IN THE COURT OF APPEALS 08/20/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00501 COA

CHRISTOPHER EDWARD PICKETT

APPELLANT

v.

DEBORAH LYNN GORDON PICKETT

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. PERCY LYNCHARD, JR.

COURT FROM WHICH APPEALED: DeSOTO COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

ROBERT H. BROOME

ATTORNEY FOR APPELLEE:

DEBORAH L. PICKETT DITTO, *PRO SE*

NATURE OF THE CASE: DOMESTIC RELATIONS: DIVORCE

TRIAL COURT DISPOSITION: DIVORCE GRANTED TO WIFE ON GROUNDS OF HABITUAL CRUEL AND INHUMAN TREATMENT, ACCOMPANIED BY PROPERTY SETTLEMENT

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

SOUTHWICK, J., FOR THE COURT:

Deborah Pickett was granted a divorce from Christopher Pickett on the ground of habitual cruel and

inhuman treatment. Mr. Pickett appeals, alleging various errors arising from the fact the divorce was initially contested, then for a time the procedures for an uncontested divorce were followed, but finally a contested divorce was granted. We find that the chancellor improperly accepted the never-executed stipulation of the parties as having a controlling effect. We affirm the decree of divorce, but reverse and remand the remainder of the judgment.

FACTS

Mrs. Pickett filed for divorce alleging in the alternative cruel and inhuman treatment and irreconcilable differences as her grounds. Her husband responded with a counterclaim for divorce alleging cruel and inhuman treatment, uncondoned adultery, and irreconcilable differences. On January 18, 1994, the court heard testimony on Mrs. Pickett's claims of cruelty. She was unable to conclude presenting her proof that day, and the case was continued. At the next trial date of March 3, the court was informed that the parties had reached an agreement on an irreconcilable differences divorce, the terms of visitation, and most of the issues concerning property settlement and support. These agreed terms were dictated by the attorneys into the record in open court. The court indicated that the agreement needed to be reduced to writing, but that this oral dictation would suffice to structure the issues for purposes of continuing the presentation of evidence at that time. What remained for determination was the division of "marital household furnishings and other personal items and . . . the responsibility for any other additional outstanding indebtedness that the parties may have that we do not know about." After this recitation in open court, both spouses on the record told the court that the oral presentation accurately reflected the agreement. Elaboration on the question of indebtedness indicated that there was nothing concrete that was in dispute, but just a lack of knowledge, or perhaps trust, regarding whether unknown debts had been incurred on joint credit cards.

The court then allowed Mrs. Pickett to present her case concerning her claims to various personal property, from books to furniture to clothing and many other such items. There was then some testimony concerning credit cards. Mr. Pickett was then questioned. The opening line of questioning concerned one of the incidents of alleged cruelty that had been addressed six weeks earlier as grounds for divorce by Mrs. Pickett. After objection that this dealt with issues other than personal property and credit cards, Mr. Pickett's attorney assured the court that the only purpose was to shed some light on Mrs. Pickett's claim to damage to certain personal property.

At the close of that testimony, the parties rested on the apparent assumption that the court had enough evidence before it to render an order on the remaining issues. The court instructed the parties to circulate a written agreement on the terms of their settlement that had been reached earlier. However, over the next month Mr. Pickett refused to sign the agreement sent to him. The court repeatedly insisted that the parties resolve their differences and forward a signed agreement to the court. An agreement was never signed or submitted.

After reciting these facts into the record on April 4, 1995, the court granted a divorce based on the husband's cruelty to his wife:

> This cause came on for hearing originally by a complaint for divorce filed by the Plaintiff

> seeking certain relief, including . . . a divorce on the grounds of habitual cruel and inhuman treatment or in the alternative irreconcilable differences. Inasmuch as no agreement between the parties has been tendered to the court, nor can be rendered, based upon any agreement whatsoever the court finds that a divorce on the irreconcilable differences cannot be entered. However, the court . . . from the testimony presented . . . finds sufficient and adequate evidence to award a divorce to the Plaintiff on the grounds of habitual cruel and inhuman treatment.

. . . .

> As to the remaining relief sought by the parties . . . [t]he agreement of the parties dictated into the record [concerning child custody, support and some property settlement] . . . will at this time . . . be ratified and made a part of this court's order.

There was apparently a hearing on the day previous to this order, at which time the court was informed of Mr. Pickett's refusal to sign the written agreement. There is no transcript of what then occurred, or what any attorney may have said on the day of the court's entry of the April 4 order. No motion for new trial was filed.

