

**IN THE COURT OF APPEALS 7/2/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CA-00188 COA**

**KAREN MCALLISTER BOLLINGER**

**APPELLANT**

**v.**

**KENNEY RAY BOLLINGER**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. MELVIN MCCLURE

COURT FROM WHICH APPEALED: DESOTO COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

H. R. GARNER

ATTORNEYS FOR APPELLEE:

LEIGH A. RUTHERFORD, REBECCA S. THOMPSON

NATURE OF THE CASE: CIVIL - DIVORCE

TRIAL COURT DISPOSITION: FINAL JUDGMENT OF DIVORCE

BEFORE THOMAS, P.J., KING, AND SOUTHWICK, JJ.

KING, J., FOR THE COURT:

Karen and Kenney Bollinger, married on July 4, 1984, filed separate complaints for divorce on the

grounds of irreconcilable differences and cruel and human treatment. The parties agreed, by written consent, filed on December 16, 1993, to be divorced on the ground of irreconcilable differences. The parties also consented to have the chancery court decide the remaining disputed issues, including alimony, attorney's fees, equitable distribution of marital home, and the assessment of debt, if any, owed to their respective parents. By agreement of the parties and approval of the court, a master was appointed pursuant to Rule 53 of the Mississippi Rules of Civil Procedure to review all of the parties' records and documents and to present a report to the chancellor of his findings. After a hearing, a judgment of divorce was filed on February 3, 1995. Finding that the chancellor was not manifestly in error, we affirm.

## I.

Karen McAllister Bollinger and Kenney Ray Bollinger were married on July 4, 1984 in Shelby County, Tennessee. During the marriage, Karen and Kenney resided in DeSoto County, Mississippi. The marriage produced no children. After Karen and Kenney separated on March 25, 1993, both parties filed complaints for divorce, which were consolidated for trial. In his complaint filed on March 26, 1993, Kenney requested that (1) the court assess all debts of the marriage against Karen; (2) grant him temporary and permanent use, possession, control, and title to the marital home and all real property of the parties; (3) grant him temporary and permanent use, possession, control, and title of all personal property of the parties; (4) grant him temporary and permanent use, possession, control, and title to all automobiles driven by him; (5) ratify, approve, and incorporate into the final judgment of divorce the separation agreement entered into or to be entered into by the parties; and (6) assess Karen with all court costs and attorney's fees.

In her complaint filed on April 20, 1993, Karen sought (1) a fair division of the parties' personal property; (2) exclusive use, possession, and ownership of the parties' residence; (3) reasonable monthly alimony; and (4) attorney's fees and court costs.

On July 28, 1993, Kenney filed a temporary restraining order against Karen to prevent her from entering the marital home, from bringing boarders in the marital home, and from removing or destroying the assets of the parties. Kenney complained that Karen was engaging in a course of conduct detrimental to him and the assets of the parties.

On July 29, 1993, the chancellor awarded temporary use of the home to both parties, and ordered Karen and Kenney to maintain separate bedrooms free from interference from the other, ordered that no property be disposed of or removed from the house until further order of the court, and enjoined the parties from contacting, harassing, bothering, or otherwise interfering with each other.

On December 16, 1993, Karen and Kenney proposed a consent agreement whereby they agreed that there were irreconcilable differences between them and consented to a divorce on the ground of irreconcilable differences. The parties consented to the chancellor resolving the remaining issues involved in the divorce.

On January 11, 1994, the parties filed a proposed settlement agreement regarding personal property, consideration for conveyance of certain personal property, and the assumption of certain debts on the personal property.

On February 8, 1995, the chancellor filed the judgment for divorce and other relief in this matter. A divorce was granted on the ground of irreconcilable differences, and the division of personal property was delineated. Additionally, the chancellor found that the equity in the marital home and surrounding acreage should be as follows:

7. As to the Miller Road property, the Court accepts the appraisal of Charles Taylor, Real Estate Appraiser, in the amount of \$44,000.00 as the more realistic of appraisals received into evidence. Based on Mr. Taylor's appraisal there is approximately 12,000.00 equity in said Miller Road property, however, this is not to say that a buyer might be found who would pay more. Against this property the Court shall impose the following equitable liens against the equity for obligations and indebtedness incurred by the parties during the marriage and the pending divorce in said Miller Road property in the priority hereinbelow listed;

