *substantial evidence* unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *Samples v. Davis*, 904 So.2d 1061, 1063-1064 (Miss., 2004) (internal citations omitted). "A Chancellor's conclusions of law are reviewed do novo." *Lowery v. Lowery*, 25 So.3d 274, 285 (Miss. 2009) (internal citations omitted).

ANALYSIS

Dalton's Issue I and Virgie's Issues I and II are combined for discussion below.

The Choctaw Tribal Code provides as follows with regard to the division of property:

Section 9-3-8 Disposition of Property and Children

When a decree of divorce is made, the court may make such orders in relation to the children, property and parties and the maintenance of the parties and children by alimony and child support, as may be equitable. Subsequent changes or new orders may be made by the court with respect to the custody of the children or the distribution of property as shall be reasonable and proper.

Choctaw Tribal Code Section 1-1-4 also states that “[a]ny matter not covered by applicable federal law and regulations or by ordinances, customs, and usages of the Tribe, shall be decided by the court according to the laws of the State of Mississippi.”

The case law of the state of Mississippi “has long recognized the concept that alimony and equitable distribution should be considered together as to prevent inequity. ***‘Alimony and equitable division are distinct concepts, but together command the entire field of financial settlement in divorce. Therefore, when one expands the other must recede.’*** *Watson v. Watson*, 882 So.2d 95, 98 (Miss. 2004)(citing *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994)).

Both parties challenge the award of alimony; but neither party challenges the equitable division of marital property. In order to address the issue of alimony raised by the parties, this Court must first review the lower court’s decision regarding the equitable distribution of marital property. “In the final analysis, all awards should be considered together to determine that they are equitable and fair.” *Watson v. Watson*, 882 So.2d 95, 98 (Miss. 2004) (citing *Ferguson*, at 929). Disparity of the parties’ separate estates is the single most important factor in determining whether lump-sum alimony is appropriate. *Cheatham v. Cheatham*, 537 So. 2d 435, 438 (Miss. 1988).

“Factor tests, such as provided in *Ferguson* for property division and *Armstrong* for alimony must be considered on the record in every case....These factor considerations are not only essential for appellate purposes, but also for trial courts, as they provide a checklist to assist in the accuracy of their rulings. Following these guidelines reduces unintended errors that may affect the court’s ultimate decision. The absence of an analysis of these factors and failure to apply the law to the facts at hand create error. Failure to make an on-the-record *Armstrong* analysis is manifest error. . . . The minimal findings of fact and conclusions of law regarding equitable division resulting in alimony include findings without support in the record, fail to identify which factors the chancellor considered to be worthy of consideration *vel non* and, finally, fail to assign weight to the factors considered.” *Lowery v Lowery*, 25 So.3d 274, 280 (Miss. 2009), rehearing denied Jan. 2010

EQUITABLE DISTRIBUTION

When reviewing a chancellor’s equitable distribution of property, this Court only “reviews the judgment to ensure that the chancellor followed the appropriate standards and did not abuse his discretion.”

Scott v Scott, NO. 2015-CA-00689-COA (Miss. Ct. App. 2015)(quoting *Phillips v. Phillips*, 904 So. 2d 999, 1001 (¶8) (Miss. 2004)).

The first step in making an equitable distribution is the identification of property as marital or separate. "Assets acquired or accumulated during the course of a marriage are subject to equitable division unless it can be shown by proof that such assets are attributable to one of the parties' separate estates prior to the marriage or outside the marriage." *Hemsley v Hemsley*, 639 So. 2d 909, 914 (Miss. 1994). "Mississippi does not recognize the concept of legal separation, but the entry of a separate maintenance order may be a line of demarcation for classifying property as marital or separate." *Aron v. Aron* at 1259 (citing *Godwin v. Godwin*, 758 So.2d 384 (Miss. 1999)). In addition, the "Court has recognized that the entry of a temporary support order may cause the classification of property thereafter as separate property." *Id.* (citations omitted). In this case the temporary order for support was issued on November 21, 2014. In addition, on 1 July 2013 this Court vacated the 15 June 2011 lower court Final Judgment on Divorce and remanded the case back with instructions allowing Virgie to respond to the complaint for divorce.

