6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01310 COA

DONNA F. MITCHELL

APPELLANT

v.

HENRY R. MITCHELL, III A/K/A HENRY R. MITCHELL

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. WILLIAM ROBERT TAYLOR JR.

COURT FROM WHICH APPEALED: JACKSON COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT:

JAMES A. BECKER, JR.

SUSAN L. STEFFEY

ATTORNEY FOR APPELLEE:

CATHERINE H. JACOBS

NATURE OF THE CASE: DIVORCE

TRIAL COURT DISPOSITION: SEE RECORD FOR DIVORCE, CUSTODY, CHILD SUPPORT, ALIMONY AND EQUITABLE DISTRIBUTION

MANDATE ISSUED: 7/8/97

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

McMILLIN, P.J., FOR THE COURT

The Court is called upon today to review certain of the terms of a divorce judgment entered in the Chancery Court of Jackson County dissolving the thirteen-year marriage of Donna F. Mitchell and Henry R. Mitchell. The case is before us on direct appeal by Mrs. Mitchell attacking the custody award and claiming that the monetary awards, both to her and for the support of the child of the parties, was so insufficient as to be inequitable. Mr. Mitchell has filed a cross-appeal claiming that the chancellor was overly generous in his division of assets and that he also erred in awarding rehabilitative alimony to Mrs. Mitchell.

I.

The Facts

The parties were married for thirteen years and had one son, nine years old at the time of divorce. Mrs. Mitchell brought few fixed assets to the marriage, but she held a masters degree in counseling psychology and worked the first six years, earning as much as $30,000 per year. She ceased work to stay home full time with the child, Hank Mitchell, and had not returned to work at the time of the break-up of the marriage. She was forty-five years old at the time of divorce and in good health insofar as the record shows.

Mr. Mitchell was a successful attorney in private practice. During the final three years of the marriage, his annual adjusted gross income ranged from $219,400 to $235,500. Mr. Mitchell had substantial fixed assets at the time of the marriage, valued in the range of $200,000 according to the evidence. He was fifty-two years old at the time of the divorce and apparently was also in good health.

The couple enjoyed a good standard of living during the marriage, and managed to accumulate a substantial amount of assets. The marital home, owned mortgage-free, was valued at $295,000. They also owned recreational boats, a beach lot with an estimated value of over $76,000, antique cars worth over $20,000, and a duplex valued at $36,000. The duplex produced $500 per month in rental income. Mr. Mitchell had a number of retirement accounts totaling over $544,000. The parties had a joint investment account with a balance of approximately $154,000, and bank accounts totaling $28, 000. The value of the real and personal property in Mr. Mitchell's law business was estimated at $184,000. Mrs. Mitchell had separate retirement accounts totaling over $57,500. The only debt owed by the Mitchells was a mortgage debt on the duplex property having a balance of about $11,000.

Mrs. Mitchell was granted a divorce on the ground of uncondoned adultery. Mr. Mitchell did not contest the ground for divorce.

Prior to commencing the trial, the parties announced to the chancellor that they had agreed on a resolution of the issue of custody of the child. The agreement, as announced to the chancellor, was that the parties would share joint legal custody of the child and that Mrs. Mitchell would have primary physical custody, subject to an agreed-upon schedule when the child would be with his father.

II.

Scope of Review

This Court has a limited scope of review of the chancellor's decision of matters such as this. We are without authority to disturb the chancellor's decision unless we can determine that there has been a manifest abuse of discretion or an erroneous application of the relevant law. *Ethridge v. Ethridge,* 648 So. 2d 1143, 1145-46 (Miss. 1995). We are not called upon or permitted to substitute our collective judgment for that of the chancellor. *Richardson v. Riley,* 355 So. 2d 667, 668-69 (Miss. 1978). A conclusion that we might have decided the case differently, standing alone, is not a basis to disturb the result. *Id.*

III.

General Considerations of the Chancellor's Ruling

Mrs. Mitchell was quick to point out to this Court that the chancellor originally issued a bench ruling on the financial aspects of this case that was substantially more favorable to her than the judgment ultimately entered. Some of the changes were made by the chancellor in a letter sent shortly after the case was tried. The chancellor made more modifications when entering a formal written judgment, and then made additional changes in an amended judgment entered after both parties filed motions to reconsider. There is nothing in the record that would indicate the reasons for these changes beyond the chancellor's continuing internal reassessment of what would constitute an equitable resolution of the financial aspects of the case. We find nothing in the record that would indicate any impropriety in the chancellor's continuing deliberation of the matter, either sua sponte prior to entry of the final judgment, or upon further consideration based upon issues presented in the reconsideration motions. Thus, we have determined that our proper review of this case on appeal is whether the ultimate ruling of the chancellor which is now before us constituted a manifest abuse of discretion based on the evidence, and that this review must be conducted without regard to the earlier provisional rulings by the chancellor.

