IN THE COURT OF APPEALS OF TENNESSEE

ELIZABETH B. MORRISON	:	HAMBLEN CHANCERY
	:	CA No. 03A01-9510-CH-00347
Plaintiff-Appellant	:	
	:	
	:	
vs	:	HON. DENNIS H. INMAN
	:	CHANCELLOR
	:	
	:	
RICHARD T. MORRISON	:	AFFIRMED IN PART,
	:	MODIFIED IN PART, and
Defendant-Appellee	:	REMANDED

DENISE S. TERRY, WITH TERRY, TERRY & STAPLETON, OF MORRISTOWN, TENNESSEE, and
D. SCOTT HURLEY, WITH HURLEY, SHARP & ATTANASIO, OF KNOXVILLE, TENNESSEE, FOR APPELLANT

RICHARD C. JESSEE and MARK A. COWAN, WITH BACON, JESSEE, PERKINS & SWANSON, OF MORRISTOWN, TENNESSEE, FOR APPELLEE

O P I N I O N

Sanders, Sp.J.

The Plaintiff appeals from a divorce decree insofar as it relates to a division of marital property, alimony, child support, and attorneys' fees. We modify the decree and remand.

The Plaintiff-Appellant, Elizabeth Morrison, and Defendant-Appellee Richard T. Morrison were married in 1972. At the time of marriage the Plaintiff wife was 18 years of age and the Defendant husband was 22 years of age. They each had a high school education but owned no material assets. At the time of their marriage, the husband was employed in his father's business, Morrison Communications Inc., and the wife

was working as a co-op student for Berkline Corporation. She continued to work at various jobs outside the home until about three months before their child, James Richardson Morrison, was born in January, 1981. After their son was born, the wife did not return to work outside the home, but devoted her time to being a housewife and mother. The parties had a modest life style. The husband remained in the employ of Morrison Communications and the wife did all the housework, maintained the lawn and shrubbery around the house, looked after James's needs and took care of all family chores. In 1978 the husband was promoted to president of Morrison Communications. His salary was increased and the parties began enjoying a comfortable life style and an automobile was purchased for the wife for the first time.

The husband's father, J. C. Morrison, Sr., was the owner and apparently the founder of Morrison Communication, Inc. It is a corporation which owns all the stock and serves as a management, or holding company, of two other corporations, Morrison Printing Co. and School Calendar Company, Inc. The printing company does printing and lithographic work. It does a lot of business for the recreation and travel industry. It produces color brochures, travel-related materials, and short-run monthly publications for that industry. The calendar company mainly produces posters for schools and universities nationwide. The two corporations employ between 175 and 200 people and have annual sales of between $16,000,000 and $18,000,000.

Mr. J. C. Morrison had three children. In addition to the Defendant husband, he had another son, J. C. Morrison,

Jr., and a daughter, Maudie Morrison Trent [now Briggs] and they are all employees of Morrison Communications. In 1982 Mr. J. C. Morrison, Sr., and his wife, Mary H. Morrison, sold all of the capital stock of Morrison Communications, Inc., to their three children. The purchase price was $500,000. It was represented by an installment note payable in monthly installments over a period of 10 years. The sale of the stock was memorialized by a written agreement, but the record before us does not contain a copy of the agreement or the note. There was, however, filed as an exhibit a document purporting to be an agreement among the three children dated January 3, 1983. As pertinent, the agreement provides they will set aside funds from the profits of the corporation, apparently to supplement the payments to be made on the note, to give their parents the standard of living to which they had become accustomed. The payments "will be distributed to them [the parents] beginning January 1, 1983, until their death." The full contents of the document are as follows:

"On this the third day of January, 1983 J. C. Morrison, Jr., Richard T. Morrison, and Maudie M. Trent [now Briggs], the children of J. C. Morrison, Sr. and Mary H. Morrison do make the following agreement:

"That jointly we will see that our parents- J. C. Morrison, Sr. and Mary H. Morrison will always be financially taken care of in the manner to which they have become accustomed.

"Through the profits of our corporation, we will set aside funds to insure their livelihood. These accumulated funds and interest earned will be distributed to them monthly beginning January 1, 1983 until their death.

"Should only one parent be surviving, that parent will be supported as above.