DISCUSSION

On appeal, Mr. Pickett asserts that the trial court committed four basic errors. First, he argues that the court could not proceed under the guidelines for an irreconcilable differences divorce until the statutorily prescribed written agreement had been signed by the parties. Second, Mr. Pickett contends that, when the irreconcilable differences divorce failed, the trial court had an obligation to consider and hear testimony on the alternative grounds for divorce presented by *both* parties. Third, the court allegedly erred by incorporating the previously agreed property settlement into the divorce granted to Deborah. Fourth, Mr. Pickett argues that a divorce on the ground of cruel and inhuman treatment was unsupported by the evidence. We will consider these in order.

I. Hearing issues for uncontested divorce before there was a written agreement

Our statutes require the parties who wish a divorce based on irreconcilable differences to execute a written agreement indicating their points of agreement for custody and maintenance of children, for property distribution, and other details required for dissolving the marriage. Miss. Code Ann. § 93-5-2 (1972). What the parties cannot agree upon is also to be set out in writing. *Id.* Here, there was nothing in writing by the time of the March 3 hearing. Instead, the attorneys made recitals into the record on the same points as required by the statute, and then the spouses orally agreed to the accuracy of the statements. The court instructed that this was to be reduced to writing and signed, but it never was.

What the chancellor permitted in this instance was understandable and not fatally defective. The

problem it created was a potential one, and the potential was realized when Mr. Pickett ultimately refused to sign. The efficient management of the chancery court's docket, with this particular case scheduled for trial on contested issues, suggested that the case proceed on that day even if in a different form than earlier contemplated, *i.e.*, as an uncontested instead of a contested divorce. Should the agreement never be reduced to writing as required by statute, it is possible the day would have been wasted. The day was not a nullity, however, and the testimony would have been properly considered by the trial court for whatever issues ultimately had to be decided. Here, what ultimately had to be decided was the grounds asserted by both spouses for a divorce based on the cruelty of the other spouse. *Cf. Massingill v. Massingill,* 594 So. 2d 1173 (Miss. 1992). Whatever defects in the proceedings might have existed are moot.

II. Trial of Contested Grounds upon Failure of Irreconcilable Differences Divorce

Once the trial court concluded on April 3-4 that an irreconcilable differences divorce would not be an available remedy, then each party was entitled to put on such evidence as it had, subject to the rules of admissibility, on the allegations of cruelty by the other spouse and rebuttal to the cruelty alleged against himself or herself. The record is completely silent on whether either party said it had additional evidence on these issues. Mrs. Picket had testified in January regarding her allegations of cruelty against her husband. Mr. Pickett never put on evidence regarding his allegations against his wife, nor did he testify in explanation of what she alleged against him except tangentially in responding to questions about property issues on March 3.

Mr. Pickett contends we should reverse because the trial court had the obligation in April to open the record for testimony from both parties concerning their alternative grounds for divorce. Instead, Mr. Pickett argues that based on incomplete testimony from one spouse concerning cruelty, and without the benefit of any proof from the other concerning his grounds for divorce or defending himself against the allegations, the chancery court prematurely and preemptively disposed of the case. That argument is a reasonable one, but our initial issue is whether the argument is procedurally preserved. There is no objection in the record to the court's decision in open court, at a scheduled trial date, to enter a decree of divorce on April 4. For all we know, Mr. Pickett did not argue that there was additional evidence he wished to present.

A motion for new trial would have been an alternative way for the record to reflect that this issue of premature closing of testimony was presented to the trial court. A motion for new trial is not necessary to preserve every appellate issue. The supreme court has attempted several times to clarify the distinction between those matters that do and those that do not have to be the subject of a new trial motion. The only category of issue that must be included in such a motion that seems potentially applicable here is a "new matter[], not shown of record and not merely cumulative irregularities, mistakes, surprises, misconduct, and newly discovered evidence." *Colson v. Sims,* 220 So. 2d 345, 347 n.1 (Miss. 1969), *quoted in Jackson v. State,* 423 So. 2d 129, 131 (Miss. 1982). This principle was later summarized by the court that if an issue is "not raised in the pleadings, transcript, or rulings, the appellant must have preserved the issue by raising it in a motion for new trial." *Ahmad v. State,* 603 So. 2d 843, 847 (Miss. 1992). Had Mr. Pickett in open court objected to the procedure followed by the chancellor, and argued that he had additional evidence to present, then no motion for new trial would be necessary. Mr. Pickett's designation of record included all "trial transcripts," and also all "testimony, all oral motions, in and out of chambers. . . ." The parties knew what their objections had

been, and which proceedings had a court reporter present to take down what was said.