IV.

Property Division

In a division of the marital assets, the chancellor awarded Mrs. Mitchell assets having a total approximate value of $670,446. The principal assets distributed to her were the marital home, approximately $55,000 of a joint Merrill Lynch investment account, an A. G. Edwards investment account, the duplex, the beach lot, her retirement accounts and approximately $86,011 out of the total of $544,044 in Mr. Mitchell's various retirement accounts. The value of marital assets set apart to Mr. Mitchell was approximately $944,493.

The chancellor has broad authority to make an equitable division of property accumulated by a couple during the course of their marriage. *Ferguson v. Ferguson,* 639 So. 2d 921, 929 (Miss. 1994). The fact that Mr. Mitchell may have been primarily responsible for the accumulation of the fairly large estate of these parties does not mean that he is entitled to the lion's share. The supreme court, in

Hemsley v. Hemsley, recognized "that marital partners can be equal contributors whether or not they both are at work in the marketplace." *Hemsley v. Hemsley,* 639 So. 2d 909, 915 (Miss. 1994). For purposes of a fair division, the chancellor should "assume for divorce purposes that the contributions and efforts of the marital partners, whether economic, domestic or otherwise are of equal value." *Hemsley,* 639 So. 2d at 915. From that point, the chancellor should follow the guideline set out in the *Ferguson* case in arriving at an equitable distribution. *Id.* at 915; *see also Ferguson v. Ferguson,* 639 So. 2d at 928. There is no requirement that the chancellor make an even division of the assets, however. *Savelle v. Savelle,* 650 So. 2d 476, 479 (Miss 1995).

In the case now before us, the chancellor made a substantial award to Mrs. Mitchell of the jointly acquired assets, her share totaling approximately $670,446 in net value after subtracting the duplex mortgage debt assigned to her for payment, or 42% of the total value of this large marital estate. Considering that Mr. Mitchell, at the inception of the marriage, had a substantially bigger separate estate than Mrs. Mitchell (*See Hemsley*, 639 So. 2d at 914), and considering the other financial benefits accruing to Mrs. Mitchell under the judgment ("All property division, lump sum or periodic alimony payment, and mutual obligations for child support should be considered together." *Ferguson,* 639 So. 2d at 929), we cannot say that this division was so inequitable as to constitute a manifest abuse of discretion.

V.

Periodic Alimony

Mrs. Mitchell complains that the periodic alimony award to her of $1,500 per month was unconscionably low. When considered in conjunction with the other awards to her, we cannot say that the award was so low as to constitute an abuse of discretion. Certainly, that amount of monthly income, standing alone, would not maintain Mrs. Mitchell in the style enjoyed by the parties during their marriage. Her testimony was that she had living expenses in excess of $5,000 per month. We are also mindful that the dissolution of the marriage was due to the adulterous conduct of Mr. Mitchell. These are both factors that would appear to suggest Mrs. Mitchell's entitlement to a significant amount of periodic alimony. *See Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993). Nevertheless, the Court must consider that Mrs. Mitchell leaves the marriage with a separate estate having a value in excess of $600,000 from which she should be able to generate some reasonable amounts of income. She also is receiving rehabilitative alimony for a period of time. This will provide a cushion to permit her to sharpen her professional skills and re-enter the workforce in some field that, based upon her past successful efforts, should result in significant income for her. We find this award, on balance, to be within the limits of the discretion granted to the chancellor, and we decline to disturb it.

VI.