"Should both parents have demised, the funds will be used to enhance the net worth of the individual children or the corporation by a joint decision of the individuals.

"Should any of the individual children have demised at the end of this agreement, their portions will be distributed to their heirs as specified by their wills.

"/s/ J. C. Morrison, Jr.
J. C. Morrison, Jr.

"/s/ R. T. Morrison
Richard T.Morrison

"/s/ Maudie M. Trent
Maudie M. Trent"

The parents were not parties to this instrument and the record shows the buy-sell agreement between the parties did not contain such provision. Also, the husband did not introduce the document into evidence or rely upon it in any way. Neither is there affirmative proof in the record that it was in fact executed by the parties. It was introduced into the record by a Mr. Warren Luhn, an attorney specializing in estate planning. He represented the Morrisons at the time of the sale of the stock to the children. There is no proof he prepared the document or had any knowledge of its execution. In introducing the document into evidence, he was asked and, as pertinent, answered as follows: "Q. Can you identify that document as one you are familiar with?" "A. This isn't a document that I am very familiar with."

There is no proof the children ever set aside any portion of the profits of the corporation for the benefit of their parents as provided in the agreement, nor is there any evidence in the record that between January, 1983, and the time the note was paid in 1992 or 1993 any amount of money was paid to the parents by either the corporation or the children other than the payments owed on the note. It was the contention of the husband, however, upon the trial of the case, that after the note was paid he and his brother and

sister each begin personally paying their father and mother $2,000 per month for a total of $6,000 per month. It was also the contention of the husband upon the trial of the case and upon this appeal that he is entitled to a deduction of $2,000 per month from his salary for the purpose of fixing child support and alimony.

The parties were separated in 1994 and the wife filed for divorce, alleging the husband was guilty of inappropriate marital conduct. She also alleged irreconcilable differences. She asked for a divorce, the custody of their 14-year-old son, James, child support, a division of marital property, alimony, and attorneys' fees.

The husband, for answer, as pertinent, filed a general denial.

Upon the trial of the case, the parties informed the court they had reached an agreement on a number of issues. They had divided their personal property including household furnishings. They were each to keep the personal property in their possession. There was very little debt and each was going to assume the debt they had created. They agreed a divorce should be granted and the wife was to have the custody of James, their 14-year-old child, with liberal visitation by the husband. They agreed the equity in their residence was $45,000 and the wife would take the residence as part of her marital property and assume the balance of the mortgage. The record fails to disclose the amount of the unpaid mortgage, but it appears the payments on the mortgage are $769 per month.

There was left for determination by the court the value of the one-third interest in the capital stock of Morrison Communications, which was marital property; the amount of child support to be paid by the husband; the amount of alimony to be paid to the wife; and who should pay the wife's attorneys' fees.

In his determination of the issues, the court found the value of the stock in Morrison Communications was $350,000. He fixed child support at $1,225 per month. He awarded the wife temporary rehabilitative alimony of $300 per month and declined to require the husband to pay her attorneys' fees and litigation expenses.

The wife has appealed, saying the court was in error in fixing the value of the Morrison Communications stock at $350,000, in excluding from the husband's income the $2,000 per month which he gave to his parents for the purpose of calculating child support, in awarding $300 per month as alimony, and in denying her attorneys' fees. We must agree, and modify the decree.

We first consider the issue of fixing the value of the Morrison Communications stock at $350,000. Upon the trial of the case, the Plaintiff and Defendant each offered the testimony of an expert witness for the purpose of expressing a professional opinion as to the market value of the Morrison Communications, Inc., stock. Both witnesses were certified public accountants and were qualified in their respective professions. In reviewing the testimony of the experts, we find each considered the appropriate factors for arriving at

the market value of stocks in closely held corporations. It was, however, a judgment call by each of them as to how those factors should be applied in the case at bar. For example, there is a "rule of thumb" in arriving at the market value of stock being sold, traded or transferred, by which 25% to 40% of the value of the stock is deducted if the purchaser of the stock will be a minority stockholder. Since there was no sale or transfer of the stock involved in the case at bar, Mr. Holt, the expert witness for the Plaintiff, took the position this principle was not applicable in the case at bar. Mr. Bacon, the expert for the Defendant, however, did apply this rule and deducted 30% from the base value he fixed on the husband's stock.

