

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00830 COA**

JERRY LOYD TIDWELL, SR.

APPELLANT

v.

JOSIE LAVELLE MAY TIDWELL

APPELLEE

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

DATE OF JUDGMENT:	6/3/96
TRIAL JUDGE:	HON. MELVIN MCCLURE
COURT FROM WHICH APPEALED:	TATE COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	BOBBY T. VANCE
ATTORNEY FOR APPELLEE:	NAT TROUTT
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	DIVORCE GRANTED TO WIFE ON GROUNDS OF ADULTERY.
DISPOSITION:	AFFIRMED - 11/4/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	11/25/97

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

HERRING, J., FOR THE COURT:

Josie Lavelle May Tidwell was granted a divorce on June 3, 1996, from Jerry Loyd Tidwell, Sr. by judgment of the Chancery Court of Tate County, Mississippi. In addition, Mrs. Tidwell was awarded periodic alimony, lump sum alimony, and attorney's fees. Mr. Tidwell now appeals the trial court's decision to this Court contending that no alimony or attorney's fees should have been awarded and that the chancellor should have recused himself. For the reasons stated in this opinion, we disagree with the Appellant and affirm the judgment of the trial court.

I. THE FACTS

Jerry Tidwell and Josie Tidwell were married on June 12, 1965, and had been married for thirty-one years at the time the trial court issued its judgment of divorce in these proceedings. Two children were born of the marriage of the parties, and both of the children were grown and emancipated at the time this action was heard on its merits. Thus, we are not concerned in this case with child custody or child support issues. The parties separated for the last time on March 20, 1995, and Mrs. Tidwell

originally filed a complaint in this action on April 13, 1995, charging Mr. Tidwell with adultery, habitual cruel and inhuman treatment, and irreconcilable differences. Mr. Tidwell filed an answer to the complaint and also filed a "counter-complaint" or counterclaim of his own in which he requested a divorce from Mrs. Tidwell on the grounds of habitual cruel and inhuman treatment and irreconcilable differences.

This action was originally set for hearing on November 21, 1995, by order of Chancellor Melvin McClure, Jr. On that date, Mr. Tidwell filed a motion requesting that the chancellor recuse himself. After a brief argument, the chancellor denied the motion and proceeded to consider the divorce phase of the case, by agreement of the parties and on an uncontested basis. In other words, Mr. Tidwell announced, through counsel, that he did not wish to contest Mrs. Tidwell's complaint for divorce on the ground of adultery. He was allowed to withdraw and dismiss his counterclaim with prejudice and to withdraw his answer to the extent that it denied that Mrs. Tidwell had the right to obtain a divorce on the ground of adultery. Mrs. Tidwell was then allowed to present evidence to the court in support of her request for a divorce on an uncontested basis, with no opposition or cross-examination from Mr. Tidwell. By further agreement of the parties, all property and other issues raised in Mrs. Tidwell's complaint were to be heard at a later date. That hearing was ultimately scheduled for February 29, 1996.

At the hearing held on November 21, 1995, Mrs. Tidwell testified that her husband had informed her that he was having an affair and sexual relations with another woman whom he had met at work in Memphis, Tennessee. He separated from his wife in 1994 in order to pursue this adulterous relationship. Later, Mr. Tidwell and his wife reconciled for a brief period when Mrs. Tidwell quit her job in Mississippi and moved to Memphis to live with her husband in an apartment in an attempt to save the marriage. This attempt at reconciliation was unsuccessful, and the parties ultimately separated for the last time on March 20, 1995. Mrs. Tidwell returned to the home of her parents. Mr. Tidwell testified as an adverse witness and admitted that he was engaged in a sexual affair with the same third party at the time of the hearing. Mr. Tidwell also testified that he had been treated for depression because of feelings of guilt he experienced as a result of his unfaithfulness to Mrs. Tidwell. Finally, Jerry Tidwell, Jr., an ordained minister and the son of the parties, testified that his father had confirmed to him that he was having an adulterous affair with a woman other than the Appellee. At the conclusion of the hearing, the chancellor announced that he was satisfied that Mrs. Tidwell had successfully established her grounds for divorce, but the court decided to wait to grant the divorce until it had heard the evidence on property issues.

