IN THE COURT OF APPEALS 10/17/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00502 COA

DEWAN LUTHER ROBERTS

APPELLANT

v.

BRENDA ROBERTS

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 MYERS

COURT FROM WHICH APPEALED: CHANCERY COURT OF GEORGE COUNTY

ATTORNEY FOR APPELLANT:

WOODROW PRINGLE

ATTORNEY FOR APPELLEE:

GARY L. ROBERTS

NATURE OF THE CASE: DOMESTIC RELATIONS: DIVORCE - ALIMONY

TRIAL COURT DISPOSITION: IRRECONCILABLE DIFFERENCES DIVORCE GRANTED; LUMP SUM ALIMONY AWARD OF $100,000; PERIODIC ALIMONY AWARDED FOR TEN (10) YEAR PERIOD AT $500 PER MONTH; ONE-HALF INTEREST IN FAMILY HOME AND SURROUNDING ACREAGE VESTED IN WIFE; ONE-HALF INTEREST IN TRAILER PARK VESTED IN WIFE; CUSTODY OF MINOR DAUGHTER GRANTED TO WIFE; $450 PER MONTH CHILD SUPPORT AWARDED

BEFORE THOMAS, P.J., COLEMAN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Brenda Roberts (hereinafter "Brenda") and Dewan Luther Roberts (hereinafter "Dewan") agreed by written consent to be divorced on the grounds of irreconcilable differences. The parties also consented that Brenda would be awarded the custody of the parties' minor child with Dewan to have visitation rights. The parties then consented to have the chancery court to decide the remaining disputed issues: (1) Which party will be responsible for carrying health and hospitalization insurance for Mollie and how any non-covered expenses are to be paid? (2) The amount of the child support to be paid by Dewan to Brenda; (3) Whether Dewan will be required to maintain life insurance upon himself, the amount thereof, duration of coverage and identity of beneficiaries; (4) Whether Brenda will be granted the exclusive use and possession of the home and its contents; (5) The payment of the indebtedness of the home including principal, interest, taxes and insurance, and reasonable upkeep and maintenance; (6) A division of the personal property acquired by the parties during their marriage; (7) The division of the debts incurred by the parties; (8) Whether Brenda will be awarded lump sum and/or periodic alimony; (9) The division of any other assets acquired by the parties, including cash, accounts and deposits; (10) Whether Brenda will be entitled to any portion of the funds held by Dewan which was received from the settlement of his personal injury claim; (11) The division of other real property acquired during the marriage of the parties; (12) Whether Brenda will be awarded an equitable or constructive trust in and to any real property; (13) Whether Brenda will be awarded attorney's fees, and if so, the amount thereof; and (14) The assessment of court costs.

The chancellor granted a divorce on irreconcilable differences grounds with the following provisions: Brenda was awarded custody of the parties' child, Mollie Michelle Roberts (hereinafter "Mollie"), with Dewan being granted visitation; Dewan was ordered to pay $450.00 in child support per month along with provisions regarding medical expenses and insurance for Mollie; each party was to share in Mollie's college expenses; Brenda was awarded the use and possession of the home and the surrounding acreage (approximately seventeen (17) acres); Dewan was ordered to pay the monthly indebtedness on the home and the taxes and insurance; Brenda was awarded an equitable interest in the home and the real estate upon which it is located (thus, divesting Dewan of a one-half interest in the home and surrounding land); the court ordered that Brenda be given full credit for any improvements she should make to the family home at the time of sale of the home; Brenda's right to the use and possession of the family home and surrounding land shall expire upon Mollie's emancipation at which time the property is to be sold; Brenda was awarded a one-half interest in the real property and improvements made to the property upon which the trailer park is located, giving Brenda a one-half undivided interest in the property (thus, divesting Dewan of one-half interest in said property); Dewan was awarded the farm equipment and implements; Brenda was awarded the personal property in the home and Mollie's personal property and the automobile currently in her possession; Brenda was ordered to pay certain indebtedness; Brenda was awarded $100,000.00 in lump sum alimony from Dewan; Dewan was ordered to pay Brenda $500.00 a month in periodic alimony for a period of ten (10) years; Dewan was ordered to pay Brenda $4000.00 for partial reimbursement for attorney's fees; Brenda was awarded a lien on all of the real estate owned by Dewan to secure payment of the funds awarded to her under the Judgement. Dewan appeals assigning the fol lowing issues on appeal: (1) Did the chancellor err in awarding lump sum alimony of

one hundred thousand dollars?; (2) Did the chancellor err in awarding periodic alimony of five hundred dollars per month for a period of ten years?; (3) Did the chancellor err in awarding attorney's fees?; (4) Did the chancellor err in divesting title of the homestead and trailer park from the appellant in order to convey one-half interest in the property to the appellee? Finding no error, we affirm.