In fixing the value of the stock, Mr. Holt testified he valued the stock of Morrison Communications at $3,587,865 and the husband's one-third of the stock at $1,195,955. Mr. Bacon testified he valued the stock at $1,491,000 and the husband's share at $497,000. He then subtracted 30% from that value, leaving a value of $348,000.

In addressing the issue of determining the value of stock under circumstances such as the case at bar, the chancellor appropriately said: "Valuing stock in a closely-held [sic] corporation is a difficult proposition at best. When the stock represents a minority interest, the problems are exponentially increased because there is no true market for such stock. Accordingly, the accounting industry has developed (or at least has attempted to develop) various methods for valuing stock in a closely-held [sic] corporation that is part science, and part art, applied to a plethora of

assumptions, some or all of which may prove to be untrue." The chancellor, in fixing the value of the stock, found the testimony "of Mr. Bacon who testified as an expert on husband's behalf, was more persuasive than the wife's expert, Mr. Holt," and fixed the value of the husband's stock at $350,000.

We cannot fault the court's choice of the testimony of Mr. Bacon over the testimony of Mr. Holt insofar as Mr. Bacon's fixing the value of the husband's stock at $497,000 instead of the $1,195,955 fixed by Mr. Holt. We cannot agree, however, that under the circumstances in the case at bar, the value of the stock should be reduced by 30% to $348,000 based on the minority stockholder rule.

The life insurance on the lives of the stockholders and the way the payment of the proceeds of the policies relates to the ultimate transfer and ownership of the stock, the contracts between the parties to make reciprocal wills to each other, the provisions of the wills of the respective parties as they now exist, and the binding contracts between the parties not to sell or transfer any of the stock without the mutual consent of all the parties were not considered by Mr. Bacon, Mr. Holt, or the court in their evaluations of the stock. We hold this completely removes the reason and rationale for applying the minority stockholder rule.

The record shows that in the early 1980's, apparently when the children acquired the stock of Morrison Communications in 1982, the corporation purchased policies of life insurance of $1,250,000 on the life of each of the

children, and the spouse or estate of each of the insured was named as the beneficiary of the policy. The corporation, however, was the owner of the policies and paid the premiums. There was an agreement between the three stockholders that if one desired to sell his or her stock, the other two had the option to purchase the stock. For tax reasons, in April, 1993, the corporation transferred the ownership of the policies to the respective insureds. The insureds became liable for payment of the premiums on the policies but the corporation gave salary increases to each of the parties commensurate with the amount of the premiums plus the increased liability for income tax.

Simultaneously with the transfer of the ownership of the insurance policies to the insureds, they entered into an agreement to which Morrison Communications, Inc., was also a party, in which they agreed that to insure that all of the stock of Morrison Communications would remain in the ownership of the share holders (1) Each stockholder agreed to not sell, encumber or otherwise transfer or dispose of any of his or her stock now owned or later acquired in the corporation, during his or her lifetime without the consent of all the parties to the contract; (2) The shareholders agreed to execute a last will and testament bequeathing, upon their deaths, all their stock in the corporation to the surviving shareholders who are parties to the agreement; (3) This agreement shall terminate upon the date of the last to survive of the shareholders who are parties to this agreement. A copy of the agreement is attached as Appendix "A" to this opinion.

Each of the parties executed a will simultaneously with the agreement bequeathing his or her stock to the other stockholders in accordance with their agreement.

There is also another compelling reason why the value of the husband's stock should not be reduced by 30%. The stock in this corporation is marital property and the wife is entitled to her share of the increased benefits the owner of the stock stands to gain as a result of its ownership. As a direct result of his ownership of the stock, the husband has life insurance policies on his life for $1,250,000 which has never cost him anything and the corporation is still, indirectly, paying the premiums. Should the husband survive his brother or sister, he will acquire one-half of that person's stock without charge and should he survive both of them, he will own all of the corporate stock without additional cost. In addition to these benefits, he receives a salary in excess of $125,000 per year from the corporation.

We modify the decree of the chancellor and fix the value of husband's stock in Morrison Communications, Inc., at $500,000.