Rehabilitative Alimony

In addition to other monetary allowances to Mrs. Mitchell, the chancellor ordered Mr. Mitchell to

pay rehabilitative alimony for a period of forty months. During the first twenty months, the amount to be paid was set at $3,000, and for the final twenty months of the period, the monthly amount was ordered at $1,500. Mrs. Mitchell suggests that the chancellor was unduly penurious in this rehabilitative alimony award. Mr. Mitchell, by cross-appeal, claims that rehabilitative alimony in any amount was an abuse of discretion. The supreme court has, by recent decision, recognized rehabilitative alimony as a separate tool available to the chancellor in adjusting the equities between parties undergoing the dissolution of a marriage. *Hubbard v. Hubbard*, 656 So. 2d 124, 130 (Miss. 1995). It is "an equitable mechanism which allows a party needing assistance to become self-supporting without becoming destitute in the interim." *Hubbard,* 656 So. 2d at 130. We doubt that Mrs. Mitchell would, by any fair standard, be deemed "destitute" during the years following the divorce. However, we conclude that the purpose of rehabilitative alimony as set out in the *Hubbard* opinion can have wider application than is suggested by a literal reading of the word "destitute." We therefore conclude that, in view of the chancellor's clear purpose of permitting Mrs. Mitchell a limited period of increased support to maintain her customary standard of living while she prepares herself to re-enter the workforce, this award is within the chancellor's broad discretion in such matters.

VII.

Child Support

The chancellor set child support at $550 per month. In addition, he ordered Mr. Mitchell to be responsible for all of the child's health care expenses and certain other recurring recreational expenses. Mrs. Mitchell alleges this amount of child support to be an abuse of discretion based on Mr. Mitchell's substantial income.

Section 43-19-101 of the Mississippi Code sets out a presumptively applicable means of determining child support based upon a percentage of the contributing parent's adjusted gross income as defined in the statute. Miss. Code Ann. 43-19-101(1) (1972). The statute goes on to provide that, in cases where the parent's adjusted gross income exceeds $50,000, the court must make written findings as to whether the percentage guidelines ought to apply. Miss. Code Ann. 43-19-101(4) (1972). If the guidelines are not to be applied, the court must make a written finding or specific finding on the record justifying the deviation using the factors set out in section 43-19-103. Miss. Code Ann. 43-19-101(2), -103 (1972).

Deviation from the guidelines without findings on the record is reversible error. *Johnson v. Johnson*, 650 So. 2d 1281, 1288 (Miss. 1994). The $550 per month child support award is less than a parent with an adjusted gross income of $50,000 would pay under the guidelines. Certainly the other items for which Mr. Mitchell was given responsibility are also a part of child support; however, no findings were made as to what these expenses actually were, and even so, there simply was not the necessary analysis required by the statute to permit this Court to make a meaningful review of the award. *See McEachern. v. McEachern*, 605 So. 2d 809, 813-14 (Miss. 1992).

We, therefore, determine that this case must be reversed and remanded for further proceedings in regard to the establishment of a proper award of child support in light of the factors discussed in this section.

VIII.

The Custody Award

Without explanation, the chancellor in his final judgment awarded joint legal custody and joint physical custody of the child to both parties. He then purported to award "primary permanent physical custody" to Mrs. Mitchell. As we have already observed, the parties stipulated that they had reached a mutually agreeable resolution of the child custody issue. The chancellor indicated his agreement to abide by the parties' agreement, then inexplicably altered the custody award. Certainly, the chancellor is not absolutely bound by any stipulation of the parties regarding custody that he determines is ultimately not in the best interest of the child. The child's best interest, not the parents' preferences, is the polestar consideration. *Riley v. Doerner*, 677 So. 2d 740, 744 (Miss. 1996). Nevertheless, there was no finding in this case by the chancellor that the stipulated arrangement for custody was not in the child's best interest. Absent such a finding based upon some evidence in the record, we conclude that the chancellor abused his discretion in unilaterally modifying the custody arrangement agreed upon by the parties. The statute on custody contemplates (a) joint physical and legal custody to both parents, (b) physical custody to both parents and legal custody to either parent, (c) legal custody to both parents and physical custody to either parent, or (d) physical and legal custody to either parent. Miss. Code Ann. 93-5-24(1). The parties stipulated to a custody arrangement under section 93-5-24(1)(c) and the chancellor awarded custody under section 93-5-24(1)(a), with some modification to provide for "primary permanent physical custody" in one parent. This form of custody arrangement is not contemplated by the statute, is not readily understandable as to its significance, and is calculated -- as this appeal demonstrates -- to cause unnecessary conflict. This was an abuse of discretion for which this Court elects to reverse and render. Custody is hereby ordered to be in accordance with the stipulation entered into by the parties at the commencement of trial.