- A. Remaining fees owed the court appointed expert, Michael Williams in the amount of \$750.00.
- B. If any equity remains, to KAREN (MCALLISTER) BOLLINGER for legal fees of H. R. Garner, \$7,602.00.
- C. If any equity remains, to KENNEY RAY BOLLINGER for legal fees of Leigh A. Rutherford, \$8,070.00.
- D. If any equity remains, to KAREN (MCALLISTER) BOLLINGER for legal fees of Leslie B. Shumake, \$1, 966.00.
- E. If any equity remains, Mr. and Mrs. McAllister (parents of KAREN (MCALLISTER) BOLLINGER) and Mr. and Mrs. Bollinger (parents of KENNEY RAY BOLLINGER), equally, a joint lien in an amount not to exceed \$6,000.00, i.e., 3,000.00 each. Both parents have helped both parties on the bills, on the house, on the attorney'S fees incurred and the Court believes the parents should be compensated.
- F. If any equity remains, after review of the check lists and guidelines of the *Ferguson* and *Hemsley* and other cases, and based on Mr. Williams' report, the Court finds that any balance in the equity shall be split one-third to KENNEY RAY BOLLINGER and two-thirds to KAREN (MCALLISTER) BOLLINGER.

....

8. That KENNEY RAY BOLLINGER shall pay to KAREN (MCALLISTER) BOLLINGER lump-sum alimony in the amount of \$3,000.00. That the cashier's check of \$2,875.00 payable to KAREN (MCALLISTER) BOLLINGER shall be applied to the lump-sum alimony leaving a remaining balance of \$125.00 due and payable 90 days from the entry of this Judgment of Divorce.

Karen is appealing from that final judgment of divorce awarded to the parties.

## II.

"Our scope of review in domestic relations matters is limited under the familiar rule that this Court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard." *Johnson v. Johnson*, 650 So. 2d 1281, 1285 (Miss. 1994) (citing *McEwen v. McEwen*, 631 So. 2d 821, 823 (Miss. 1994)).

### 1. WHETHER THE CHANCELLOR'S DECISION WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS AND/OR WHETHER THE CHANCELLOR APPLIED AN ERRONEOUS LEGAL STANDARD IN THE DIVISION OF THE MARITAL PROPERTY?

In the instant case, Karen argues that the chancellor applied an erroneous legal standard in the equitable division of marital property. On the other hand, Kenney argues that the chancellor correctly considered the stipulated evidence, the report of the court appointed expert, and the sworn testimony of the witnesses in making the division of marital property, and was not clearly erroneous.

In Mississippi, "[d]ivision of marital assets is now governed under the law as stated in *Hemsley and Ferguson*." *Johnson*, 650 So. 2d at 1287.

First, the character of the parties' assets, *i.e.*, marital or nonmarital, must be determined pursuant to *Hemsley*. The marital property is then equitably divided, employing the *Ferguson* factors as guidelines, in light of each parties' nonmarital property. *Ferguson*, 639 So. 2d at 928. If there are sufficient marital assets which, when equitably divided and considered with each spouse's nonmarital assets, will adequately provide for both parties, no more need be done. If the situation is such that an equitable division of marital property considered with each party's nonmarital assets, leaves a deficit for one party, then alimony based on the value of nonmarital assets should be considered.

*Id.* The matter is within the chancellor's discretion, considering all the equities and other relevant facts. *Bowe v. Bowe*, 557 So. 2d 793, 794 (Miss. 1990).

Because the parties in the instant case had a written agreement for the division of the personal property, the chancellor only had to determine the division of the marital home, debts owed, if any, to the respective parents, the division of Kenney's retirement pension, and attorney's fees. Additionally, the parties also agreed that the chancellor should consider the report of the court appointed expert, Michael Williams in assessing the equitable division of the marital property.

In the financial report for Kenneth and Karen Bollinger, Michael Williams, found among other things that "Karen [was] entitled to 63% of the value of the Miller Rd. property and Kenneth [was] entitled

to 37% of the value of the Miller Rd. property." In his ruling, the chancellor basically agreed with the report given by Williams on the award of the property. In doing so, the chancellor stated:

Generally speaking, I'm going to agree with Mr. Williams' report; however, simply for clarity and simplicity, I'm going to do what I call round it off, and I'm going to say anything other than the \$27,388 that I have already mentioned will be split between the husband and wife -- one third to the husband and two thirds to the wife. Court costs will be equally assessed against the parties. That should conclude the matter.

