

**IN THE COURT OF APPEALS 09/03/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CA-00913 COA**

**IN THE MATTER OF THE DISSOLUTION OF THE MARRIAGE OF AVIS MAE WALLACE AND CARL D. WALLACE: ROBERT WALLACE, CONSERVATOR OF CARL D. WALLACE**

**APPELLANT**

**v.**

**AVIS MAE WALLACE**

**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 HALE SINGLETARY

COURT FROM WHICH APPEALED: HINDS COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

ROBERT S. MURPHREE

ATTORNEY FOR APPELLEE:

BETH RICHMOND

NATURE OF THE CASE: OTHER--COMBINATION OF DOMESTIC AND  
CONSERVATORSHIP

TRIAL COURT DISPOSITION: APPELLANT HELD IN CONTEMPT AND ORDERED TO  
PAY ALIMONY AND ARREARAGE; AWARD OF ATTORNEY'S FEES

BEFORE BRIDGES, P.J., KING, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

This case involves the enforcement of a previous judgment of divorce entered in the Chancery Court of Hinds County. Carl D. Wallace and Avis Mae Wallace were granted a divorce on the ground of irreconcilable differences on August 1, 1990. Mr. Wallace, due to health problems, is not a party to this proceeding. Rather, his interests are being represented by his duly appointed conservator.

I.

Facts and Contentions of the Parties

A property settlement agreement entered into between the parties and incorporated into the judgment provided for sixty installments of alimony from Mr. Wallace to Mrs. Wallace, beginning on July 1, 1990. The first thirty-six installments were to be in the amount of \$500.00 each, and the final twenty-four installments were to be in the amount of \$300.00 each.

On February 16, 1994, Mrs. Wallace filed a petition seeking, among other things, an adjudication of Mr. Wallace's contempt for his failure to make these installment payments (except for one partial payment of \$100.00 which Mrs. Wallace acknowledges receiving). The parties do not dispute that the remainder of the payments were not made. Rather, Mr. Wallace, through his conservator, sought to avoid his obligation on equitable grounds. He asserted that, after the divorce, the parties continued to live together under substantially the same arrangement as before the divorce until mid October 1993, and that, during that time, Mr. Wallace made the house payments, utility payments, and insurance payments on the home and contributed in some measure to the other normal living expenses of Mrs. Wallace, all in an amount he alleged to be in excess of his monthly obligation under the judgment. He claims that equity required that he be credited with such amounts against his obligation, which amounts were sufficient to cancel his obligations in full. He also asserts that Mrs. Wallace had exclusive possession of the home during the months of October 1993 through January 1994, but that he paid the mortgage payments for those months and was, therefore, entitled to credit for that amount also.

Mrs. Wallace's position is that, during this period, she was providing valuable services to Mr. Wallace by operating the household and providing personal care to him since, according to her, his health and ability to care for himself was steadily deteriorating due to the onset of Alzheimer's disease. She claims these services were more than equal in value to any in-kind benefits provided by Mr. Wallace during the period. It is undisputed that in October 1992, she obtained what was apparently a general power of attorney to manage Mr. Wallace's financial affairs and was, until the appointment of a conservator for Mr. Wallace, in sole control of Mr. Wallace's finances. She admitted her ability to pay herself from Mr. Wallace's funds during this period, but testified that she had simply declined to do so.

Mr. Wallace's condition deteriorated to the extent that, in the Fall of 1993, his brother secured an appointment as conservator of Mr. Wallace's person and estate. Mr. Wallace's family removed him

from the former marital home in October 1993, and since that time he has resided in the home of his mother. Mr. Wallace's living expenses were, at the time of the hearing, being met through social security benefits and pension benefits, although his conservator testified these sources were not adequate to meet Mr. Wallace's regularly recurring living expenses.