At the February 29, 1996, hearing, the trial court found that Mrs. Tidwell had a gross monthly income of \$1,085.02 and a net monthly income of \$859. Mr. Tidwell had a gross monthly income of \$2,498 and a net monthly income of \$1,794. Mrs. Tidwell was a high school graduate who had worked primarily in clerical positions, and she had given up her long-time employment at C.O. Pate Funeral Home in order to go to Memphis and attempt to save her marriage. Because of lack of support from her husband after their separation on March 20, 1995, Mrs. Tidwell incurred several debts to help pay for her living expenses and outstanding loans. She had possession of one jointly owned vehicle, a 1991 Chevrolet Cavalier, upon which she owed a debt of \$2,478.42. Mrs. Tidwell was paying this debt at a rate of \$172.03 per month. Mr. Tidwell owned a 1989 Ford pickup truck, upon which nothing was owed. He also bought a 1991 Pontiac automobile in his name during January, 1996. The sum of \$5,700 was owed on the Pontiac, and Mr. Tidwell was paying \$163 per

month on this debt.

Mr. Tidwell had debts of \$12,560 for which he was responsible, and Mrs. Tidwell had debts of \$4,026.25. Finally, Mr. Tidwell had IRA and 401K accounts in the sum of approximately \$12,800 at the Peoples Bank in Senatobia, Mississippi, which he had accumulated as a result of his employment. However, this money had been withdrawn in cash by Mr. Tidwell prior to these proceedings. Mrs. Tidwell had also withdrawn \$5,600 from accounts jointly held by the parties during the separation of the parties but prior to their brief reconciliation. When the parties decided to give their marriage a second chance, Mrs. Tidwell divided the money she had left giving Mr. Tidwell \$1,500.

In its ruling, the trial court found as follows:

1. Mrs. Tidwell was entitled to a divorce on the grounds of uncondoned adultery.
2. Mrs. Tidwell was awarded an immediate cash payment of \$6,400, which could be referred to as either lump sum alimony or an equitable division of jointly accumulated personal property.
3. Mr. Tidwell was required to pay certain indebtedness during the marriage in the sum of \$12,164.
4. Mrs. Tidwell was ordered to pay certain indebtednesses in the sum of \$4,026.42
5. Mrs. Tidwell was awarded title to her 1991 Cheverolet Cavalier automobile and required to pay the indebtedness against it. Mr. Tidwell was required to pay the sum of \$131.77 per month to his medical insurance provider so that Mrs. Tidwell could have COBRA benefits from Mr. Tidwell's medical insurance policy.
6. Mr. Tidwell was required to pay periodic alimony to Mrs. Tidwell in the sum of \$400 per month.
7. Mr. Tidwell was required to pay Mrs. Tidwell's attorney's fee in the sum of \$2,150 at the rate of \$75 per month.

II. THE ISSUES

Mr. Tidwell submitted the following issues for consideration on appeal:

- A. DID THE CHANCERY COURT ERR IN OVERRULING THE DEFENDANT'S MOTION FOR RECUSAL?
- B. DID THE CHANCERY COURT ERR IN RENDERING ITS DECISION REGARDING THE GROUNDS FOR DIVORCE, THE AWARD OF LUMP SUM ALIMONY, THE AWARD OF PERIODIC ALIMONY, AND THE AWARD OF ATTORNEY'S FEES?

III. ANALYSIS

- A. DID THE CHANCERY COURT ERR IN OVERRULING THE DEFENDANT'S MOTION FOR RECUSAL?

