

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01110 COA

SHELIA BROOME

APPELLANT

v.

T.C. BROOME

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 H. MYERS

COURT FROM WHICH APPEALED: JACKSON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

WILLIAM T. REED

ATTORNEY FOR APPELLEE:

MARK H. WATTS

NATURE OF THE CASE: DIVORCE - ALIMONY & PROPERTY SETTLEMENT

TRIAL COURT DISPOSITION: WIFE AWARDED CUSTODY AND 30% OF CONSTRUCTION CO. VALUE.

MANDATE ISSUED: 6/10/97

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

BRIDGES, C.J., FOR THE COURT:

The Chancery Court of Jackson County granted Shelia Broome a divorce from Thomas Broome on grounds of uncondoned adultery. Aggrieved by certain aspects of the chancellor's ruling, Shelia

appeals on the following grounds:

I. THE TRIAL COURT ERRED IN ITS FAILURE TO AWARD SHELIA BROOME PERIODIC ALIMONY.

II. THE TRIAL COURT ERRED IN FAILING TO ENFORCE ITS OPINION AND ORDER AS TO THE EQUITABLE DISTRIBUTION OF ASSETS, BY ALLOWING T.C. BROOME TO ARBITRARILY AND UNILATERALLY CALCULATE, OFFSET, AND DETERMINE SUCH LIABILITY.

Thomas cross-appeals asserting that:

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY AWARDING ATTORNEY FEES TO MRS. BROOME. MRS. BROOME IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES FOR PROSECUTING THIS APPEAL.

FACTS

Thomas and Shelia Broome were married on December 26, 1970. In June of 1993, Thomas filed a complaint for divorce against Shelia in the Chancery Court of Jackson County on the ground of habitual cruel and inhuman treatment. Shelia answered the complaint, counter-claiming for separate maintenance and requesting a divorce on the ground of uncondoned adultery. In December of 1993, the chancellor decreed a judgment of divorce in favor of Shelia based on Thomas's uncondoned adultery. Both parties filed post-trial motions for reconsideration and new trial, which were denied by the chancellor. Feeling aggrieved, Shelia has perfected this appeal.

I. THE TRIAL COURT ERRED IN ITS FAILURE TO AWARD SHELIA BROOME PERIODIC ALIMONY.

Shelia appeals from the chancellor's denial of her request for periodic alimony. Thomas responds by arguing that the chancellor awarded Shelia lump-sum alimony, and that the chancellor's denial of periodic alimony was not manifest error or an abuse of discretion. Sheila argues that the divorce decree provision characterized by Thomas as lump-sum alimony was in fact not alimony, but rather part of the court's equitable division of the marital estate. Shelia contends that "the chancellor did not award *any* alimony whatsoever -- not lump[-]sum, periodic, or rehabilitative."

This Court has reviewed the chancery court record in this matter and the chancellor's order of divorce. Based on our analysis of these findings, we hold that the so-called "lump-sum alimony" provision, as alleged by Thomas, was not an award of alimony. We hold that Shelia is correct in characterizing the chancellor's award to her of the fair market value of thirty percent of Thomas's interest in T.C. Broome Construction Company to be a part of the court's equitable division of the marital property. Accordingly, Shelia was not awarded periodic alimony by the chancellor and her appeal from this ruling is well founded.

This Court's standard of review is limited in domestic relations cases where the chancery court has decided to award alimony. In such cases, the award will not be altered on appeal unless it is found to

be against the overwhelming weight of the evidence or manifestly in error. *Tilley v. Tilley*, 610 So. 2d 348, 351 (Miss. 1992). Likewise, because this Court's power to review a chancellor's award of alimony is limited, so is this Court's power to review a chancellor's refusal to grant alimony. See *Smith v. Smith*, 614 So. 2d 394, 397 (Miss. 1993) (stating that whether to award alimony is matter largely within discretion of chancellor). Periodic alimony is designed to support the wife in the manner to which she has become accustomed to the extent of the husband's ability to pay. *Brendel v. Brendel*, 566 So. 2d 1269, 1272 (Miss. 1990). In determining if an award of alimony is appropriate, "[t]he chancellor should consider the reasonable needs of the wife and the husband's right to lead a normal life with a decent standard of living." *McEachern v. McEachern*, 605 So. 2d 809, 815 (Miss. 1992). "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). The Mississippi Supreme Court has established the following factors to be used by chancellors in determining if an award of periodic alimony is appropriate:

(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, and (5) other factors such as estimated amount of income taxes, the use of the family home or automobile, and the payment of insurance.

Crowe v. Crowe, 641 So. 2d 1100, 1102 (Miss. 1994).

Under the facts of this case, Thomas was forty years old at the time of the divorce and in excellent physical health. The evidence before the chancellor indicated that at the time of the divorce Thomas was earning between \$100,000 to \$150,000 annually. While Shelia was only forty-three years old at the time of divorce, because she had "very few skills and no recent work experience," the chancellor found that she "has no capacity to earn any income of any appreciable nature," and that "Mr. Broome has by far the greater earning capacity of the parties." Furthermore, because Shelia is unable to earn any more than the minimum wage, she will have to deplete her share of the marital assets to provide for her own day-to-day support, maintenance, and upkeep. Of note, the chancellor ordered Thomas to pay Shelia's medical expenses for four years from the June 16, 1995 order of the court. However, we hold that the chancellor's finding that Shelia "has no capacity to earn any income of any appreciable nature" clearly and unequivocally establishes her need for periodic alimony. In light of the chancellor's factual determination as to Shelia's future earning prospects, we hold that it was manifest error for the chancellor to deny her prayer for periodic alimony. Accordingly, we must reverse and remand this issue to the chancellor for a hearing as to what amount of periodic alimony is appropriate under the facts at bar.