Although the terms of the 1990 agreement called for an immediate sale of the home and an equal division of the net proceeds, the parties made no effort to sell the home until Mr. Wallace was removed by his conservator over three years later. Approximately three months after Mr. Wallace left the home, Mrs. Wallace also vacated the property and unilaterally listed the house for sale with a real estate broker. The house was vacant and unsold at the time of the hearing. During the time from the divorce through the hearing date, Mr. Wallace had made all of the mortgage payments (both a first and second mortgage), had paid the taxes and insurance on the property, and had paid all utilities during the time the parties jointly occupied the property.

The chancellor granted Mrs. Wallace substantial relief on her petition. Until the time she began to manage Mr. Wallace's finances in October 1992, he adjudicated Mr. Wallace to be in contempt for wilfully failing to pay the monthly alimony installments; however, he prescribed no punishment for Mr. Wallace's contempt beyond awarding interest at the rate of 8% per annum on these installments. The chancellor determined that, after October 14, 1992, Mr. Wallace's deteriorating mental capacities prevented a determination that he was wilfully disregarding his obligations. Nevertheless, he determined that the alimony payments continued to be his lawful obligation. The chancellor refused to award interest on these installments. He also gave Mr. Wallace certain credits against the amount due, apparently based upon the equitable consideration that Mr. Wallace was paying some amount of Mrs. Wallace's living expenses. Under the terms of the original agreement, it would appear that \$5,200.00 would have fallen due during this period; however, the chancellor reduced that amount to \$2,700.00, a reduction of the obligation by approximately one-half.

The chancellor then awarded Mrs. Wallace a judgment for the remaining installments for November 1993 through May 1995 in the amount of \$5,700.00 without any reduction, except that he declined to award interest on the amount.

Beyond the \$2,700.00 credit against Mr. Wallace's obligation mentioned above, the chancellor granted Mr. Wallace an additional credit of \$5,908.50, which, according to Mrs. Wallace's testimony, equaled one-half the first mortgage payment for the time the parties shared occupancy of the home. Mrs. Wallace claimed this to be for a thirty-nine month period during which the mortgage obligation was \$303.00 per month. The proof showed that there was, during that same period, a second mortgage obligation on the home in an amount of approximately \$370.00 per month (there was a slight variation in the proof as to the exact amount) paid solely by Mr. Wallace, for which the chancellor made no corresponding adjustment. The chancellor also gave Mr. Wallace credit in an amount equal to the total of both the first and second mortgage payments during the three months Mrs. Wallace was in sole occupancy of the property.

## II.

### Scope of Review

This Court has a limited scope of review of the chancellor's decision in 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) (citations omitted). We are not called upon nor permitted to substitute our collective judgment for that of the chancellor. *Richardson v. Riley*, 355 So. 2d 667, 668-69 (Miss. 1978) (citations omitted). A conclusion that we might have decided the matter differently, standing alone, is not a basis to disturb the result. *Id.*

### III.

#### Monetary Credits Allowed and Disallowed

Mr. Wallace cites us to no Mississippi authority that would permit the chancellor to make adjustments in the amounts due to a divorced spouse under a property settlement agreement on a showing that the indebted former spouse had bestowed in-kind benefits on the other after the divorce. We conclude that the answer to that proposition is not the foregone conclusion that the chancellor appeared to determine. It must be remembered that a property settlement agreement has been said to be in the nature of a contract between the parties. *East v. East*, 493 So. 2d 927, 931 (Miss. 1986) (citations omitted). Provisions for lump-sum alimony, though payable in installments, are not subsequently modifiable by the chancellor. *East*, 493 So. 2d at 931 (citing *Butler v. Hinson*, 386 So. 2d 716, 717 (Miss. 1980)). Parties, once legally divorced, have no legal or equitable obligation to continue to contribute toward the support or maintenance of the other beyond the terms of the divorce judgment and are to be treated, in all other respects, as any other two legally competent individuals.

Therefore, to frame the issue in more stark terms, the question could be analogized to a situation where one *sui generis* individual is indebted by contract to another and is sued for collection of the debt. Can the debtor claim credits against the undisputed obligation by showing that, for a period of time, the creditor lived in the debtor's house rent-free, was provided free meals and other benefits? Framed in those terms, the proposition seems doubtful. Our supreme court has, on at least one occasion, declined to adjust the various claimed equitable rights of persons cohabiting but not married on considerations of public policy. *See, e.g., Davis v. Davis*, 643 So. 2d 931, 934-36 (Miss. 1994) (citations omitted).

