

IN THE COURT OF APPEALS

7/15/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00957 COA

LARK CHARLES BURCHELL APPELLANT

v.

ELIZABETH B. BURCHELL APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. SEBE DALE, JR.

COURT FROM WHICH APPEALED: FORREST COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT: JAMES R. HAYDEN

ATTORNEYS FOR APPELLEE: REBECCA TAYLOR

NATURE OF THE CASE: DIVORCE

TRIAL COURT DISPOSITION: DIVORCE TO ELIZABETH, AWARD OF \$11,097 IN LUMP SUM ALIMONY, 35% OF HIS \$82,000 RETIREMENT ACCOUNT, PAYMENT OF

MORTGAGE, PERIODIC ALIMONY OF \$600 PER MONTH TO CONTINUE UNTIL HER REMARRIAGE AND AS A LIEN UPON HIS ESTATE, AND AWARD OF \$1,200 TOWARD HER ATTORNEY'S FEES.

MANDATE ISSUED: 8/5/97

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

BRIDGES, C.J., FOR THE COURT:

Elizabeth Burchell (Elizabeth) was granted a divorce on the uncontested ground of adultery. The chancellor attempted to equitably divide the estate of Elizabeth and Lark Charles Burchell (Charles). Among other things, the chancellor granted Elizabeth periodic alimony to continue until her remarriage, and if Charles should die without Elizabeth remarrying, his estate shall continue to pay the periodic alimony. On appeal, Charles presents the following issues:

I. THE CHANCELLOR COMMITTED MANIFEST ERROR IN AWARDING PERIODIC AND LUMP SUM ALIMONY TO ELIZABETH.

II. THE CHANCELLOR COMMITTED ERROR IN PROVIDING THAT THE PERIODIC ALIMONY WOULD BE A LIEN AGAINST CHARLES' ESTATE.

III. THE CHANCELLOR ERRED IN ORDERING THE PAYMENT OF TWELVE HUNDRED DOLLARS FROM CHARLES TO ELIZABETH AS A CONTRIBUTION TOWARDS HER ATTORNEY'S FEES.

Elizabeth cross-appeals, basically refuting Charles's claims and stating that what she received was insufficient. Additionally, Elizabeth prays that Charles pay her attorney's fees on this appeal. We agree that the chancellor erred in granting Elizabeth a lien upon Charles's estate, but find no error with the chancellor's other rulings.

FACTS

Charles and Elizabeth were married on December 24, 1958 when they were seventeen and eighteen years old, respectively. The couple attended college together, with Elizabeth working full-time during most of their college, and Charles working during the summers. After college, both Charles and Elizabeth began careers in teaching and school administration. Two children were born of the marriage, who were self-supporting adults at the time of the divorce. Eventually, both Charles and Elizabeth obtained doctorates in their fields. Charles is a tenured staff member at University of Southern Mississippi (Southern). He earns an annual salary of \$65,000.00 and has approximately

\$82,000.00 in his state retirement account. While Elizabeth worked at Southern for a time, after she obtained her Ph.D., university policy forbade her to continue at the school. She accepted a position at William Carey College, where she worked for eight years. Elizabeth currently works at Pearl River Community College as grant administrator at an annual salary of \$51,000.00. She is employed on an annual contract basis and has no commitment beyond each year's contract. After several previous withdrawals for family expenses, Elizabeth's state retirement account contains approximately \$19,000.00.

The facts leading up to this divorce are mainly undisputed. Charles left Elizabeth on their thirtieth wedding anniversary and has since moved into a house with his paramour. Charles admitted to adultery. He pays \$900.00 a month to his paramour for her house payment. It was established that Charles does not have any significant savings beside his retirement account, nor does he own any real property. He drives a 1993 Chevrolet King Cab pick up truck, on which he owes \$5,800.00. His only other debt is a credit card account in the amount of \$1,500.00. The chancellor found Charles's expenses to be approximately \$2,000.00 a month.

Elizabeth stayed in the marital home, which has since fallen into a state of disrepair due to lack of funds to keep it up. In 1992, Charles conveyed the marital home to Elizabeth by quitclaim deed. However, the conveyance was not an assumption by Elizabeth of the financial obligation of the home other than the paying of then owing ad valorem taxes. Charles and Elizabeth first purchased the house in 1976, for about \$70,000.00. There is a balance of \$34,000.00 owing on the original mortgage resulting in monthly payments of \$554.79. Additionally, there exists a second mortgage on the house in the amount of \$36,500.00 with monthly payments of \$458.27. While both Charles and Elizabeth are obligors on both notes, only Elizabeth has made payments over the last five years. As for transportation, Charles provided Elizabeth with a 1981 Monte Carlo automobile that he obtained from his paramour. The Monte Carlo has 181,000 miles on it, is unreliable has neither air conditioning nor heat. Often Elizabeth is forced to rent a car in order to have reliable transportation to and from work. In addition to the mortgage debts of \$70,000.00 and unreliable transportation, Elizabeth owes approximately \$5,500.00 in past medical bills, and \$7,000.00 in personal debt. Her health has been poor in the past few years, necessitating hospitalization and sometimes extensive treatment. While Elizabeth's health is far from good, Charles has no health problems besides the occasional pain from arthritis.