We can only assume based on the record before us, that either there was no objection to what the chancellor did, or if so there was no court reporter present to record it. In either event, the matter was something that had to be raised in a motion for new trial. The purpose of the rule is simple and salutary. There are certain errors that must be brought to the attention of the trial judge in a motion for new trial, so that the trial judge may have an opportunity to pass upon their validity before this Court is called upon to review them. *Id.* Mr. Pickett's argument here would raise serious questions about the chancellor's actions only if the chancellor made his ruling in the face of objections that there was additional testimony he needed to hear. *See Morreale v. Morreale*, 646 So. 2d 1264, 1260-70 (Miss. 1994).

A chancellor may not deny a party the opportunity to present its side of a contested divorce In a recent divorce case, the chancellor refused prior to final judgment to accept additional evidence regarding child custody issues. *Murphy v. Murphy*, 631 So. 2d 812, 813, 816 (Miss. 1994). The supreme court reversed, finding that the chancellor was not in a position to adequately assess the case and erred in refusing to afford the parties an opportunity to submit additional evidence. *Murphy*, 631 So. 2d at 816; *see also Peterson v. Peterson*, 648 So. 2d 54, 57 (Miss. 1994) (Rule 60(b) motion filed after divorce raised the issues that were then presented on appeal). Neither of those cases undermines the point here. We reject this issue because a party cannot raise for the first time on appeal that he had additional evidence. The trial judge must be given an opportunity to admit or reject the additional evidence. The record reflects no such event.

III. Incorporation of Property Settlement Agreement in Contested Divorce

Mr. Pickett argues that the trial court erred by adopting the property settlement and support agreement developed by the parties in contemplation of an irreconcilable differences divorce. We are cited to case law that a chancellor may decline to enforce a settlement agreement developed in anticipation of an irreconcilable differences divorce, when entering an order granting a divorce on fault grounds. *Grier v. Grier*, 616 So. 2d 337, 338 (Miss. 1993); *see* Miss. Code Ann. § 93-5-2(2) (1972). The court held that "all agreements in contemplation of [an irreconcilable differences] divorce are voided when . . . the irreconcilable differences proceeding fails and a party seeks a divorce on other grounds." *Grier*, 616 So. 2d at 338. "It would be fundamentally unfair to hold either of the parties to portions of the [settlement agreement] after the foundation of the bargain is removed." *Id.* at 339.

We face a different question, however, than the one in *Grier*. Here in effect one party is arguing that the chancellor may not independently determine that the provisions of the never-entered stipulation are appropriate for settlement of property, alimony, and child custody and support issues. We see no reason that a chancellor must ignore any previous attempt to resolve custody, child support, alimony, and other issues. However, the chancellor must adopt all or part of the prior agreement after having subjected it to the proper review. In his order, the chancellor stated that the previous agreement "makes adequate and sufficient provisions for the custody and maintenance of the child and for the settlement of the limited property rights addressed therein. . . ." The "adequate and sufficient" language may well have been used because that would have been the chancellor's necessary finding in approving an agreement under the statutory provisions for an irreconcilable differences divorce. Miss.

Code Ann. § 93-5-2(3) (Rev. 1994). The chancellor also referred to the parties having "stipulated and dictated into the record certain terms and conditions. . . ." The chancellor does not even hint that the stipulation was in fact no longer effective. The chancellor then said he would "ratify and approve the stipulated agreement. . . ." We interpret the chancellor's decree to mean he treated the now-defunct agreement as still binding on the parties and that the only review he gave it was the same as if he were granting a divorce based on irreconcilable differences.

A chancellor in granting a divorce on fault grounds "may, in [his] discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife or husband. . . ." Miss. Code Ann. § 93-5-23 (Rev. 1994). This language requires the court to make an assessment of the evidence and determine what is "equitable and just" on the matters he must resolve. If a chancellor is going to structure his order on a contested divorce around a previous, tentative agreement between the parties, it is essential that the chancellor determine that the terms are appropriate for purposes of the contested divorce that is being granted. The chancellor did not do that. On the face of his decree, he followed the procedures for an irreconcilable differences divorce at the same time he was granting a fault divorce. The tentative stipulation, never reduced to an executed written agreement, had no life of its own. It could be the starting point and even the conclusion of the chancellor's analysis. It could not substitute for the chancellor's analysis.