The Appellant says it was error for the court to exclude from the husband's income $2,000 per month in calculating child support. The court's purpose in making this deduction was to allow the husband to be exempt from paying child support out of the $2,000 he testified he was giving to his parents each month. The proof shows the corporation increased the husband's salary in 1993 to compensate him for the payments he was making to his parents. In fixing the

child support payments, the court, as pertinent, said: "For purposes of computing the amount of husband's gross monthly income, the reimbursement from the corporation for the insurance policy premiums should be included, since husband obviously is receiving a tangible benefit. However, the amount of the reimbursement for the payment to his parents should not be included because it is, in effect, a payment from the corporation to husband's parents in the nature of a retirement benefit. Thus, husband's monthly gross income is $8,395.00. Under the Guidelines, his child support obligation is $1,225.00 per month."

In excluding the $2,000 per month from husband's income when calculating the husband's gross income for fixing child support, the chancellor apparently overlooked the 1994 amendment to the child support guidelines which requires the court to "order child support based upon...all net income of the obligor" as opposed to the $6,250 ceiling formerly contained in the guidelines.

The Support Guidelines IV-D, Chapter 1240-2-4(3) which were amended and became effective December 14, 1994, provide:

> The court must order child support based upon the appropriate percentage of all net income of the obligor as defined according to 1240-3-4-03 of this rule but alternative payment arrangements may be made for the award from that portion of net income which exceeds $6,250. When the net income of the obligor exceeds $6,250 per month, the court may establish educational or other trust funds for the benefit of the child(ren) or make other provisions in the child(ren)'s best interest; however, all of the support award amount based on net income up through $6,250 must be paid to the custodial parent.
> ....

1240-2-4-.03(a) provides as pertinent:

> Gross income shall include all income from any source (before taxes and other deductions), whether earned or unearned, and includes but is not limited to the following: wages, salaries, ...

and 1240-2-4-.02(7) provides:

> These guidelines shall be applied as a rebuttable presumption in all child support cases. If the court finds that the evidence is sufficient to rebut the presumption that the application of the guidelines is the correct amount to be awarded, then the court must make a written or specific finding that the application of the child support guidelines would be unjust or inappropriate in that particular case. Findings that rebut these guidelines must state the amount that would have been required under the guidelines and include a justification for deviation from the guidelines which take into consideration the best interest of the child.

We hold it was error for the chancellor to fail to include all of the husband's income pursuant to 1240-2-4-.03 for calculating the child support award or, in the alternative, if he found the evidence sufficient to rebut the presumption the guidelines were correct and would be unjust or inappropriate, then to make a written or specific finding to that effect pursuant to 1240-2-4-.02(7) of the guidelines.

The case is remanded to the trial court to fix child support in accordance with the child support guidelines as amended in 1994.

The Appellant says the court erred in awarding her only $300 per month as alimony and failing to require the husband to pay her attorneys' fees and litigation expenses. We must agree.

In addressing the issue of alimony in divorce cases, TCA § 36-5-101(5)(d), as pertinent, states:

> It is the intent of the general assembly that a spouse who is economically disadvantaged relative to the other spouse be rehabilitated whenever possible by the granting of an order for payment of rehabilitative, temporary support and maintenance. .... In determining whether the granting of an order for payment of support and maintenance to a party is appropriate, and in determining the nature, amount, length of term, and manner of payment, the court shall consider all relevant factors, including:
>
> 1. The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources; ....

In considering the relative earning capacity of the parties, the record shows the husband has an income of between $125,000 and $135,000 per year. While there is no copy of an income tax return of the husband in the record, the figures used by the chancellor in fixing child support establish an income of approximately $125,000 per year. An affidavit of the wife shows husband's weekly income to be approximately $2,607.95, which is in excess of $135,000 per year. The wife is unemployed and has no income except what she receives from the Defendant, nor does the wife have any employable skills which would qualify her for earning more than the minimum wage.

The affidavit filed by the wife as to her monthly needs for household and living expenses is $3,009.41. The $300 per month alimony awarded by the court would pay less than half of the monthly mortgage payment on the residence which is $769, but would pay half of the cost of food which is $600 per month.

> 2. The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;

Each of the parties had a high school education at the time of marriage. During the 22 years of marriage, the husband has been improving his skills and training until he is now secretary and treasurer of the three family corporations and earning a top salary. The wife, however, has devoted her time and talents to being a homemaker and rearing their son. Also, she is wholly dependent on the husband for her income.