The chancellor awarded Kenney the Firebird automobile, the tractor and equipment, his \$5,500 dollar retirement pension, and one-third interest in the marital home at Miller Road, which includes a house and 21.01 acres, subject to the equitable liens that the chancellor placed on the property. Karen received the pickup truck and two-thirds interest in the marital home, also subject to the equitable liens that the chancellor placed on the property.

Taking into account that fairness is the prevailing guideline in marital division, this Court cannot say that the chancellor erred in his division of the marital estate. Thus, this issue is without merit.

## 2. WHETHER THE CHANCELLOR COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT PERMANENT ALIMONY?

Karen argues that the trial court erred when it failed to award her permanent or periodic alimony. Karen explains that because of her medical problems and the fact that she is unable to work, the chancellor's lump-sum alimony award in the amount of \$3,000 was in error.

"Our scope of review of an alimony award is well-settled. Alimony awards are within the discretion of the chancellor, and his discretion will not be reversed on appeal unless the chancellor was manifestly in error in his finding of fact and abused his discretion." *Ethridge v. Ethridge*, 648 So. 2d 1143, 1145-46 (Miss. 1995) (quoting *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993) (citation omitted)). "This Court will not disturb a chancellor's ruling if the findings of fact are supported by credible evidence in the record." *Ethridge*, 648 So. 2d at 1146 (citations omitted). "In the case of a claimed inadequacy or outright denial of alimony, we will interfere only where the decision is seen as so oppressive, unjust or grossly inadequate as to evidence an abuse of discretion." *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993) (citation omitted).

During the hearing in the instant case, Karen testified that she has problems which affect her ability to hold and maintain employment. She explained that those problems include a degenerative narrowing of the knee cap, which doesn't allow her to stand for long periods of time or do any bending or a lot of walking. Karen also explained that she is under a doctor's care for female problems and sinus problems. Karen testified that Dr. Lynch, an orthopaedic surgeon, has advised her that she needs knee surgery; however, no objective medical evidence was offered on these matters. When asked about other career plans/options, Karen testified that her doctor told her that if she does not correct her weight problem, he cannot correct her knee problem.

So in other words, I'm heading toward total disability on that knee if I cannot get that surgery done. So then I'm going to have to change my field of work, because I will not be able to stand on my knee for eight hours which is required bending, lifting, walking all of that as being [sic] a computer operator.

Karen admitted, however, that she had not been declared disabled and that she hoped her condition was temporary. Karen stated that her attempts to obtain other employment have been unsuccessful because either she has been over qualified or under qualified. She also explained that she began working for her parents at their recording studio helping them get that business off the ground, and that she made some trips to Nashville, Tennessee in regard to that business. However, Karen explained that she did not draw a wage or salary from that employment. Karen estimated that her household expenses would run approximately \$1,200 to \$1,500.

Kenney testified that Karen "sent out resumes for jobs, did work at the studio some off and on." "She was interviewed at one place and was offered a position but didn't take it" because the position "was making \$15,000 a year, and she said she could make more on unemployment than she could by getting a job."

Kenney has been a lead shift computer operator with Flemings Company for approximately ten years at \$12.29 per hour. His take home pay ranged from \$350 to \$355 a week, or approximately \$1,500 per month. Kenney gave testimony that his expenses exceeded his take home pay and that he had been forced to borrow from his parents.

In determining that Karen was entitled to alimony, the chancellor stated:

I've heard the wife's needs about not having employment at all, about medical problems, and everything else. I think she is entitled to some alimony. There again, I wish I could give you what you -- what I really felt like you were entitled to, but I have to look at what's left in the piece of pie. I am going to give you some alimony. I'm going to tell you on the front end I'm almost embarrassed to say how much it is, but I don't think it's as much as either one of you deserve [sic]. But I'm going to award a lump-sum alimony award of \$3,000.

On the record before us, we cannot say that the chancellor's decision to award Karen a lump sum alimony in the amount of \$3,000 is "so oppressive, unjust or grossly inadequate as to evidence an abuse of discretion." *Armstrong*, 618 So. 2d at 1280 (citation omitted). We find this issue to be without merit.