The propriety of a trial judge sitting to hear a case is subject to review under the manifest abuse of

discretion standard. *Green v. State*, 631 So. 2d 167, 177 (Miss. 1994); *Rutland v. Pridgen*, 493 So. 2d 952, 954 (Miss. 1986). In *Green*, the Mississippi Supreme Court stated:

A presumption exists "that a judge, sworn to administer impartial justice, is qualified and unbiased. To overcome the presumption, the evidence must produce a 'reasonable doubt' (about the validity of the presumption)[.]" *Buchanan [v. Buchanan]*, 587 So. 2d at 896, quoting *Turner v. State*, 573 So. 2d 657, 678 (Miss. 1990). When a judge is not disqualified under the constitutional or statutory provisions, "the propriety of his or her sitting is a question to be decided by the judge and is subject to review only in case of manifest abuse of discretion." *Ruffin v. State*, 481 So. 2d 312, 317 (Miss. 1985).

Green, 631 So. 2d at 177.

Mr. Tidwell contends that since the chancellor had at one time practiced law with the attorney for Mrs. Tidwell, the judge's impartiality might reasonably be questioned pursuant to Canons 2 and 3(C) (1) of Mississippi's Code of Judicial Conduct. Canon 2 of the Mississippi Code of Judicial Conduct states:

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interest of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Canon 3(C)(1) states:

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as [a] lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it; . . .

See also Miss. Code Ann. § 9-1-11 (Rev. 1991) and Miss. Const. Art. 6, § 165, which provides that no judge shall preside at a trial where he is related to any of the parties or where he has an interest in any matter before the court.

There is no evidence in the record to establish that the chancellor or counsel for Mrs. Tidwell are related or that the chancellor had any personal interest or prejudice in regard to the outcome of the case *sub judice*. Thus, we are unprepared to say that the chancellor, who took an oath to administer

impartial justice, should be required to recuse himself based upon the fact that he once practiced law in association with Mrs. Tidwell's attorney. In the absence of some evidence that casts reasonable doubt upon the validity of the presumption of the trial judge's impartiality or some other evidence challenging the chancellor's impartiality, we are compelled to rule that this assignment of error has no merit. *See Turner v. State*, 573 So. 2d 657, 678 (Miss. 1990); *Jenkins v. Forrest County Gen. Hosp.*, 542 So. 2d 1180, 1181 (Miss. 1988) (holding that the propriety of a trial judge sitting is subject to review only in a case of "manifest abuse of discretion").

It is noteworthy that Mr. Tidwell's motion to recuse was filed on the very day that this case was set for hearing on its merits. According to Mississippi Rule of Civil Procedure Rule 6(d), a motion shall not normally be heard unless opposing counsel receives notice of the motion at least five days prior to the hearing. The chancellor, in denying the motion to recuse, correctly took note of the lateness of the filing of the motion to recuse and stated that one of his bases for denying the motion was the fact that the Mississippi Rules of Civil Procedure had not been complied with.

B. DID THE CHANCERY COURT ERR IN RENDERING ITS DECISION REGARDING THE GROUNDS FOR DIVORCE, THE AWARD OF LUMP SUM ALIMONY, THE AWARD OF PERIODIC ALIMONY, AND THE AWARD OF ATTORNEY'S FEES?

In this assignment of error, Mr. Tidwell makes a broad attack, generally, upon the sufficiency of the chancellor's decision as it pertains to (1) Mrs. Tidwell's grounds for divorce, (2) the award of lump sum alimony, (3) the award of periodic alimony, and (4) the award of attorney's fees. We will address each of these four aspects of the trial court's twenty-nine page opinion in the sequence which they were raised by Mr. Tidwell. However, it should be noted:

Our scope of review in domestic relations matters is limited by our familiar substantial evidence/manifest error rule. *Stevison v. Woods*, 560 So. 2d 176, 180 (Miss. 1990). "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." *Bell v. Parker*, 563 So. 2d 594, 596-97 (Miss. 1990)

In other words, "[o]n appeal [we are] required to respect the findings of fact made by a chancellor supported by the credible evidence and not manifestly wrong." *Newsom v. Newsom*, 557 So. 2d 511, 514 (Miss. 1990) *This is particularly true in the areas of divorce, alimony and child support. . . . The word "manifest," as defined in this context means "unmistakable, clear, plain, or indisputable."* *Blacks Law Dictionary* 963 (6th ed. 1990).