Although the parties had limited education at the time of marriage, in 1990 the wife began college training on a part-time basis at Carson Newman College. At the time of the divorce she had almost completed the second semester of her sophomore year at Carson Newman and had hopes of graduating in March, 1998. The tuition for attending Carson Newman is $9,000 for each four semesters, but that does not include books or other college expenses. She was indebted to the college at the time of trial for $4,000. To pay that indebtedness and six more semesters of tuition would be $26,500. The record fails to show an estimate of additional expenses needed before graduation, at which time the wife could become self-supporting; perhaps $3,500 would be a conservative amount, making total college expenses of approximately $30,000.

3. The duration of the marriage;

The parties were married in May, 1972, and divorced in May, 1995. The duration of the marriage was 23 years.

4. The age, and physical and mental condition

of each party;

The husband was 44 years of age at the time of the divorce, which should be the prime of his professional career. The wife is 40 years of age, which gives her a late start in life for a professional career. Both parties are in good mental and physical condition.

5. The extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage;

Since the son was 14 years of age at the time of the divorce, this should not be a major problem.

6. The separate assets of each party, both real and personal, tangible and intangible;

It appears that neither of the parties owns any separate assets. All of their assets have been acquired during the marriage.

7. The provisions made with regard to the marital property as defined in § 36-4-121;

The marital assets have been divided equally between the parties. The principal asset is the stock in Morrison Communications, Inc., which is awarded to the husband. The value of the stock has been fixed at $500,000; the equity in their residence has a stipulated value of $45,000; a 401-K savings account has a value of $6,000, making a total of marital assets of $551,000, or an equity of $275,500 each. It is stipulated the residence shall be conveyed to the wife at a value of $45,000 and

she will assume the balance of the mortgage. She is also awarded one-half of the 401-K at a value of $3,000, leaving a balance of $227,500 due the wife from the husband for her remaining equity in the stock.

> 8. The standard of living of the parties established during the marriage;

The proof shows the parties maintained a comfortable standard of living in the latter years of their marriage - perhaps much better than the wife will be able to maintain in the future.

> 9. The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;

The proof shows the husband was a hard worker and the sole financial contributor to the family. The proof also shows the wife did her full share as a housewife and mother. Neither party can be faulted for not fulfilling his or her full responsibility.

> 10. The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so;

The parties stipulated a divorce should be granted and there is nothing in the record to indicate fault should be a factor in fixing alimony.

> 11. Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties;

Considering the income of the husband, he is no doubt in an income tax bracket of at least 38% and should be granted the son as a dependent for tax purposes.

TCA § 36-5-101(d) makes it clear the economically disadvantaged, relative to the other spouse, should be rehabilitated where possible by awarding "rehabilitative temporary" alimony as opposed to permanent alimony. We think, under the facts in the case at bar, this is a classic case for such an award. While the trial court awarded the "wife as temporary and rehabilitative spousal support Three Hundred Dollars ($300.00) per month, for a total of thirty-six months," we are at a loss to understand how the wife could even live on such a meager amount, much less become rehabilitated to the point she could become self-supporting. It appears the court was of the opinion the husband, considering his other obligations such as child support, obligations to his parents and payments to his wife for her interest in the marital property, did not have sufficient funds to pay more alimony. We do not concur in this conclusion.

It appears the cardinal rule in fixing alimony and adjudicating other expenses which the advantaged spouse should pay to or for the disadvantaged spouse is governed by the need of the obligee and the ability of the obligor to pay. **Barker v. Barker**, 671 S.W.2d 843 (Tenn.App.1984); **Fisher v. Fisher**, 648 S.W.2d 244 (Tenn.1983); **Wallace v. Wallace**, 733 S.W.2d 102 (Tenn.App.1987).

The wife, in an affidavit of her estimated living expenses, showed a need for $3,009.41 per month. There is no contention by the Defendant this amount is excessive or not in keeping with the parties' standard of living. This statement of living expenses does not include tuition or other expenses now owed or to be incurred in the wife's obtaining a degree from Carson Newman college, nor does it include the $12,191.30 for attorneys' fees and litigation expenses which the wife has incurred in this litigation.

