

IN THE COURT OF APPEALS 12/17/96
OF THE
STATE OF MISSISSIPPI
NO. 94-CA-00183 COA

KAREN ELAINE (TURNER) BAIN HAMBY

APPELLANT

v.

BILLY DAVID BAIN

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: GRENADA COUNTY CHANCERY COURT ATTORNEY
FOR APPELLANT: JAMES P. VANCE

ATTORNEY FOR APPELLEE: SAMUEL J. WAITS

NATURE OF THE CASE: CONTEMPT OVER ALIMONY

TRIAL COURT DISPOSITION: JUDGMENT FOR HUSBAND, ALIMONY TERMINATED AT
REMARRIAGE

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

SOUTHWICK, J., FOR THE COURT:

Karen Hamby filed a motion for contempt against her former husband for failure to make required payments under a divorce decree. The Chancery Court of Grenada County found that the monthly

payments were for periodic alimony, and accordingly her ex-husband's obligations to make them terminated when she remarried. We agree with Mrs. Hamby's argument on appeal that the payments were installments of lump sum alimony, and reverse.

FACTS

The parties were married in 1972 and divorced on July 28, 1989. The decree incorporated a property settlement agreement. Mrs. Hamby conveyed to Mr. Bain two parcels of real property that were unmortgaged and had a value of \$125,000.00. Mr. Bain conveyed to Mrs. Hamby his undivided one half interest in the marital residence, his interest being valued at \$52,500.00. The now-disputed part of the agreement was that Mr. Bain was to pay alimony in the sum of \$1,200.00 per month for 60 months. The total payment would thus be \$72,000.00, which is the shortfall in the value of the real property Mrs. Hamby received compared to the value of that retained by Mr. Bain. In effect, these payments in time would equalize the disparity in real property values.

Mrs. Hamby was remarried on or about August 29, 1991. Mr. Bain continued making the \$1200 payments through May of 1992, although he was not timely. In September of 1992, Mr. Bain was notified that he would be cited for contempt if he did not bring his payments current. Mr. Bain promptly paid \$3,600.00 and claimed that this payment brought him current through August of 1991 when Mrs. Hamby remarried.

The chancellor found that during the preparation of the property settlement agreement, Mr. Bain wanted to describe the payments as "alimony." If they were alimony, he would be able to deduct them from his income tax obligations. The chancellor in considering the 1992 contempt motion, found that the parties would have labeled this \$72,000 as part of the property settlement, had they been required to give them a label that accurately described the purpose of the payments. The significance of the categories is that periodic alimony terminates at the remarriage of the recipient, while lump sum alimony paid in installments and property settlement payments do not. *Bowe v. Bowe*, 557 So. 2d 793, 794-95 (Miss. 1990). Periodic alimony is subject to modifications as well, while lump sum alimony is not. *Hubbard v. Hubbard*, 656 So. 2d 124, 132 (Miss. 1995).

The chancellor thoughtfully and cogently discussed recent developments in the supreme court case law in this area. He found there to be a significant, but not fully completed shift in the interpretation of payment obligations. The chancellor found that a majority of the court could still find compelling that no lump sum amount was stated in the agreement, only the amount of the monthly payments and the number of months they were to be made. Thus, even though the chancellor found that the payments were intended to equalize the property distribution, he felt bound by certain case law that had not yet been overruled. For him, the controlling case law would hold that "the language employed (included any poor draftsmanship, etc.) is the primary and ultimate referent[;] therefore the Court finds that the award was for 'periodic' alimony payments which terminated upon remarriage. The Plaintiff shall not have to repay any sums to the Defendant paid after the remarriage."

DISCUSSION

"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)). We find ample evidence in the record that the parties were trying to allow Mrs. Hamby to receive an equal distribution of property to that received by Mr. Bain, through the \$1,200.00 monthly payment spread out over sixty months. Taking that finding as controlling, we must determine the legal consequence. Particularly, we must decide the impact of these payments being called "alimony."

The general rule is that when the terms of alimony are unclear, courts will interpret a provision as one for periodic alimony and not lump sum. *Sharplin v. Sharplin*, 465 So. 2d 1072, 1073 (Miss. 1985). Even so, it is clear that a court should focus on the substance of the provision rather than on the label attached. *Creekmore v. Creekmore*, 651 So. 2d 513, 518 (Miss. 1995).

As the chancellor acknowledged, the supreme court already had held that a "[f]ixed and certain sum of money which is due and payable over a *definite period of time* is clearly alimony in gross, or lump sum alimony, and not periodic alimony." *Holleman v. Holleman*, 527 So. 2d 90, 92 (Miss. 1988) (citing *Wray v. Wray*, 394 So. 2d 1341, 1345 (Miss. 1981)). The difference in the Hamby-Bain agreement is that there was no initial statement of a sum certain to be paid; "simple math," to use the chancellor's phrase, could calculate that \$1200 per month for sixty months was \$72,000. But the chancellor saw a distinction between supreme court precedents in which that sum certain actually was identified in the agreement, and those in which it was not. We find, however, that the absence of the "simple arithmetic" being set out in the divorce agreements cannot override the clear intent that the alimony be a lump sum, property-equalizing set of payments.

For example, one case that the chancellor did not have to review is *Creekmore*, 651 So. 2d 513, 518 (Miss. 1995). In that case, a \$12,000 entitlement was labeled as periodic alimony, payable in twenty-four months with \$500 monthly installments. The court held that the award was "lump sum alimony" notwithstanding its being called "periodic alimony" in the chancellor's decree. The court stated the applicable rule in determining whether alimony awarded is lump sum or periodic as being "[w]ith or without a label attached, we must look to the substance of what has been provided to determine whether an obligation is lump sum or periodic." *Creekmore*, 651 So. 2d at 518 (citing *Bowe v. Bowe*, 557 So. 2d 793, 795 (Miss. 1990)). The substance here is to give Mrs. Hamby \$72,000.

There are other developing nuances to alimony interpretation. *See, e.g., Hubbard v. Hubbard*, 656 So. 2d 124, 126 (Miss. 1995) ("rehabilitative alimony"). We need go no further in this case than to commend the chancellor for his careful review of the case law and to hold that in fact the mere absence of a total amount appearing in a settlement agreement, does not keep a fixed number of payments of alimony from being "lump sum" alimony. Since the chancellor found that these payments were to equalize the property distribution, the label as simple "alimony" will not control. Mr. Bain's obligation to make the payments did not terminate at Mrs. Hamby's remarriage. Consequently we must return this cause to the chancellor for further proceedings to determine the amount still owing, and to make other appropriate orders.

THE JUDGMENT OF THE CHANCERY COURT OF GRENADA COUNTY IS REVERSED AND THE CAUSE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS ARE TAXED TO APPELLEE.

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