All the matters contained in the former stipulation need to be independently evaluated by the chancellor. Since the chancellor's decision on the "contested" issues (all were actually contested once Mr. Pickett would not sign the stipulation) may well have been affected by the terms of the former stipulation, he should reexamine all property matters, whether in the tentative stipulation or not. We reverse and remand for that purpose. Should additional evidence need to be taken since the earlier proceedings were so severely truncated, that is within the chancellor's discretion.

IV. The decision to grant a divorce based on cruelty was unsupported by substantial evidence

This issue indirectly raises again the unusual procedure followed in the case below. We do not readdress our previous decision that the issue of Mr. Pickett's failure to be given an additional opportunity to present evidence is not properly preserved for review. Instead, we look at whether the evidence that is in the record is sufficient to support the divorce.

The supreme court has recently summarized the manner in which cruel and inhuman treatment claims are to be evaluated. A preponderance of the evidence must show systematic and continuous mental or physical abuse, proximately causing the parties separation. *McKee v. Flynt*, 630 So. 2d 44, 48 (Miss. 1993) (citations omitted). The evidence must show "something more than unkindness or rudeness or mere incompatibility or want of affection" and ordinarily more than one act or an isolated incident. *Id.* (citations omitted). The evidence here establishes such a charge against Mr. Pickett.

The evidence presented by Mrs. Pickett, through her testimony and the testimony of others, demonstrated that Mr. Pickett subjected her to continuous verbal insults punctuated by occasional fits of rage. Mr. Pickett privately and publicly insulted his wife's appearance, her personality, and her dedication to establishing her career in nursing. The evidence showed that he threatened his wife with a screwdriver, punched a hole in a wall near her head, and threatened to rape her. While Mr. Pickett

denied having subjected his wife to this treatment, the chancellor's decision remains consistent with substantial evidence. Based on this evidence, the chancellor was not manifestly in error in finding that Mr. Pickett had been guilty of habitual cruel and inhuman treatment to his wife. *Id.* (citations omitted).

The judgment of divorce is affirmed. The remainder of the decree, which concerns child custody, visitation, child support, automobile loans and ownership, student loans, and personal property, is reversed, and the cause is remanded for further proceedings.

THE JUDGMENT OF THE DeSOTO COUNTY CHANCERY COURT OF DIVORCE IS AFFIRMED; THE REMAINDER OF THE JUDGMENT IS REVERSED AND THIS CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE TAXED EQUALLY TO THE PARTIES.

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

PAYNE, J., CONCURRING IN PART AND DISSENTING IN PART BY SEPARATE WRITTEN OPINION, BARBER, J., JOINS IN THE CONCURRING IN PART.

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PAYNE, J., CONCURRING IN PART, DISSENTING IN PART:

I respectfully dissent from that portion of the majority's opinion ordering reversal for a reexamination of all property matters. No good purpose, legal or otherwise, will be served by requiring the chancellor to go back and jump through the same hoops just with altered verbiage. On an almost daily basis, chancellors determine equitable matters in divorce situations. In the present case, the chancellor elected to adopt the property division which the parties had previously dictated into the record during a more harmonious segment of the case. While the majority resolves that the chancellor failed to properly consider the appropriateness of the award, it is more fitting and equally plausible for this Court to conclude that the chancellor acted because the previous property division was reasonable. *See Love v. Barnett*, 611 So. 2d 205, 207 (Miss. 1992) (citations omitted) ("As to issues of fact where no specific findings have been articulated by the chancellor, this Court proceeds upon the 'assumption that the chancellor resolved all such fact issues in favor of appellee,' or as a minimum, in a manner which would be in line with the decree."); *Gates v. Gates*, 616 So. 2d 888, 890 (Miss. 1993) (citations omitted) ("[A]ll reasonable presumptions are in favor of the validity of the trial proceedings and judgment thereon, and it is our duty to affirm in the absence of some showing that the trial court erred."). A careful review of the terms of the property division reveals no abuse of discretion.

Under the present set of circumstances, I would affirm the entire judgment.

BARBER. J., JOINS IN PART THIS SEPARATE WRITTEN OPINION.