Magee v. Magee, 661 So. 2d 1117, 1122 (Miss. 1995) (other citations omitted) (emphasis added); *see also Reddell v. Reddell*, 696 So. 2d 287, 288 (Miss. 1997).

(1) Grounds for Divorce.

It is well settled in Mississippi that to obtain a divorce on the ground of adultery there must be clear and convincing evidence of both an adulterous inclination and a reasonable opportunity to satisfy that inclination. *Holden v. Frasher-Holden*, 680 So. 2d 795, 798 (Miss. 1996). The evidence is not required to show the alleged acts beyond a reasonable doubt, but rather the evidence must be logical, tend to prove the facts charged, and be inconsistent with a reasonable theory of innocence. *Owen v.*

Gerity, 422 So. 2d 284, 287 (Miss. 1982) (citation omitted). "Adultery may be shown by evidence or admissions and either are sufficient to support a decree of divorce." *Jordan v. Jordan*, 510 So. 2d 131, 132 (Miss. 1987).

At the trial, Mr. Tidwell testified to having sexual relations with another woman during a time when he was still married to Mrs. Tidwell and at the time of trial. Moreover, he testified at trial that he did not disagree with the allegations of adultery made by Mr. Tidwell. Jerry Tidwell, Jr., the son of the parties, testified on behalf of Mrs. Tidwell. Jerry, who is a minister for the Enterprise Church of Christ in Myrtle, Mississippi, stated that he had spoken with his father on two occasions about his father's relationship with another woman. The first occasion occurred in August of 1994. At that time, Mr. Tidwell admitted to Jerry that he had had an affair with another woman many years earlier during his marriage with Jerry's mother. Jerry spoke to his father again after Mr. Tidwell had separated from his mother the last time. Jerry testified that Mr. Tidwell at that time indicated that he "just couldn't get away from this woman."

In his findings of fact and conclusions of law, the chancellor specifically found that Mrs. Tidwell had carried her burden of proof in demonstrating Mr. Tidwell's uncondoned adultery. Moreover, the chancellor recognized that Mr. Tidwell did not contest Mrs. Tidwell's complaint for divorce on the ground of adultery when, through counsel, the Appellant stated to the court, "We do not object to the plaintiff obtaining a divorce on the grounds of adultery, and we understand that she will have to bring forth minimum proof for the Court to be able to make an award on that ground" Thereafter, the chancellor received evidence and testimony regarding Mr. Tidwell's alleged adultery. Not only did Mrs. Tidwell testify as to what she knew of Mr. Tidwell's adulterous activities, but also she submitted the testimony of her son. As stated, there was also the testimony of Mr. Tidwell, in which he admitted to having sexual relations with another woman while the parties were still married. Moreover, Mr. Tidwell admitted to being treated for depression as a result of the guilt he felt because of his relations with another woman. We rule that the chancellor did not err in granting Mrs. Tidwell a divorce on the grounds of adultery.

(2) Lump Sum Alimony.

The chancellor awarded to Mrs. Tidwell the sum of \$6,400 as lump sum alimony. As stated in *Tilley v. Tilley*, 610 So. 2d 348, 351 (Miss. 1992): "The amount of alimony awarded is a matter primarily within the discretion of the chancery court because of its peculiar opportunity to sense the equities of the situation before it." Moreover, in *Cheatham v. Cheatham*, 537 So. 2d 435, 438 (Miss. 1988) and subsequent cases, our supreme court has identified four factors to be considered in determining whether lump sum alimony is appropriate in a particular case where the wife is granted a divorce:

1. Substantial contribution to accumulation of total wealth of the payor, either by quitting a job to become a housewife or assisting in spouse's business;
2. A long marriage;
3. Where the recipient spouse has no separate income or the separate income is meager by

comparison;

4. Without the lump sum awarded, the receiving spouse would lack any financial security.

See also Tilley, 610 So 2d at 351. Moreover, according to the *Cheatham* case, "the single most important factor is the disparity of the separate estates." *Cheatham*, 537 So. 2d at 438.