THE JUDGMENT OF THE JACKSON COUNTY CHANCERY COURT AWARDING JOINT PHYSICAL AND LEGAL CUSTODY OF THE CHILD OF THE PARTIES TO BOTH PARTIES WITH PRIMARY PERMANENT PHYSICAL CUSTODY TO THE APPELLANT IS REVERSED AND RENDERED TO GRANT JOINT LEGAL CUSTODY TO BOTH PARTIES AND PHYSICAL CUSTODY TO THE APPELLANT SUBJECT TO THE RIGHTS OF VISITATION SET FORTH IN THE ORIGINAL JUDGMENT. THE JUDGMENT ESTABLISHING PERIODIC CHILD SUPPORT AT $550 PER MONTH IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. THE JUDGMENT, INSOFAR AS IT CONCERNS ISSUES OF EQUITABLE DISTRIBUTION OF MARITAL ASSETS, PERIODIC ALIMONY, AND REHABILITATIVE ALIMONY, IS AFFIRMED. COSTS OF THIS APPEAL ARE DIVIDED EQUALLY BETWEEN THE APPELLANT AND THE APPELLEE.

BRIDGES, C.J., DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY COLEMAN, J. THOMAS, P.J., NOT PARTICIPATING.

6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01310 COA

DONNA F. MITCHELL APPELLANT

v.

HENRY R. MITCHELL III A/K/A HENRY R.

MITCHELL APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

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

I concur with the majority opinion as to all issues except that I feel compelled to dissent on the issue of periodic alimony. The majority recognizes that Mrs. Mitchell has living expenses of $5,000 per month and that Mr. Mitchell's adultery caused the breakup of the marriage. The majority then states, "These are both factors that would suggest Mrs. Mitchell's entitlement to significant amount of periodic alimony. [] Nevertheless, the Court must consider that Mrs. Mitchell leaves the marriage with a separate estate having a value in excess of $600,000 [her share of the marital assets] from which she should be able to generate some reasonable amounts of income." While appearing to start off in the right direction, the majority then comes to an entirely different conclusion in affirming the periodic alimony award. Equitable distribution is the division of marital assets, and it is often seen as "net worth" upon the dissolution of the marriage, but it has little if any impact on cash flow. Periodic alimony addresses the need for support and provides for funds required for living expenses. If a woman has to deplete her assets to pay her monthly expenses, there is a transfer of the duty of alimony from the husband's income to the wife's assets.

The Mississippi Supreme Court has said, "Generally, a wife is entitled to periodic alimony when her income is insufficient to maintain her standard of living, and the husband is capable of paying." *Heigle v. Heigle*, 654 So. 2d 895, 898 (Miss. 1995) (citing *Rainer v. Rainer*, 393 So. 2d 475, 478 (Miss. 1981)); *see also Branton v. Branton*, 559 So. 2d 1038, 1040 (Miss. 1990). "The husband is required to support his wife in the manner to which she has become accustomed, to the extent of his ability to pay. The value of the wife's assets and income should be determined in order to ascertain her needs to maintain her position in life to which she had become accustomed, and such value is considered by the trial court in assessing both alimony and support." *Brennan v. Brennan*, 638 So. 2d

1320, 1324 (Miss. 1994) (citing *Brendel v. Brendel*, 566 So. 2d 1269 (Miss. 1990)).

In the present case, there is no indication that Mr. Mitchell's annual income in excess of $200,000 renders him unable to pay. Mrs. Mitchell has a monthly income of $3,000 $3,000 per month in rehabilitative alimony to be reduced to $1,500 per month after twenty months and to be ceased and, presumably replaced by a comparable salary after a return to work after a total of forty months. plus $1,500 in periodic alimony. Mrs. Mitchell established that her monthly expenses exceed $5,000. Simple mathematics demonstrates that she will suffer a deficit of at least $500 each month, and possibly more once her rehabilitative alimony is reduced. How can this be considered keeping her in the lifestyle to which she had become accustomed?

I believe the chancellor abused his discretion in failing to award periodic alimony which will keep Mrs. Mitchell in the standard of living she enjoyed during the marriage and to which she had become accustomed. The majority further complicates the matter in affirming based upon Mrs. Mitchell's share from the equitable distribution of marital assets-- assets to which she was entitled based upon her contributions to the marriage. In essence, the majority is allowing equitable distribution to supplement periodic alimony, a purpose for which it was not intended.

COLEMAN, J., JOINS THIS SEPARATE WRITTEN OPINION.