

IN THE COURT OF APPEALS 5/6/97

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00242 COA

MARTIN HOWARD, JR.

APPELLANT

v.

TERESA HOWARD

APPELLEE

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

TRIAL JUDGE: HON. W. HOLLIS MCGEHEE II

COURT FROM WHICH APPEALED: PIKE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

CLYDE RATCLIFF

ATTORNEY FOR APPELLEE:

RALPH L. PEEPLES

NATURE OF THE CASE: DOMESTIC-DIVORCE

TRIAL COURT DISPOSITION: DIVORCE GRANTED; MARITAL PROPERTY DIVIDED;
ETC.

MANDATE ISSUED: 8/5/97

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

BRIDGES, C.J., FOR THE COURT:

Martin and Teresa Howard were granted a divorce on the ground of irreconcilable differences in the Pike County Chancery Court. The chancellor awarded joint legal custody, with Teresa being granted primary custody of the three minor children, allowed to stay in the marital home, and granted alimony and child support, as well as an equitable distribution of the couple's joint property and assets. In addition to joint legal custody of the children, Martin was granted an equitable distribution of the couple's joint property and assets. Teresa is a stay-at-home mother with no income of her own, while Martin is a surgeon who makes over \$200,000.00 annually. Martin appeals the decision of the Pike County Chancery Court and presents the following issues for consideration:

I. MANIFEST ERROR WAS COMMITTED WHEN THE LEARNED CHANCELLOR CLASSIFIED AS MARITAL PROPERTY AMERICAN ARTIST FILM CORPORATION SHARES ACQUIRED WITH PERSONAL INJURY PROCEEDS.

II. THE LEARNED CHANCELLOR COMMITTED MANIFEST ERROR IN DIVIDING MARITAL PROPERTY WITHOUT REGARD TO EQUITY VALUES AND DEBTS ASSIGNED TO MARTIN.

III. THE CHANCELLOR ABUSED HIS DISCRETIONARY AUTHORITY IN AWARDING TERESA ATTORNEY FEES.

Finding no error, we affirm.

FACTS

Martin and Teresa were married on December 18, 1982, while Martin was in his second year of medical school in Alabama. Teresa worked various jobs from the time of their marriage until 1988 when their second child was born. At that time, Teresa stayed home to take care of the children and the household. At the time of the divorce, the Howards had three children: Jillian, age ten; Kyle, age eight; and Rachael, age six.

After completing his residency in 1991, Martin accepted a position in Rocky Point, South Carolina. The family purchased a home there that they were unable to sell when they moved from Rocky Point to McComb, Mississippi. (The South Carolina residence eventually sold, against Teresa's wishes but at Martin's insistence, resulting in a loss.) The family moved to Mississippi so Martin could accept a surgical staff position at Southwest Mississippi Regional Medical Center. When Martin accepted his position, the hospital retired approximately \$100,000.00 of Martin's student loans. Martin had approximately \$40,000.00 of student loans left to repay.

In 1994, Teresa filed for divorce, charging Martin with adultery, cruel and inhuman treatment, and in the alternative, irreconcilable differences. Additionally, she asked for care, custody and control of the children. Martin filed his answer, consisting of a general denial and a counterclaim in which he also asked for custody of the children. On December 19, 1994, the chancellor entered a temporary order granting Teresa temporary custody of the children, temporary child support, alimony *pendente lite*, and enjoining the parties from interfering with one another. The matter came on for trial in September

1995, and the parties were granted a divorce on the ground of irreconcilable differences. The chancellor granted joint legal custody of the children to the parties, with Teresa having the primary care and custody. Additionally, the chancellor equitably divided the parties' jointly owned property based on the values presented by and agreed to by the parties. Feeling aggrieved, Martin appeals the chancellor's decision.

I. MANIFEST ERROR WAS COMMITTED WHEN THE LEARNED CHANCELLOR CLASSIFIED AS MARITAL PROPERTY AMERICAN ARTIST FILM CORPORATION SHARES ACQUIRED WITH PERSONAL INJURY PROCEEDS.

During their marriage while living in Mississippi, Martin was injured in a car accident. He received settlement proceeds in the amount of \$50,000.00. Teresa was not a party to the suit. When Martin received the proceeds, he deposited them into his and Teresa's joint checking account. From that checking account, he wrote the checks that purchased the \$50,000.00 worth of American Artist stock. On appeal, Martin claims that the stock belonged solely to him, and was not appropriate for equitable distribution. 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).

Maslowski, 655 So. 2d at 20-21. Under the law as it now stands, Martin's personal injury settlement money became commingled, marital property when he deposited it in his and Teresa's joint checking account. In order for property to be divided, it must be "marital property." The Mississippi Supreme Court defined marital property in *Hemsley v. Hemsley*:

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.