The lower court found that all the assets identified by the parties during the thirty-nine year marriage were marital property, except Dalton's 401k retirement account created in 2013 that was found to be separate property as "the point of demarcation occurred before 2013." However, the lower court erred in not finding the specific event that the court used to support its finding that the point of demarcation happened prior to 2013. "Cases appear to hold that, as a matter of law, property acquired during separation is marital unless a support order has been entered.... However, a few cases suggest that the issue is a question of fact for the chancellor to decide...." *Bell on Mississippi Family Law* at § 6.02[3][b] n. 58 (citing *Stone v Stone*, 824 So.2d 645, 647-48 (Miss. Ct. App. 2002); *Aron v. Aron*, 832 So.2d 1257, 1258-1259 (Miss. Ct. App. 2002)." *Lowery* at 285-286.

The court stated that "the parties separated in 2008 and Virgie documented that she would not be joining Dalton in Choctaw in the letter admitted as Exhibit P1." The record shows that Dalton moved to Choctaw under a 2-year temporary assignment from the BIA to work with MBCI and that Dalton testified that he decided not to return to the BIA and the Washington DC area at the end of his temporary assignment. Also, the parties had a joint bank account until 2009. The record also shows that it was not uncommon for Dalton to move ahead of Virgie when taking a new permanent position with the BIA. This Court remands this issue back to the lower court for a finding of the event that the court can use to support a demarcation date prior to the date of divorce. Once the lower court identifies the point of demarcation, the assets identified by the parties need to be determined to be marital or separate property. The value of all the assets must be determined by the lower court.

"A chancellor's conclusions of law are reviewed de novo. . . . A chancellor is required to make findings of fact regarding all applicable *Ferguson* factors." *Lowery* at 285. "The failure to consider all applicable *Ferguson* factors is error and mandates reversal." *Lowery* at 286.

The lower court listed the factors to be weighed by *Ferguson v. Ferguson*, 639, So.2d 921(Miss. 1994), to equitably divide the marital property. The court erred in not including in its opinion the weighing of, or the finding of inapplicability of the following factors on the record of its *Ferguson* analysis:

Factor 1. '[M]arital misconduct is a viable factor entitled to be given weight by the chancellor when the misconduct places a burden on the stability and harmony of the marital and family relationship.' *Carrow v. Carrow*, 642 So.2d 902, 904-05 (Miss. 1994)." *Lowery* at 285. The court failed to consider and weigh the effect of Dalton's admitted adulterous affair on the stability and harmony of the marital relationship. The record shows that Dalton accepted a 2-year temporary assignment from the BIA to work with the MBCI. The record shows that Dalton would often move ahead of the family to take a new permanent position and that the family would later join him. The record shows that Dalton did not decide not to return to the BIA and the Washington DC area until the end of the temporary assignment with the MBCI.

Factor 2. "This Court has held that gambling losses can be considered as dissipation in an equitable distribution of marital assets." *Lowery* at 288. The court failed to address whether Dalton's large withdrawal of funds at the Silver Star resulted in gambling losses that should be considered and weighed as dissipation of marital assets. In addition, marital assets used to pursue an extramarital relationship are considered waste and requires reimbursement to the marital estate or to be off-set from any distribution received by the non-offending party. *Garriga v. Garriga*, 770 So.2d 978,984 (Miss. Ct. App. 2000). Dalton has admitted to financially assisting Mary Sam and the court has to determine any marital assets used in furtherance of this relationship.

Factor 5. The court failed to weigh or find inapplicable the \$10,000 judgment rendered in December 2010 against Virgie in California. The record shows and Virgie testified that she had this judgment against her due to lack of support from Dalton.

Factor 6: The court failed to mention the extent, if any, to which it weighed Dalton's federal retirement account proceeds received between June 2011 and December 2014. In addition, the court, as agreed in the November 21, 2014 hearing, neglected to include payments Dalton made to Virgie following the court's temporary order.

"The chancellor is not required to utilize all of the *Ferguson* factors in making a distribution award, the factors relevant to the case at hand must be addressed." *Aron* at 1260 (citing *Craft v. Craft*, 825 So.2d 605, 614 (Miss. 2002)). "The chancellor should make findings ... based either on the evidence currently in the record, or on such further evidence of value as the chancellor in his discretion may require the parties to submit." *Aron* at 1260. Therefore, the Court reverses and remands for

further proceedings in order to equitably divide the marital property. The Court reaffirms the lower court's decision granting Virgie 50% of Dalton's federal retirement.

