IN THE COURT OF APPEALS 08/20/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00955 COA

BILLY W. SMITH

APPELLANT

v.

ZENA FAYE PHILLIPS SMITH

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOHN C. ROSS, JR.

COURT FROM WHICH APPEALED: PRENTISS COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

DUNCAN LOTT

ATTORNEY FOR APPELLEE:

JOSEPH C. LANGSTON

NATURE OF THE CASE: DOMESTIC: PROPERTY DISPUTE

TRIAL COURT DISPOSITION: COMPLAINT DISMISSED

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

This suit began as competing complaints by Billy and Zena Smith to be granted a divorce from each

other. The complaints for divorce were denied, but additional disputes persisted regarding the effect of an antenuptial agreement on the control of certain assets while the marriage continued. In 1995 the Mississippi Supreme Court affirmed an earlier judgment entered in this cause. In subsequent trial court proceedings the chancellor determined that the 1995 decision was *res judicata* on the issue of Billy Smith's right to money that had been in a savings account he jointly held with his wife. Mr. Smith's complaint was dismissed. We find that the supreme court did not in fact resolve this issue. We reverse and remand.

FACTS

Billy and Zena Smith were married in 1985. Prior to the marriage, they entered into an antenuptial agreement. The agreement provided that both parties would have "full, complete and absolute control and management of all [their] property" by "sale, *inter vivos* gift . . . so that all of said property shall be disposed of as [each] alone desires." The parties further relinquished any claims to each other's non-marital assets brought into the marriage.

In 1991, Mr. Smith filed for divorce and Mrs. Smith counterclaimed for separate maintenance. Prior to filing for divorce, Mr. Smith filed a separate action to have his wife redeposit $38,750.00 she had taken from their joint savings account. Although he requested that this case be consolidated with the divorce case, they were not. A temporary restraining order was issued requiring that Mrs. Smith redeposit the money. She redeposited approximately $32,500.00, the rest having been spent.

In the divorce action, both the requests for divorce and for separate maintenance were denied. However, the chancellor concluded that because the money in the savings account was jointly held, with rights shared by both parties to withdraw and deposit funds, Mrs. Smith was entitled to withdraw the money. The previous temporary restraining order was rescinded. The supreme court would later characterize this removal of the TRO as an "award" of the $32,500 to Mrs. Smith. *Smith v. Smith*, 656 So. 2d 1143, 1146 (Miss. 1995). Mr. Smith appealed to the supreme court. The supreme court affirmed the chancellor's findings on the divorce case. As a part of this affirmance, the court concluded that Mrs. Smith was entitled to withdraw from the account. *Id.* at 1148. However, the court held that permitting Mrs. Smith's withdrawal of the funds did not resolve her liability to Mr. Smith based on his potential ownership interest. *Id.* What was preserved for further litigation was that Mr. Smith "may be entitled to establish his interest in the proceeds of the account and establish a debt owing to him in proceedings brought for that purpose." *Id.*

Based on that ruling, Mr. Smith returned to the chancery court to seek enforcement of the antenuptial agreement and to establish his interest in the proceeds of the money taken from the joint savings account. The chancellor dismissed the complaint, stating that "[t]he issue of Zena Faye Phillips Smith's withdrawal of the funds from the joint checking account has already been resolved by this Court and affirmed by the Supreme Court. The relief requested in the current complaint is *res judicata.*"

DISCUSSION

Resolving the issues in this case requires determining the effect of the earlier supreme court decision.

There are two issues presented: whether an antenuptial agreement can be enforced in the absence of a divorce, and whether Mr. Smith was precluded by operation of *res judicata* from establishing his ownership interest in the withdrawn funds.

The only rights asserted by Mr. Smith are under the antenuptial agreement. We are faced with the unusual issue of deciding whether the enforcement of an antenuptial agreement is contingent upon the dissolution of the union it contemplates. The supreme court was not explicit on the issue:

> In general, an antenuptial agreement is usually enforced at the time of dissolution of the marriage or at the time of death of a party. [citation omitted] However, legal observers recognize that breach of the agreement can give rise to an appropriate remedy. 1 Ann Oldfather, Janice E. Kosel, et al., *Valuation and Distribution of Marital Property*, § 4.05 at 4-42 (1994 ed.).

Smith, 656 So. 2d at 1147. We have examined the just-cited section of the *Marital Property* treatise and find nothing in it explicitly authorizing the enforcement of an antenuptial agreement while the marriage continues. Consequently, we are uncertain whether the supreme court meant to imply that an "appropriate remedy" could be enforcement of an antenuptial agreement at a time other than during the "dissolution of the marriage" or death. Of course, if an antenuptial agreement only provided for the division of property at the time of divorce, the agreement would be irrelevant absent a dissolution of the marriage. It should also be remembered that public policy restricts the subject matter of contracts between spouses. Agreements between spouses are void if they are deemed by case law or a legislature to vary some "essential incident of the marital relationship in a way detrimental to the public interest." *Restatement (Second) of Contracts* § 190 (1981). In Mississippi, a statute prohibits contracts between spouses that would "entitle the one to claim or receive any compensation from the other for work or labor. . .." Miss. Code Ann. § 93-3-7 (1972). Even so, we discover no limitation on spouses' ability to contract with one another about the separate property that each brings to the marriage. That is the nature of the contract here.