Hemsley v. Hemsley, 639 So. 2d 909, 914 (Miss. 1994). Therefore, the stocks were bought with joint funds, and were therefore subject to equitable distribution.

Martin also complains that the chancellor did not give him the right to buy Teresa's shares of the stocks once they were divided. However, in the chancellor's judgment and amended judgment of divorce, the following language grants either party the right to buy out the other:

If either party wishes to buy the other out, he or she may do so within sixty (60) days of entry of the order in this cause. Otherwise, there shall be an order entered directing the transfer of said stock as set out herein.

This issue is without merit.

II. THE LEARNED CHANCELLOR COMMITTED MANIFEST ERROR IN DIVIDING MARITAL PROPERTY WITHOUT REGARD TO EQUITY VALUES AND DEBTS ASSIGNED TO MARTIN.

The chancellor found that the entire value of the parties' marital property equaled \$392,615.00, and the total debt equaled \$277,500.00. The chancellor divided the assets and awarded Martin assets totaling \$193,655.00 (49% of the value of marital property), and awarded Teresa assets totaling \$198,960.00 (51% of the value of the marital property). Teresa received the 1993 Suburban, and Martin received the Ford Bronco. Martin further received the USAA account (\$1,500.00) and the DGNB IRA (\$25,000.00). Martin was ordered to pay all debts of the marriage except for those incurred by Teresa after the date of the temporary order. Teresa was granted sole use and occupation of the marital home as long as she remained unmarried, had custody of the children, and until the emancipation of all three children. Martin was ordered to continue meeting the mortgage payments on the marital home, for which he would be credited when the home was eventually sold. Teresa was awarded the contents of the marital home. The American Artist stock was divided, with Teresa awarded 70% and Martin retaining 30%.

This Court reviews the chancellor's decision under the manifest error standard of review. *Ferguson v. Ferguson*, 639 So. 2d 921, 930 (Miss. 1994). 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.

Ferguson, 639 So. 2d at 928. The chancellor reviewed all of the evidence and kept in mind the financial and familial contributions of both parties when considering the distribution of property. The chancellor also had to consider the fact that Martin was gainfully employed as a surgeon making approximately \$20,000.00 a month, while Teresa had not worked in eight years. At the time of the proceedings, Teresa was attending classes to enable her to find suitable employment in the future. While she was granted the marital home, the furnishings and contents of the marital home, and the 1988 Suburban, Teresa did not have any liquid assets on which to live. The American Artist stock was the only asset granted to her that Teresa could liquidate and live off until she finished school in the future and found employment. (The chancellor did order alimony for 48 months at \$1,000.00 per month and \$2,100.00 child support per month.) In light of the aforementioned *Ferguson* factors, we are satisfied that the chancellor's equitable division of property was not manifest error. This issue is meritless.

III. THE CHANCELLOR ABUSED HIS DISCRETIONARY AUTHORITY IN AWARDING TERESA ATTORNEY FEES.

The chancellor awarded Teresa attorney's fees in the amount of \$5,550.00, and gave Martin twelve months in which to pay them. Martin maintains the chancellor abused his discretion because Teresa could afford to pay her bills. An award of attorney's fees in divorce cases is within the sound discretion of the trial court. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1282 (Miss. 1993). Unless a chancellor abuses his discretion, his decision will be upheld. *Id.* The Mississippi Supreme Court addressed the awarding of attorney's fees in *Creekmore v. Creekmore*, 651 So. 2d 513, 520 (Miss. 1995):

The award of attorney fees in divorce cases is left to the discretion of the chancellor, assuming he follows the appropriate standards. Attorney fees are not generally awarded unless the party requesting such fees has established the inability to pay. "The fee should be fair and should only compensate for services actually rendered after it has been determined that the legal work charged for was reasonably required and necessary." When considering an award of attorney fees,

a sum sufficient to secure a competent attorney is the criterion by which we are directed. The fee depends on ... relative financial ability of the parties, the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, as well as the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case.

Attorney fees have been refused "where little or no evidence has been presented to substantiate the amount requested." Unless the chancellor abused his discretion or is manifestly wrong, his decision regarding attorney fees will not be disturbed on appeal.

Creekmore, 651 So. 2d at 520 (citations omitted). Teresa testified to her inability to pay her attorney. Her attorney testified to the time he spent on Teresa's case and his reasonable charges. The chancellor's decision to award Teresa attorney's fees is supported by trial testimony meeting *Creekmore* standards and not resulting in an abuse of discretion.

THE JUDGMENT OF THE PIKE COUNTY CHANCERY COURT GRANTING TERESA HOWARD A PERCENTAGE OF AMERICAN ARTIST FILM STOCK, EQUITABLY DIVIDING MARITAL PROPERTY, AND AWARDED ATTORNEY FEES IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. COSTS OF THIS APPEAL TAXED TO APPELLANT.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. HINKEBEIN, J., NOT PARTICIPATING.