In the case *sub judice*, the chancellor found that the parties had been married for thirty-one years and that Mrs. Tidwell's income was fifty percent less than Mr. Tidwell's income. In addition, the evidence established that Mrs. Tidwell had indeed contributed substantially to the accumulation of the assets of the parties during the course of the marriage, and although neither party had financial security, Mrs. Tidwell was "steadily losing ground" and was being forced to borrow money to meet her living expenses. The \$6,400 award to Mrs. Tidwell in lump sum alimony represented one-half of the funds in the Individual Retirement Account and the 401K account accumulated by Mr. Tidwell over the years through his employment. With the appropriate standard of review in mind, we are unwilling to say that the trial court abused its discretion or committed manifest error in its award of lump sum alimony to Mrs. Tidwell. This assignment of error likewise has no merit.

(3) Periodic Alimony.

Mr. Tidwell was required to pay periodic alimony to Mrs. Tidwell in the sum of \$400 per month. As stated above, we will not overturn the trial court's ruling on this issue unless the court was manifestly wrong and abused its discretion in its findings of fact, or otherwise applied an incorrect legal standard. *Magee*, 661 So. 2d at 1122. In making its determination to award periodic alimony, the chancellor correctly considered the guidelines or factors set forth in *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993). These factors are:

- a. the income and expenses of the parties;
- b. the health and earning capacities of the parties;
- c. the needs of each party;
- d. the obligations and assets of each party;
- e. the length of the marriage;
- f. the presence or absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide child care;
- g. the age of the parties;
- h. the standard of living of the parties, both during the marriage and at the time of the support determination;
- i. the tax consequences of the spousal support order;
- j. fault or misconduct;
- k. wasteful dissipation of assets by either party;

1. any other factor deemed by the court to be just and equitable in connection with the setting of spousal support.

Id. at 1280. See also *Hammonds v. Hammonds*, 597 So. 2d 653, 655 (Miss. 1992); *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994).

In its twenty-nine page opinion, the trial court analyzed each of the twelve *Armstrong* factors in arriving at its periodic alimony award.⁽¹⁾ After a review of the entire record as well as the briefs filed by counsel, we find it unnecessary to re-evaluate each of the *Armstrong* factors in this opinion. We find that the chancellor was within his discretion in awarding \$400 per month in periodic alimony to Mrs. Tidwell.

(4) Attorney's Fees.

Mr. Tidwell was required by the trial court to pay Mrs. Tidwell's attorney's fees in the sum of \$2,150. In making this ruling, the chancellor took into consideration Mr. Tidwell's "limited ability to pay" and allowed the appellant to pay the fees in monthly installments of \$75 per month.

The award of attorney's fees in matters such as this is entrusted to the sound discretion of the trial court. *Armstrong*, 618 So. 2d at 1282. However, before such fees can be awarded, as well the amount of such fees, the court should consider "the 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 of the attorney due to the acceptance of the case." *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982). Furthermore, it must be shown that the party requesting attorney's fees has no ability to pay her own attorney's fees. *Dunn v. Dunn*, 609 So. 2d 1277, 1286 (Miss. 1992). In the case *sub judice*, the chancellor expressly found that Mrs. Tidwell had no ability to pay her own attorney's fees since she was borrowing money to make ends meet. Moreover, it appears from the record and briefs that all parties and the court agree that the *McKee* factors enumerated above were addressed and satisfied. Thus, we find that the court did not abuse its discretion in awarding attorney's fees to Mrs. Tidwell in the sum of \$2,150, to be paid in \$75 monthly installments.

THE JUDGMENT OF THE CHANCERY COURT OF TATE COUNTY IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

1. In its opinion, the trial court determined that this was not a proper case for an equitable distribution of assets accumulated during the marriage, since those assets were meager at best.