ALIMONY

Both parties challenge the award of periodic alimony awarded in the December 2014 Order. Mississippi case law on alimony states that "[i]f situation is such that an equitable distribution of marital property, considered with each party's non-marital assets, leaves a deficit for one party, then alimony based on the value of non-marital assets should be considered." *Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss. 1994).

"In the final analysis, all awards should be considered together to determine that they are equitable and fair." *Watson v. Watson*, 882 So.2d 95, 98 (Miss. 2004) (citing *Ferguson*, at 929). Since the Court has remanded the equitable division of marital property, the Court hereby reverses and remands the award of alimony to be determined in conjunction with the equitable division of assets.

ATTORNEY FEES

Dalton also contends that the judge committed error by ordering attorney's fees to be paid to Virgie without the proper testimony or proof in the record in violation of *McKee v. McKee*, 418 So.2d 764 (Miss. 1982). This Court agrees.

Although the trial court is the appropriate entity to award attorney's fees and costs, an award of attorney fees must be supported by "substantial credible evidence in the record." *Mabus v. Mabus*, 910 So.2d 486, 488 (Miss. 2005). "[F]or this Court to say that the chancellor has abused his discretion, there must be insufficient evidence to support his conclusions." *Mabus* at 490. No evidence was introduced at trial regarding the amount of attorney fees, although the record contains attorney invoices greater than that awarded. "The reasonableness of attorney's fees are controlled by the applicable Mississippi Rule of Professional Conduct 1.5 factors and the *McKee* factors." *Mabus* at 489. The lower court failed to justify its award of \$3,500 as being reasonable. We therefore remand to the lower court for justification for the award, if possible

CONCLUSION

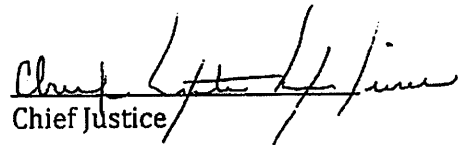
All federal retirement funds plus interest held in escrow shall be released to Virgie Lee Henry concomitant with the filing of this order. Any remaining funds remitted into escrow for attorney's fees shall be subject to release and paid out in conformity with orders of the lower court following remand and determination of the issues as directed by this opinion.


So that this Court no longer serves as intermediary between the parties to ensure payment of court ordered federal retirement benefits, the trial court shall direct counsel for both parties within 90 days following equitable distribution and awarding of alimony, if any, to submit for trial court signature a Qualified Domestic Relations Order (QDROS) that meets the requirements of the plan administrator of the Federal Employee Retirement System (FERS), including express language that the provisions of the court order concerning FERS benefits are governed by 838 of Title 5, Code of Federal Regulations. Until the QDROS is accepted by FERS, Dalton shall resume paying 50% of federal retirement benefit proceeds directly to Virgie as heretofore required in that 31 December 2014 order.

The Court remands to the lower court the identification of the event that serves as the date of demarcation for when property ceases to be marital and become separate. The Court also reverses and remands the classification of property as either marital or separate after the court identifies the specific date of demarcation. Further, the Court reverses and remands the equitable division of marital property and alimony, if any. Finally, we remand to the lower court for clarification of the award of the attorney's fees consistent with the *McKee* standard.

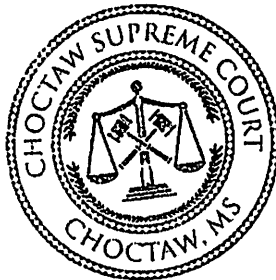
The Court lifts the partial stay and reinstates for full force and effect the December 31, 2014 order requiring payment unto Virgie of retirement and alimony until final decision by the lower court of the issues remanded.

SO ORDERED, this 31st day of May 2018.


Chief Justice


Associate Justice


Associate Justice



CERTIFICATE OF SERVICE


I, do hereby certify that I have this, the 31st day of May, 2018 caused to be forwarded by electronic mail, United States mail and/or hand delivered, a true and correct copy of the above and foregoing document to the below listed counsel of record.

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