This Court does not feel that this is an appropriate case to reach this issue. The proof was substantially lacking, both as to the nature of the benefits provided by Mrs. Wallace in terms of personal care to Mr. Wallace after the divorce, as well as in the value of any benefits bestowed upon Mrs. Wallace by virtue of her continued occupancy of the home. There was no proof of the actual costs of upkeep and maintenance of the home, utility costs, expenditures for food, and such related items that might be expected to form the basis for an equitable adjustment by the chancellor, assuming such an adjustment were determined proper under the law. The chancellor's decision to simply credit Mr. Wallace with approximately one-half of his otherwise existing obligation during the time the parties continued to reside together appears nothing more than an arbitrary guess, unsupported by competent evidence. Since Mr. Wallace bore the burden of proof on his claimed

equitable credits, we conclude that the chancellor was manifestly in error in making such an arbitrary determination without competent proof, and that, therefore, the credit to Mr. Wallace of \$2,700.00 must be disallowed, but for a failure of the proof rather than as a misapplication of the law, which is an issue we decline to reach.

On the other hand, we must deal with the chancellor's credits extended to Mr. Wallace for making the mortgage payments during the time the parties jointly occupied the property. The property settlement agreement was silent, both as to the question of which cotenant was entitled to use and occupancy of the property after the divorce and as to which cotenant would assume responsibility for the inevitable expenses associated with ownership of the property pending a sale -- mortgage payments, taxes and insurance, among others. It is obvious that these provisions were left unaddressed because the agreement contemplated the immediate sale of the property; however, that does not leave the original agreement beyond reproach on the point. Even had the parties immediately commenced strenuous efforts to sell the property, there was no certainty that such efforts would meet with immediate success. There was always the possibility of a period extending to months during which the property remained unsold, without any provision in the agreement as to how that situation would be handled.

Section 93-5-2 of the Code of Mississippi contemplates an agreement providing "for the settlement of any property rights between the parties," and such agreement should reasonably be expected to address foreseeable contingencies. Miss. Code Ann. § 93-5-2(2) (1972). This agreement clearly did not accomplish that aim in that it failed to provide for the almost certain circumstance of the proper treatment of the marital domicile pending a sale. Realizing that none of the attorneys now before the Court were involved in the original divorce, this is not intended as a criticism of any of them. It is mentioned to illustrate the problems that a settlement agreement prepared with insufficient consideration of its possible consequences can cause for the parties later, at a time when their mutual affairs should have long ago been concluded and each hopefully well on his or her way to a better future, unshackled by past problems. There is also the corresponding detriment to society occasioned by the necessity to occupy the limited judicial resources of the State in resolving matters that should have been considered and addressed at an earlier stage. A marriage, particularly one of long standing, inevitably results in entangled and complex financial considerations. The practice of giving insufficient consideration to the potential complications involved in untangling these relationships in the name of expediency simply to conclude a divorce does not promote the best interests of the parties nor the ends of justice.

We determine that the only proper way to resolve this matter of the house, silent as the property settlement agreement is on the question, is to determine it according to general principles of law relating to jointly owned property. The law of cotenancy provides a number of basic rules that are applicable. Both cotenants enjoy an equal right to occupancy of the property. *Williams v. Sykes*, 170 Miss. 93, 95-96, 154 So. 727, 728 (1934). In this case, for the bulk of the time after the divorce, the parties did, in fact, share the occupancy; therefore, there is no basis for any monetary adjustment on this basis. The law of cotenancy in Mississippi also declares that:

"it is a settled rule that when one co-tenant has paid a debt or obligation for the benefit of the common property, or has discharged a lien on or an assessment imposed against it, he is entitled as a matter of right to have his fellows refund to him their proportionate shares

of the amount paid, or else abandon their interests in the property."