3. WHETHER THE CHANCELLOR WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS AND/OR APPLIED AN ERRONEOUS LEGAL STANDARD IN AWARDING ATTORNEY'S FEES TO KENNEY?

Karen argues that the chancellor awarded attorney's fees to Kenney without proof as to Kenney's inability to pay his attorney. We disagree. The record and Kenney's accompanying testimony clearly reflect Kenney's inability to pay. Moreover, Karen fails to recognize the evidence offered by Kenney that his parents had paid all of his attorney's fees.

"The award of attorney's fees in a divorce case is generally left to the discretion of the chancellor." *Brooks v. Brooks*, 652 So. 2d 1113, 1120 (Miss. 1995) (citation omitted); *see also Hemsley v. Hemsley*, 639 So. 2d 909, 915 (Miss. 1994). The Mississippi Supreme Court has held:

[W]hen a party is able to pay attorney's fees, award of attorney's fees is not appropriate. However, where the record shows an inability to pay and a disparity in the relative financial positions of the parties, we find no error.

*Brooks*, 652 So. 2d at 1120 (citing *Hammett v. Woods*, 602 So. 2d 825, 830 (Miss. 1992)).

We find that the chancellor was well within his discretion in awarding Kenney payment of his attorney's fees. We find that this assignment of error is without merit.

#### 4. WHETHER THE CHANCELLOR ABUSED HIS DISCRETION IN IMPOSING AN EQUITABLE LIEN AGAINST THE MARITAL HOME IN FAVOR OF THE PARTIES' PARENTS?

This issue involves a question of unjust enrichment in favor of Karen's and Kenney's parents. Karen argues that the chancellor abused his discretion when he imposed an equitable lien on the marital home to repay loans to Karen's parents, Mr. and Mrs. McAllister, and Kenney's parents, Mr. and Mrs. Bollinger.

An equitable lien is defined as a "right, not existing at law, to have specific property applied in whole or in part to payment of a particular debt or class of debts." Black's Law Dictionary (6th ed. 1990). "A lien may also be impressed out of recognition of general principles of right and justice." *Lindsey v. Lindsey*, 612 So. 2d 376, 379 (Miss. 1992). "A principal reason for impressing an equitable lien is to prevent unjust enrichment, *i.e.*, where it would be contrary to equity and good conscience for an individual to retain a property interest acquired at the expense of another." *Neyland v. Neyland*, 482 So. 2d 228, 230 (Miss. 1986) (citations omitted).

In the consent agreement, Karen and Kenney requested that the trial court "determine which party, if any, to assess all debts or a portion of the debts of the marriage against one or the other." Of those debts, the court was asked to decide *inter alia* the (4) loans by Karen's parents and repayment, if any; and (5) loans by Kenney's parents and repayment, if any.

During a hearing on this matter, Karen testified that her parents loaned her money for the down-payment on the marital home and that they assisted her in improving the property both during the marriage and after the separation. Likewise, Kenney testified that his parents loaned him money during the marriage and after the parties separated.

In finding that Kenny and Karen owed their respective parents a debt sufficient to impose an equitable lien against the marital property, the chancellor stated:

The next liens will be two joint liens with equal priority; and there again, I can't put any exact figures on it, but I feel like both of your parents have helped you both all along. They have helped on bills; they have helped on the house; they have helped on attorney's fees; they have helped on everything else, and I'm talking about both of you. I'm not going to try to go through and look at every check and get this to the dime, so to speak, but what I'm generally doing is I'm trying to tell you that I'm putting some consideration for each of your parents ahead of the two of you. I'm arbitrarily picking a figure of \$3,000 each. Each one of your parents will have an equitable interest in this property to the extent of \$3,000 each, and by them having equal priority on that if there is only \$2,000 worth of equity left, then each of them will get a thousand as opposed to one of them getting some and the other one not getting anything.

Karen, as a party who requested that the chancellor resolve the question of liability to her parents cannot now be heard to complain that the chancellor erred when he found that a debt was owed to both Kenney's and her parents.

For the foregoing reasons, the judgment of the trial court is affirmed.

**THE JUDGMENT OF THE CHANCERY COURT OF DESOTO COUNTY IS AFFIRMED.  
APPELLANT IS TAXED WITH ALL COSTS OF THIS APPEAL.**

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