

IN THE COURT OF APPEALS

7/15/97

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00602 COA

HELEN JAMES APPELLANT

v.

EARL JAMES APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. FRANKLIN C. MCKENZIE

COURT FROM WHICH APPEALED: JONES COUNTY CHANCERY COURT

FOR APPELLANT: TERRY L. CAVES

FOR APPELLEE: TUCKER BUCHANAN

NATURE OF THE CASE: DOMESTIC

TRIAL COURT DISPOSITION: DIVORCE AWARDED ON GROUND OF IRRECONCILABLE DIFFERENCES. PROPERTY EQUITABLY DIVIDED BETWEEN PARTIES, WITH WIFE

RECEIVING PERIODIC ALIMONY.

MANDATE ISSUED: 8/5/97

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

BRIDGES, C.J., FOR THE COURT:

After thirty-four years of marriage, Earl and Helen James agreed to a divorce on the ground of irreconcilable differences. In January 1996, trial was held to determine the division of assets and any other issues existing between Earl and Helen. Aggrieved by the result, Helen presents the following issues on appeal:

I. THE CHANCELLOR ERRED IN FAILING TO AWARD HELEN JAMES ADEQUATE PERIODIC ALIMONY.

II. THE CHANCELLOR ERRED IN HIS DIVISION OF MARITAL ASSETS OF THE PARTIES.

III. THE CHANCELLOR ERRED IN REFUSING TO AWARD HELEN JAMES LUMP SUM ALIMONY.

IV. THE CHANCELLOR ERRED IN HIS DIVISION OF THE TRUSTMARK CHECKING ACCOUNT WHICH REFLECTED AN INADEQUATE AWARD OF TEMPORARY ALIMONY.

V. THE CHANCELLOR ERRED IN FAILING TO AWARD TO HELEN JAMES THE UNDISPUTED AMOUNT OF ATTORNEY'S FEES.

Helen's second issue has some merit, and we reverse in part and remand on the issue of Earl's \$12,000.00 inheritance. As to all other issues, they are meritless, and we affirm.

#### FACTS

Earl and Helen were fifty-six and sixty-five years of age respectively at the time of trial. They were married on January 22, 1962. A son, emancipated at the time of divorce, was born during their marriage. Earl worked for an oil drilling company; Helen did not work. When Earl was laid off a few years earlier, Helen worked four to five days a week at a frame shop. Before that, she had experience as a dental assistant, and she had helped Earl in his business during their early years of marriage. Helen has only a tenth grade education and no high school equivalency certificate.

At the time of trial, Earl had a gross income of \$3,000.00 a month, the use of a company car, and an

expense account with which to entertain clients. Helen received \$291.00 a month in Social Security benefits. During the trial, each party testified to his monthly expenses. Earl's monthly expenses amounted to \$1,700.58, while Helen testified that she had monthly expenses in the amount of \$3,122.76. The chancellor was correct in his admission that he was being asked to perform the impossible in relation to spousal support.

Earl and Helen jointly owned their marital home, as well as the household belongings contained therein. When asked how she wanted the household belongings divided, Helen stated that she wanted everything. Helen has a doll collection and several valuable pieces of jewelry valued together at \$30,000.00. An IRA in Helen's name is worth \$2,700.00. Earl has two IRA's with a value of \$4,734.37, in addition to a 401(k) balance of \$3,960.00. Together Earl and Helen own a 1988 Lincoln Town Car and 404 shares of bank stock valued at between \$8,000.00 and \$9,000.00. Each has a life insurance policy valued at approximately the same amount. A joint checking/savings account existed from which Helen withdrew \$10,600.00 at the time of the separation. In September 1995, by temporary court order, Helen was allowed to expend \$660.00 a month for living expenses. In his memorandum opinion, the chancellor divided the marital property as follows:

1. The 404 shares of Bank stock shall be equally divided between Earl and Helen.
2. Helen shall retain ownership of her IRA account, and Earl shall retain ownership of his two IRA accounts.
3. Helen shall have ownership and possession of the 1988 Lincoln Towncar, her jewelry and the doll collection.
4. Each party shall retain ownership and possession of the cash value of policies of insurance on their life.
5. Earl will have ownership and possession of any firearms.
6. The household furnishings and appliances shall be divided by Helen preparing two lists with all the furniture and appliances to be placed on one or the other of the two lists. Earl will have the right to select either list as his property and Helen will have the items on the other list as her property.
7. Earl shall retain ownership of the funds in his 401(k) plan.
8. The marital home, real property and the two burial lots shall be partited by sale unless the parties agree upon other means of disposition within thirty (30) days. Such property has an estimated value of \$85,750.00 of which \$12,000.00 represents a contribution by Earl on an inheritance from his Father's estate. This represents 14% of the estimated value of the property. Therefore, after the payment of the costs of the sale, Earl will receive the first 14% of the sale proceeds but not to exceed \$12,000.00 and the balance shall be divided equally between Earl and Helen.
9. The sum of \$4,600.00 should remain from the \$10,600.00 Helen withdrew from the joint savings account. Of that amount Earl is entitled to one-half and Helen is entitled to one-half.

The chancellor concluded that Helen was entitled to an award of periodic alimony. In so deciding, he

looked at Helen's age, the length of their marriage, her limited prospects for employment, and her small amount of social security income. However, the chancellor noted that Helen's claimed yearly expenses of \$37,473.12 exceeded Earl's yearly gross income of \$36,000.00. The chancellor stated, "In reviewing Helen's financial declaration, it appears to the Court that many of the expenses listed by her are grossly exaggerated and exceed what could be considered as reasonable. None of her claimed expenses were supported by documentary evidence in the form of bills, invoices or canceled checks." The chancellor concluded that the standard of living desired by both Helen and Earl could not be accommodated with Earl's limited income, and both parties would have to adjust. Helen was awarded \$800.00 a month in periodic alimony. Additionally, the chancellor ordered Earl to pay one-half of Helen's attorney's fees out of his share of the proceeds from the sale of the jointly owned property.

## I. THE CHANCELLOR ERRED IN FAILING TO AWARD HELEN JAMES ADEQUATE PERIODIC ALIMONY.

As an error-corrections court, it is our task to review the chancellor's decision under the well known standard set forth by the Mississippi Supreme Court: "This Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Brennan v. Brennan*, 638 So. 2d 1320, 1323 (Miss. 1994). The chancellor has the authority to grant both lump sum and periodic alimony in a divorce proceeding. *Id.* at 1324. In the case at hand, the chancellor only granted periodic alimony, in an amount which Helen complains is insufficient. "The right to an award of periodic alimony flows from the duty of the husband to support his wife." *Id.* In *Crowe v. Crowe*, 641 So. 2d 1100, 1102 (Miss 1994) the Mississippi Supreme Court reiterated the factors to be considered when evaluating an award of periodic alimony:

(1) the health and earning capacity of the husband, (2) the health and earning capacity of the wife, (3) the reasonable needs of the wife, (4) the husband's necessary living expenses, (5) other factors such as estimated amount of income taxes, the use of the family home or automobile, and the payment of insurance.

It is very clear from the record that the chancellor took all of these factors into account when awarding Helen the amount of alimony that he did. Helen has failed to prove that the chancellor was manifestly wrong or clearly erroneous.

## II. THE CHANCELLOR ERRED IN HIS DIVISION OF MARITAL ASSETS OF THE PARTIES.

The process regarding equitable distribution is governed by *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994):

Although this listing is not exclusive, this Court suggests the chancery courts consider the following guidelines, where applicable, 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 marital 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.

In order for property to be divided, it must be "marital property." The

Mississippi Supreme Court defined marital property in *Hemsley v. Hemsley* 639 So. 2d 909, 914 (Miss. 1994) :

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.