Charles is in the possession of checks from the IRS for refunds totaling \$16,900.00 payable to him and Elizabeth. However, Charles and Elizabeth are jointly indebted to the state of Mississippi for approximately \$4,900.00.

The chancellor granted Elizabeth a divorce on the confessed and proven ground of adultery. Elizabeth was granted lump sum alimony in the form of the IRS refund checks, minus the \$4,903.00 owed to the state of Mississippi. In addition to the refund checks, the chancellor also granted Elizabeth thirty-five percent of Charles's retirement account to be paid when Charles commences to draw his retirement or on his death, whichever shall occur first. The last award of lump sum alimony granted to Elizabeth was in the form of the principal balance due on the second mortgage of the marital home, approximately \$36,500.00. The sum could be paid in lump sum or in monthly payments. As security for the debt, Charles was ordered to maintain a life insurance policy on himself in an amount not less than the outstanding balance of the mortgage debt, with Elizabeth and the

mortgagor as beneficiaries.

In periodic alimony, the chancellor awarded Elizabeth \$600.00 to be paid on or before the fifth day of each month. Moreover, the chancellor stated that if Elizabeth remained unmarried at the time of Charles's death, the payments shall remain an obligation of his estate. Lastly, the chancellor awarded Elizabeth one half of her attorney's fees, \$1,200.00.

I. THE CHANCELLOR COMMITTED MANIFEST ERROR IN AWARDING PERIODIC AND LUMP SUM ALIMONY TO ELIZABETH.

Charles contends that the chancellor should not have granted lump sum and periodic alimony, and Elizabeth argues that the chancellor did not grant enough lump sum and 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. That is what the chancellor did in the case before us. Certain guidelines have been developed to determine if an award of either is warranted.

A. Periodic Alimony

"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.

At the time of trial, Charles was in a tenured position at the university with an annual salary of \$65,000.00. Additionally, he was in good health, had no significant debt, and no extravagant living expenses. Elizabeth, on the other hand, was in an annual contractual position that paid a salary of \$51,000.00, but that she was in fear of losing because of lack of funding. The record is clear that Elizabeth's health was poor. She had heart and reflux problems necessitating ongoing treatment and care of physicians. While Elizabeth lived in the marital residence, she had made all the house payments since the separation, but was unable to maintain the house in a state of repair. Not only was her house in need of repair, but the automobile secured by Charles for Elizabeth to drive was a 1981 model with over 180,000 miles on it, without working heat or air conditioning. Charles, however, was driving a 1993 Chevrolet King Cab pickup truck. The chancellor took into account Charles's employment, his good health, and his expenses, as well as considering Elizabeth's failing health, job insecurity and unreliable transportation. We find no error with the chancellor's award of periodic alimony.

B. 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). Elizabeth helped with the household expenses from the day she and Charles were married. Moreover, she stayed in the marriage, while Charles left her on their thirtieth wedding anniversary. Charles has job security, good health, and a large retirement account. Elizabeth fears that her job will be cut due to lack of funding, her health is deteriorating, and she had to delve into her retirement account for family medical expenses. The disparity between Charles's and Elizabeth's estates is clear. Without the lump sum award, Elizabeth would lack financial security. The chancellor did not err in awarding lump sum alimony in addition to periodic alimony. Finding no error, we affirm.

II. THE CHANCELLOR COMMITTED ERROR IN PROVIDING THAT THE PERIODIC ALIMONY WOULD BE A LIEN AGAINST CHARLES'S ESTATE.

We agree that the chancellor erred in ordering the periodic alimony to become a lien on Charles's estate after his death. The law in this state is clear that periodic alimony ceases at a certain point. "This Court has consistently held that periodic alimony is subject to modification and ceases upon the wife's remarriage or the husband's death." *McDonald v. McDonald*, 683 So. 2d 929, 931 (Miss. 1996). The chancellor was clearly erroneous. While affirming the award of periodic alimony, we reverse and render the chancellor's order that the award become a lien on Charles's estate at his death.