*Connolly v. McLeod*, 217 Miss. 231, 242, 63 So. 2d 845, 850 (1953) (quoting 14 Am. Jur. *Cotenancy*

§ 43 (1938)). It is on this consideration that we determine that the chancellor's decision concerning credits for mortgage payments constitutes a manifest abuse of discretion.

The chancellor awarded Mr. Wallace credit for one-half the first mortgage payment, but allowed no credit for payments of the second mortgage. He offered no reason for this arbitrary denial. Since Mrs. Wallace was obligated by law to pay one-half of both these joint obligations, and since Mr. Wallace, for the entire period, discharged her share of the obligations from his own resources, the above authority clearly establishes his right of contribution from her for her one-half. The proof is not totally clear as to the amounts paid by Mr. Wallace during the applicable period in discharge of these obligations. The figure of \$303.00 for the first mortgage was used, but there is also an indication that this amount may have varied from time to time because it included an escrow for taxes and insurance. The proof indicates that the second mortgage was a constant amount during the entire period, although there is a conflict in the proof as to the exact amount.

There is the additional error in the chancellor's ruling that permitted Mr. Wallace credit for the entire mortgage amount, both first and second, for the three months Mrs. Wallace was in exclusive possession of the property. It is not contended that Mrs. Wallace ousted Mr. Wallace from his right of occupancy of the property as a cotenant. The right of both cotenants to the occupancy of the entire property is absolute. *Wilder v. Currie*, 231 Miss. 461, 474-75, 95 So. 2d 563, 566-67 (1957). By continuing her occupancy, Mrs. Wallace was doing nothing beyond exercising a right she enjoyed under the law, and there was no basis, legal or equitable, to require her to reimburse Mr. Wallace any amount for her continued occupancy beyond her one-half share of the necessary obligations to protect and preserve the property, such as the mortgage, tax, and insurance obligations already discussed. The additional requirement that she discharge Mr. Wallace's one-half of the obligation for this period was manifestly in error.

IV.

#### Interest Calculations

The chancellor suspended the accrual of legal interest on a significant portion of Mr. Wallace's obligation, allowing it only for the period that he determined Mr. Wallace to be in contempt for willfully failing to pay. An obligation to pay a sum of money pursuant to the lawful order of a court of competent jurisdiction accrues interest under the mandate of statute. Miss. Code Ann. § 75-17-7 (1972); *Brand v. Brand*, 482 So. 2d 236, 237-38 (Miss. 1986) (citations omitted). The right to have interest accrue on a judgment does not hinge upon the issue of whether the judgment debtor was willfully refusing to pay. Interest accrues on a judgment even in spite of an unequivocal showing of

inability to discharge the obligation. It has been said that an obligation under a divorce decree to make a future payment becomes an unalterable legal obligation at the time the payment falls due, after which it accrues interest. *Lewis v. Lewis*, 586 So. 2d 740, 742-43 (Miss. 1991) (citations omitted). We can find no authority for the chancellor to suspend the statutory right of Mrs. Wallace to have interest accrue on those obligations due her under the terms of the divorce judgment and conclude that this was a manifest abuse of discretion.

We also note an obvious error in the chancellor's handling of interest that must be considered on remand. He allowed interest to accrue from the date the obligation became due, which was correct. However, as to those credits allowed Mr. Wallace for mortgage payments, he only credited the amount actually paid. Some of these credits were earned by Mr. Wallace a number of years prior to the chancellor's decision and should have been credited against Mr. Wallace's obligation on the date earned. Such a proper use of credits would have substantially decreased the interest obligation. Though we are reversing the decision for other reasons, nevertheless, we direct that this error not be repeated on remand, and that, to the same extent all obligations of Mr. Wallace are to accrue interest from the due date, he is certainly entitled to have his credits applied at the time they were earned.

V.