However, the Mississippi Supreme Court has stated, "[W]e found that nonmarital assets. . . may be converted to marital assets if they are commingled with marital assets or used for familial purposes." *Heigle v. Heigle*, 654 So. 2d 895, 897 (Miss. 1995). In *Maslowski v. Maslowski*, 655 So. 2d 18, 20-21 (Miss. 1995) the supreme court held:

Commingled property is a combination of marital and non-marital property which loses its status as non-marital property as a result. (citation omitted) *See also Boggs v. Boggs*, 26 Ark. App. 188, 761

S.W.2d 956, 957 (1988) (en banc) (holding money received from inheritance, as non-marital property, presumptively became marital property when placed in joint account under Arkansas law).

We agree with the chancellor's division of property with the exception of the \$12,000.00 Earl received from his father. While the \$12,000.00 was initially non-marital property, it became marital property when Earl used the money for the familial purpose of improving the marital home. Both Earl and Helen testified that the \$12,000.00 was used for such purpose. When Earl was asked if he ever put any of his inheritance money in a bank account, he replied, "No, because my wife took it and paid the house off." When this occurred, the money became commingled and subject to equitable distribution. Therefore, we reverse and remand for the chancellor to equitably distribute the \$12,000.00 between Earl and Helen.

### III. THE CHANCELLOR ERRED IN REFUSING TO AWARD HELEN JAMES LUMP SUM ALIMONY.

The following factors are to be considered in granting an award of lump sum alimony:

1) Substantial contribution to accumulation of total wealth of the payor either by quitting a job to become a housewife, or by assisting in the spouse's business. 2) A long marriage. 3) Where the recipient spouse has no separate income or the separate estate is meager by comparison. 4) Without the lump sum award the receiving spouse would lack any financial security. . . [T]he single most important factor undoubtedly is the disparity of the separate estates.

*Cleveland v. Cleveland*, 600 So. 2d 193, 197 (Miss. 1992). The chancellor has the authority to grant lump sum alimony if he deems it appropriate under the guidelines. In the present case, the disparity between the estates of Earl and Helen is not so great as to warrant an award of lump sum alimony. While Earl is employed, he does not own an estate of any consequence. The chancellor dutifully provided for Helen, but was not bound to leave Earl destitute. This issue is meritless.

### IV. THE CHANCELLOR ERRED IN HIS DIVISION OF THE TRUSTMARK CHECKING ACCOUNT WHICH REFLECTED AN INADEQUATE AWARD OF TEMPORARY ALIMONY.

At the time of their separation, Earl and Helen had a Trustmark bank account from which Helen withdrew approximately \$10,600.00. In accordance with a temporary order, Helen withdrew \$660.00 a month in temporary support. Approximately \$4,600.00 remained at the time of divorce. The chancellor divided the amount equally between the parties. Although without compelling argument or substantial case authority, Helen claims on appeal that she should have received the entire remaining balance. To the contrary, both Earl and Helen contributed to the funds in the bank account, and the chancellor was justified in equitably distributing the remaining \$4,600.00. This issue is meritless.

### V. THE CHANCELLOR ERRED IN FAILING TO AWARD TO HELEN JAMES THE UNDISPUTED AMOUNT OF ATTORNEY'S FEES.

"The award of attorney fees in divorce cases is left to the discretion of the chancellor, assuming he follows the appropriate standards." *Creekmore v. Creekmore*, 651 So. 2d 513, 520 (Miss. 1995). Helen admitted on cross-examination that she had already paid her attorney \$1,500.00 from the \$10,600.00 that she took from the Trustmark account. After the equitable distribution of property and her award of periodic alimony, Helen and Earl's estates are such that they are equally able to pay their attorney's fees. However, we cannot say that the chancellor abused his discretion in ordering Earl to pay one-half of Helen's attorney's fees. This issue is meritless.

**THE JUDGMENT OF THE JONES COUNTY CHANCERY COURT IS AFFIRMED IN PART AND REVERSED IN PART AND REMANDED FOR RECONSIDERATION NOT INCONSISTENT WITH THIS OPINION OF THE \$12,000.00 INHERITANCE. COSTS OF THIS APPEAL ARE TAXED TO APPELLEE.**

**McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**