II. THE TRIAL COURT ERRED IN FAILING TO ENFORCE ITS OPINION AND ORDER AS TO THE EQUITABLE DISTRIBUTION OF ASSETS, BY ALLOWING T.C. BROOME TO ARBITRARILY AND UNILATERALLY CALCULATE, OFFSET, AND DETERMINE SUCH LIABILITY.

Shelia complains that the \$165,140 Thomas tendered The \$165,140 amount was arrived at unilaterally by Thomas, with no input from Shelia or sanction by the chancery court. The chancellor's decree of June 16, 1995 did not establish a specific dollar amount for the "fair market value" of the interest at issue, nor did it specify how or by whom such valuation was to be made. to her as

allegedly representing the fair market value of her thirty percent of his equity interest in T.C. Broome Construction Co. was not an accurate valuation of the property. Shelia asserts that the chancellor refused to compel Thomas "to produce the books, documents and records upon which the calculations were based," or to afford her accountant an opportunity to examine these documents so as to allow her to ascertain the fair value of her interest. Thomas, however, contends that he allowed Shelia's accountant, Kelly Singleton, "to examine all financial documents of the company and also allowed him to examine any and all [of] T.C. Broome Construction Company's files upon request." Although each side of this dispute presents diametrically opposite versions of the facts, it is stipulated by both parties that Shelia's cashing the \$165,140 check from Thomas would "not be taken as an admission on her part in reference to the value of the company or any other financial matters that are still in dispute." In light of the significant factual disputes surrounding this issue and the absence of factual findings concerning the valuation of Shelia's interest, on remand the chancellor shall fashion such relief as he deems necessary to insure that the fair market value The fair market value of Shelia's interest in T.C. Broome Construction Co. shall be calculated as of the date of the divorce decree, December 30, 1993. Shelia shall be compensated with interest on this amount, at the judgment rate, from December 30, 1993 until the final resolution of this issue. Thomas shall be credited with the \$165,400 previously tendered to Shelia, plus interest at the judgment rate from the date of her presentment of the check until the final resolution of this issue. of Shelia's interest is conclusively established. Of course, such valuation may result in a finding that Thomas must tender additional sums to Shelia, that Shelia must return a portion of the \$165,140 to Thomas, or that the \$165,140 did in fact represent the fair market value of the portion of T.C. Broome Construction Co. to which Shelia is entitled. We strongly suggest that the chancery court employ financial experts to assist the court in valuing Shelia's interest in T.C. Broome Construction Co.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY AWARDING ATTORNEY FEES TO MRS. BROOME. MRS. BROOME IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES FOR PROSECUTING THIS APPEAL.

Thomas argues that Shelia was able to pay her attorney, therefore, the chancellor's award of attorney's fees to her was an abuse of discretion. Shelia contends that the chancellor's award to her of attorney's fees incurred in pursuing her divorce from Thomas was not an abuse of discretion and was supported by the facts before the chancellor. Shelia also asks this Court for an award of her attorney's fees incurred in prosecuting this appeal.

The award of attorney's fees and other costs in a divorce action is generally left to the discretion of the chancellor. *Brooks v. Brooks*, 652 So. 2d 1113, 1120 (Miss. 1995). The Mississippi Supreme Court, however, has held that "if a party is able to pay attorney's fees, [the] award of attorney's fees is not appropriate." *Martin v. Martin*, 566 So. 2d 704, 707 (Miss. 1990). On the other hand, "where the record shows an inability to pay and a disparity in the relative financial positions of the parties, we find no error" in the award of attorney's fees. *Brooks*, 652 So. 2d at 1120. Importantly, "consideration of the net worth of the parties, standing alone is insufficient" to support an award of attorney's fees. *Benson v. Benson*, 608 So. 2d 709, 712 (Miss. 1992). Under such circumstances, "[t]he record must [also] reflect the requesting spouse's inability to pay his or her own attorney's fees." *Brooks*, 652 So. 2d at 1120.

In the portion of his order dealing with the issue of attorney's fees and other costs of the divorce, the

chancellor specifically found that "Mrs. Broome has no capacity to earn any income of any appreciable nature, and that Mr. Broome has by far the greater earning capacity of the parties." We hold this statement to constitute a finding by the chancellor that a disparity exists in the relative financial positions of the parties and that Shelia was unable to pay her attorney. In light of such a factual determination, we must hold that the chancellor's award to Shelia of her attorney's and accountant's fees, along with the chancellor's assessment to Thomas of the costs of the divorce proceeding, was not an abuse of the chancellor's discretion.

Regarding Shelia's prayer for attorney's fees on appeal, this Court is guided by our supreme court's decision in *Smith v. Smith*, 429 So. 2d 588, 590 (Miss. 1983). In *Smith*, the court subjected the chancellor's award of attorney's fees to our familiar abuse of discretion standard, and also followed its "custom" of awarding the prevailing party attorney's fees incurred on appeal. The *Smith* court held that "in accord with custom, one-half that amount [awarded below] is awarded here for attorney's fees on appeal." *Smith*, 429 So. 2d at 590; *see also McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982) (stating that "[o]rdinarily, under our rule, an award of one-half of the sum granted by the trial court is deemed appropriate on appeal"). Based on the foregoing authority, because the chancellor did not abuse his discretion in awarding Shelia \$7500 in attorney's fees for the proceeding below, we feel that an award of one-half that amount is appropriate on appeal. Shelia is therefore entitled to the sum of \$3750 for her attorney's fees incurred in prosecuting this appeal.

THE JUDGMENT OF THE CHANCERY COURT OF JACKSON COUNTY IS REVERSED AND REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE/CROSS-APPELLANT.

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