#### The Necessity for Remand

Because of the uncertainty in the actual amounts expended by Mr. Wallace in discharging the first mortgage obligations, we are unable to render the correct judgment in this Court with the degree of certainty the law requires. We, thus, are required to reverse and remand with the following directions. Mr. Wallace's obligation to make the installment payments under the divorce agreement is affirmed, and Mrs. Wallace is entitled to the amount due. She is entitled, as the chancellor awarded, interest on the installments beginning in July 1990 and ending with the October 1992 installment, but she is also entitled to interest on the remaining installments for which the chancellor suspended interest accrual, and, to that extent, the chancellor's order is reversed. This interest shall, in each case, accrue from the due date of the installment.

However, Mr. Wallace shall, in each month, be entitled to a corresponding *contemporaneous* credit in the amount of one-half the first and second mortgage payments (to include payments of taxes and insurance) together with one-half any additional expenditures made by Mr. Wallace for the necessary repair and structural upkeep of the property as shown by the proof. These additional expenses do not include expenses related solely to the normal operation of the household, such as utility charges, telephone charges, household cleaning, yard maintenance and related expenses, as the law does not provide a right of contribution between cotenants for such expenditures. Interest shall accrue only on the net amount found due each month by Mr. Wallace after allowing his proper credits for that month.

It is contemplated, in view of the apparent amount of the monthly obligations being discharged solely by Mr. Wallace, that at the point when his monthly obligation under the divorce agreement reduced to \$300 per month, his right of contribution from Mrs. Wallace will be found to exceed his alimony obligation. Such excess credits shall result in additional *contemporaneous* credit against any

computed obligation due from Mr. Wallace at that time. This method of computation shall continue unchanged during the period of time that Mrs. Wallace was in sole occupancy of the home place, as well as during the time thereafter that the property was apparently unoccupied. The extra credit allowed Mr. Wallace for the full amount of both mortgage payments during the three months Mrs. Wallace solely occupied the property is reversed and modified to permit a credit for only one-half such payments.

VI.

#### Enforcement Remedies

Neither side in this appeal has questioned the authority of the chancellor to limit Mrs. Wallace's remedy for collection of her judgment to a payment of \$500.00 per month from Mr. Wallace's conservator. It would appear to this Court that such an adjudication may be beyond the authority of a chancellor. *Brown v. Gillespie*, 465 So. 2d 1046, 1048-49 (Miss. 1985). *But see Rubisoff v. Rubisoff*, 242 Miss. 225, 133 So. 2d 534, 538 (1961). A judgment creditor is entitled, under the law, to those remedies provided for satisfaction of a judgment. Any legal obligation, whether child support, alimony, or simply a contractual debt, once reduced to judgment vests the judgment creditor with the collection remedies provided by statute, and we question the equitable power of the chancellor to suspend such rights of collection in these circumstances. Admittedly, the *Rubisoff* case would seem to indicate to the contrary; however, insofar as this Court can determine, the case has not been followed on this point in any subsequent decision of the supreme court. This issue should be addressed, if necessary, in the subsequent judgment of the chancery court.

VII.

#### The Defense of Laches

Mr. Wallace argues that Mrs. Wallace's failure to insist upon payment of the monthly obligations due her during the time the parties continued to reside together and her failure to pay herself each month once she assumed responsibility for Mr. Wallace's finances under the power of attorney should, under the facts of this case, constitute a bar to her recovery under the doctrine of laches. We cannot disagree that this argument has some merit, especially in view of Mr. Wallace's present incapacity. Had the chancellor agreed with this argument, this Court would be hard pressed to disturb such a finding. However, he did not, and we conclude that the decision of whether or not to apply the doctrine of laches is one rightfully committed to the sound discretion of the chancellor. We cannot determine that the chancellor's decision was such so demonstrably wrong as to warrant interference by this Court. *See Mississippi Dep't of Human Servs. v. Molden*, 644 So. 2d 1230, 1233 (Miss. 1994) (citations omitted).

**THE JUDGMENT OF THE HINDS COUNTY CHANCERY COURT IS REVERSED AND THIS CAUSE REMANDED FOR FURTHER DISPOSITION NOT INCONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE ASSESSED EQUALLY BETWEEN**

**ROBERT WALLACE, CONSERVATOR FOR CARL D. WALLACE, AND AVIS MAE WALLACE.**

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