We interpret the supreme court's *Smith* opinion to leave open the possibility that this antenuptial agreement has express terms that can be enforced in non-divorce circumstances. Giving a contract the title of "Antenuptial" does not mean that all its terms are written only to be activated at the time antenuptial agreements usually become effective, namely, at divorce. The circumstance giving rise to the contract is, of course, a present or prospective marital union. However, the contract's operation need not be made contingent upon the status of the couple's relationship. It is implicit in *Smith* that if a contract between spouses, entered before or during marriage, is by its own terms enforceable at times other than at divorce, the aggrieved spouse can seek an appropriate remedy. To rephrase the point, if a contract between spouses is written such that it can be breached without a dissolution of marriage, then it can be the basis for litigation.

What we say here does not conflict with case law that settlement agreements made in contemplation of divorce are void without a divorce. *Gardner v. Gardner*, 234 Miss. 72, 79, 105 So. 2d 453, 455-56 (Miss. 1958) (citations omitted).

The same rules of interpretation and construction that apply to most contracts are to be applied to

antenuptial contracts. *Smith,* 656 So.2d at 1147. Thus, it must first be determined if the antenuptial contract creates rights enforceable during the life of the marriage. The contract is not in the record. Most of our understanding of its terms comes from the earlier supreme court decision. *See, e.g., id.* at 1145. The factual context for this determination is whether Mr. Smith may establish his right to any proceeds of the bank account from which his wife removed the money. We find that issue open after examining the supreme court's 1995 opinion. In that case, Mr. Smith sought reversal based on the chancellor's refusal to divide the assets, to refund the money received from another source, and to adjudicate "the parties' interest or claims to all property prayed for by the parties." *Id.* at 1147. The Court held that since no divorce was granted, the chancellor had no authority to divide property. *Id.* (*citing Gardner v. Garner*, 618 So. 2d 108, 115 (Miss. 1993)). This can be read consistently with the language already quoted from *Smith,* to the effect that Mr. Smith "may be entitled to establish his interest in the proceeds of the account and establish a debt owing from Zena to him. . . ." *Smith,* 656 So. 2d at 1148. The supreme court barred a chancellor from making wholesale distributions of assets absent a divorce. However, the court allowed a chancellor to determine whether a spouse owed a debt to the other spouse, and, if so, to reduce that debt to judgment. That debt can arise from a premarriage agreement.

However, a review of the antenuptial agreement on remand will not necessarily resolve the issue of Mr. Smith's contractual rights to the account. The terms of the account itself must be considered. In fact, the account contractual rights were the chancellor's initial focus before the case was appealed to the supreme court in 1995. The account documents are not in the record. If the account documents were executed by both spouses, they may have altered the earlier antenuptial contract. An antenuptial agreement is not etched in stone, free from amendment or even rescission. The chancellor must consider whether the agreement Mr. Smith is seeking to enforce was amended, or even rescinded insofar as this account is concerned. If both documents or sets of documents are relevant to this issue, the chancellor must determine how each impacts on the other.

We intimate no conclusion regarding the effect of the terms of the antenuptial contract, the subsequent account documents, and whether a breach of any agreement occurred. These are contract interpretation questions for the chancellor to address. We conclude only that should Mr. Smith prove the elements of his claim, he is entitled to have a judgment for the debt entered in his favor. Should he not be able to prove that claim, then judgment must be for Mrs. Smith.

In conclusion, we lament the limited information provided to us for resolving the case. Our remand might appear to be requiring the chancellor to determine what he has already determined before, i.e., whether the establishment of the joint account altered the limitations of the antenuptial agreement. The chancellor before the first appeal held that the account contract controlled. That conclusion, however, was not accepted by the supreme court. The previous opinion is explicit on this point -- "this opinion will only have a res judicata effect on the TRO suit," meaning the chancellor was correct in refusing to order Mrs. Smith to leave the money in the account. *Smith,* 656 So. 2d at 1148. We interpret the supreme court's ruling as a finding that Mr. Smith's arguments were wrongly cast. Since he could not have a divorce-like distribution of marital assets without a divorce, the TRO to effect some of that redistribution was improper. What the chancellor now must determine is whether all the relevant agreements give Mr. Smith a right to the money placed in the jointly held account. If so, then Mrs. Smith's taking of the money created a debt that can be the basis of a judgment.

The absence of the relevant documents, and the lack of detailed knowledge regarding what went on in the case before the initial appeal, has left us with a key-hole view, not an open door view. Not having the context for the 1995 *Smith* decision has made it difficult to apply the holding to what is now before us. In designating the record on appeal, the parties here and in subsequent cases should step back and decide what is necessary to place the door wide open for an appellate court.

THE JUDGMENT OF THE CHANCERY COURT OF PRENTISS COUNTY IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. THE COSTS ARE ASSESSED EQUALLY TO THE PARTIES.

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