The husband, in his affidavit as to monthly expenses, listed $4,219.35. This did not include any alimony for the wife or child support as fixed by the court, nor did it include the sum of $1,205.59 per month which the court ordered husband to pay on the judgment for the wife's remaining interest in the Morrison Communication stock. It did, however, include as an expense $2,000 per month for payments to his parents.

We hold the payment of $2,000 per month to the husband's parents is not a deductible expense for the purpose of fixing alimony for the wife or in determining husband's liability for wife's attorneys' fees and litigation expenses. We hold the payment of $2,000 per month to his parents to be a voluntary payment and not a contractual obligation. There is no evidence in the record to show the husband ever had an agreement with his parents to make such payments, nor is there any evidence in the record to show he has any legal obligation to personally make these payments. The husband's testimony on cross-examination with reference to this issue was as follows:

"Q. Now, Mr. Morrison, the payments that you have made and that your brother and sister have made to your parents in the past few years have been done of your own accord. Is that correct?

"A. Have been done of our own accord?

"Q. Of your own desire. Are you contractually obligated to make those payments?

"A. We made an agreement with them early on into the buyout that, in the event that they were still living at the end of the buyout, that that would never stop. And that agreement was an obligation that was committed to many years ago.

"Q. Was that agreement in writing?

"A. No, sir.

"Q. Was there any of the buyout agreement in writing?

"A. Any of the buyout agreement?

"Q. Like when you and your brother and sister purchased your father's interest in the company or companies?

"A. Yes.

"Q. Was any of that reduced to writing?

"A. Yes.

"Q. And my question is ....If the agreement to purchase was in writing, was the five hundred thousand or so purchase price recited in that agreement?

"A. Yes, sir.

"Q. To your knowledge, was the agreement to continue making payments to your parents for as long a time as they lived, was it also in writing?

"A. No, sir.

"Q. Are you aware of any writing that's in existence between you, your brother and sister and your parent or

parents, where a writing addresses the fact that you will continue to make payments as long as they live? Is there any writing?

"A. No, sir."

Even if we should be mistaken as to husband's legal liability or if the husband feels he has a moral obligation to make these payments, we don't think it is too much for the husband to suspend these payments or make other arrangements to take care of them pending his obligations to his wife for alimony and child support.

We modify the decree of the chancellor and increase the temporary rehabilitative alimony to $2,500 per month for 36 months. In addition thereto, the husband shall pay the wife's college expenses, including tuition, books, and any additional out-of-pocket expenses to Carson Newman College, including past accrued unpaid college expenses, so long as the wife carries at least 12 hours of credits up to her date of graduation, but not to exceed 30 months.

Upon the trial of the case, the wife stipulated she was agreeable to the judgment against the husband for her interest in the corporate stock to be paid in installments. The chancellor, accordingly, entered a decree ordering the husband to pay $1,205.59 per month on the judgment until his child support obligations were terminated. Thereafter he was to pay the unpaid balance in monthly installments within seven years.

The decree of the chancellor is further modified to release the husband from the obligation of making any

payments on the $227,500 judgment for 36 months but the judgment shall bear 10% interest pursuant to TCA § 47-14-121. After 36 months the husband shall begin payments on the judgment at the rate of not less than $2,000 per month for 36 months. The payments shall be applied first to interest and the balance to principal, after which the husband shall pay not less than $5,000 per month for 36 months, and after that shall pay not less than $7,500 per month until the judgment and accrued interest are paid in full. Husband's life insurance policy shall also cover the unpaid portion of the judgment.

Under the modified decree, the husband will have in excess of $5,000 per month income with which to pay his living expenses and other obligations. The wife has no extra funds with which to pay attorneys' fees and legal expenses. The decree of the chancellor is accordingly modified to require the husband to pay, as additional alimony to the wife, attorneys' fees and legal expenses in the amount of $12,191.30.

To the extent the decree of the chancellor is not modified, it is affirmed. The cost of this appeal is taxed to the Appellee and the case is remanded to the trial court for the entry of a decree in keeping with this opinion.

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Clifford E. Sanders, Sp.J.

CONCUR:

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Herschel P. Franks, J.

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Don T. McMurray, J.