III. THE CHANCELLOR ERRED IN ORDERING THE PAYMENT OF TWELVE HUNDRED DOLLARS FROM CHARLES TO ELIZABETH AS A CONTRIBUTION TOWARDS HER 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). The party requesting attorney's fees must establish the inability to pay. *Id.* When questioned at trial, Elizabeth related the amount of money her attorney charged per hour and the approximate number of hours worked. When asked if she had any money to pay that bill other than her monthly paycheck, Elizabeth responded, "No." The chancellor ordered that Charles pay one half of Elizabeth's attorney's fees. We do not believe the chancellor abused his discretion. Finding no error, this issue is meritless. Moreover, we are satisfied that the awards made to Elizabeth are fair and appropriate, and are not swayed by her arguments that the chancellor's awards are insufficient.

THE JUDGMENT OF THE FORREST COUNTY CHANCERY COURT IS AFFIRMED AS TO THE AWARD OF LUMP SUM AND PERIODIC ALIMONY AND THE AMOUNT OF ATTORNEY'S FEES. THE ORDER OF THE CHANCELLOR MAKING THE PERIODIC ALIMONY A LIEN ON CHARLES'S ESTATE IS REVERSED AND RENDERED. COSTS OF THIS APPEAL ARE ASSESSED TO APPELLEE.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION.

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

While I concur with the majority's decision to affirm issues I and III, I must dissent with that portion of the majority opinion that reverses and *renders* the chancellor's order that the award of periodic alimony become a lien on Charles's estate at his death. I agree with the majority's assertion that periodic alimony generally ceases upon the remarriage of the payee spouse or the death of the payor spouse. *McDonald v. McDonald*, 683 So. 2d 929, 931 (Miss. 1996). I also agree that the chancellor erred in awarding periodic alimony that will continue after Charles's death as an obligation of the estate. My problem, however, is with the majority's decision to render instead of remanding this case for further consideration by the chancellor.

It is obvious that the chancellor attempted to devise a total package to provide this wife of thirty years with a modicum of security. It would seem that disallowance by this Court of one portion of the chancellor's order would upset the whole plan. If we look at the total award which consists of only thirty-five percent of Charles's retirement and only \$600 a month for periodic alimony (\$487.27 of which must go for the first mortgage) with the only lump sum alimony being one IRS refund and payment of a second mortgage, it is clear that Elizabeth would be left with no security if the periodic alimony were stopped in the event of Charles's sudden death. I propose that it would be more equitable for this Court to remand this case to the chancellor and let him clarify the periodic and lump sum alimony awards. Obviously, the chancellor has blurred the distinction between the two forms of alimony and should be allowed to clarify his intentions. While I am aware that ambiguously worded alimony awards are to be construed as periodic alimony, *Overstreet v. Overstreet*, 692 So. 2d 88, 91 (Miss. 1997), I also know that we have the authority to find that a chancellor has mislabeled the award. *Creekmore v. Creekmore*, 651 So. 2d 513, 517 (Miss. 1995). In *Creekmore*, the supreme court found a clear case of mislabeling and therefore studied the substance of the award and labeled it appropriately, remanding the case for proper determination of the amount. *Id.*

In the case before us, the chancellor's intentions are not as clear and by taking it upon ourselves to place a label on the award, we risk upsetting the balance of equities that the chancellor has attempted to create. By remanding, we allow the chancellor to again devise a total package that is fair and equitable to the parties. *See Overstreet*, 692 So. 2d at 92 ("[O]ur ruling that the original alimony award was not lump sum . . . requires that we remand this matter to the chancellor for reconsideration in that light. The chancellor will then be able to consider the myriad of equitable factors which may affect this award."). If the chancellor's intent was to provide Elizabeth with some type of support in the event of Charles's sudden death then he can do so by awarding Elizabeth a fixed and certain sum of money which would be consistent with the definition of lump sum alimony in addition to the IRS refund and payment of a second mortgage that he has already awarded. *McDonald*, 683 So. 2d at 931-32 (holding that lump sum alimony is a fixed and certain sum of money that may be paid in installments which constitutes a property transfer that vests in the recipient spouse at the time alimony is awarded and therefore does not cease upon remarriage or death). On the other hand, if the chancellor did not intend to provide Elizabeth with additional support in the event of Charles's death, he could clarify this by making an award of alimony that is consistent with the definition of periodic alimony. *Id.* (holding that periodic alimony is modifiable and ceases upon the wife's remarriage or the husband's death). Either way, we have done our job as a reviewing court while at the same time permitting the one person (the chancellor) who is best positioned to determine an equitable solution in this matter to do so.