STATEMENT OF FACTS

Brenda and Dewan Roberts were married October 31, 1975. The parties were married approximately eighteen years and the marriage produced one child, Mollie, who was sixteen years of age at the time of trial. Brenda is employed by Mississippi Gulf Coast Community College as a secretary and has worked there twenty-five (25) years. Brenda holds an Associate of Science degree plus 12 hours and is not actively working toward a degree. Dewan is self-employed in the rental business, in which he was when they were married. Dewan has also worked offshore and has driven an 18-wheeler truck. The family has lived in the family home for 16 years and built it from a shack (with one bedroom, a living area, kitchen, utility room and a bathroom) to approximately 3500 square feet with a significant portion unfinished. The house sits on approximately seventeen (17) acres which Dewan owned prior to the marriage. The home sustained substantial damage from Hurricane Fredrick in 1979. This property was free of debt prior to that point when the parties borrowed approximately $34,000.00 for repairs. This debt is secured by the home and various other properties with both Dewan and Brenda having borrowed the money. Dewan developed a trailer park on a three (3) acre parcel of land adjoining the home's acreage. He then purchased various mobile homes during the course of the marriage, renovating, repairing and placing them in the trailer park. The trailer park developed into a 20 trailer park which generates rental income. Brenda testified that she handled the rental property finances on some occasions which included working on the books for all the rental properties. Brenda also testified that she helped Dewan in cleaning up rental properties on occasion in order to ready them for rental to tenants, that she helped collect rent, and that she helped keep the properties rented. Other real properties owned by Dewan include: the Torres Street home; the Dantzler Street duplex; five apartments on Cornwood Drive; a duplex on Seneca Street in Pascagoula; two unimproved lots in Escatawpa (which are rented to trailer owners); a house with 35 acres of land (which he purchased from his mother); and an improved 40 acre plot in Agricola.

In 1986, Dewan received a settlement in the amount of $685,000.00 from a disability injury incurred while he was employed by Child's Drilling Company. At that time, Dewan deposited $585,000.00 in an investment account with Prudential Bache Securities and $100,000.00 in a certificate of deposit with First National Bank of Lucedale. At the time of trial the accounts contained approximately $600,000.00 and $56,000.00, respectively.

Brenda testified that her adjusted monthly gross income is $1,432.14. She testified that her car payment is $278.97 per month and that she would incur an additional $200.00 expense each month to add Mollie to her health insurance. Brenda testified that during the marriage she paid household expenses and her car note, the rental money paid the house note and Dewan paid the utilities. Brenda estimated her monthly expenses to be $2,420.44 per month on her financial declaration dated 12/15/92.

Dewan's testimony is less clear in that he testified that his income fluctuates from month to month

depending on when certain dividends are paid and the occupancy rate of the rental properties. Dewan prepared a financial declaration as 12/15/92 which provided $3,308.00 per month in gross income. This same declaration reflected a $2,724.67 in monthly adjusted gross income and $2,251.00 in monthly expenses. Dewan also introduced into evidence an updated list, titled "Monthly Expenses," which reflects $6,375.65 in monthly expenses. The remaining information is less clear. Dewan testified that the $8,205.00 figure reflects the rental income and his interest income. The record reveals that the trailer park contains twenty (20) trailers which average $200.00 each per month in rental income. Furthermore, testimony regarding Dewan's 1992 tax return revealed his monthly interest income to be "a little more than $3,000" (reflected as $37,508 annual income in 1992).

STANDARD OF REVIEW

"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)).

ARGUMENT AND DISCUSSION OF LAW

The division of marital assets is now governed by the guidelines set forth by the Mississippi Supreme Court in *Hemsley v. Hemsley*, 639 So. 2d 909 (Miss. 1994) and *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994). *Johnson*, 650 So. 2d at 1287.

> First, the character of the parties' assets, i.e., marital or nonmarital, must be determined pursuant to *Hemsley*. The marital property is then equitably divided, employing the *Ferguson* factors as guidelines, in light of each parties' nonmarital property. *Ferguson*, 639 So. 2d at 928. If there are sufficient marital assets which, when equitably divided and considered with each spouse's nonmarital assets, will adequately provide for both parties, no more need be done. If the situation is such that an equitable division of marital property considered with each party's nonmarital assets, leaves a deficit for one party, then alimony based on the value of nonmarital assets should be considered.

Johnson, 650 So. 2d at 1287. "Upon dissolution of a marriage, the chancery court has the discretion to award periodic and/or lump sum alimony, divide real and personal property, including the divesting of title, and may consider awarding future interests to be received by each spouse." *Ferguson*, 639 So. 2d at 929. "In the final analysis, all awards should be considered together to determine that they are equitable and fair." *Id*. With these principles in mind, we turn to the present case.

> I. DID THE CHANCELLOR ERR IN AWARDING LUMP SUM ALIMONY OF ONE HUNDRED THOUSAND DOLLARS?

The Mississippi Supreme Court has set forth four factors which are to be considered in awarding lump sum alimony:

> 1) substantial contribution to accumulation of wealth by quitting job to become housewife or assisting in husband's business; 2) long marriage; 3) separate income or separate estate meager in comparison to that of payor spouse; and 4) financial security without lump sum alimony.

Creekmore v. Creekmore, 651 So. 2d 513, 517 (Miss. 1995); *Crowe v. Crowe*, 641 So. 2d 1100, 1103 (Miss. 1994) (citations omitted); *Bland v. Bland*, 629 So. 2d 582, 587 (Miss. 1993) (citation omitted). "Most important is a comparison of the estates." *Creekmore*, 651 So. 2d at 517. In *Heigle v. Heigle*, the court stated that "[i]n the case of property settlement and lump sum alimony, the court's decision must hinge on the value of the marital estate, or the spouses' separate estates." *Heigle v. Heigle*, 654 So. 2d 895, 898 (Miss. 1995) (citing *Ferguson v. Ferguson*, 639 So. 2d 921, 928-29 (Miss. 1994); *Cheatum v. Cheatum*, 537 So. 2d 435, 438 (Miss. 1988)).

Dewan gives substantial weight to the first factor in arguing that Brenda is not entitled to lump-sum alimony because she did not contribute to the accumulation of his wealth. Instead, he argues that it was his work that resulted in the accumulation of wealth. This argument is flawed for several reasons. First, the chancellor did hear testimony from Brenda that she contributed to Dewan's rental business by working on the books. Brenda also testified that she helped Dewan in cleaning the rental properties, that she helped collect rent, and that she helped keep the properties rented. While it does not appear that Brenda's contributions were continuous, the period of the accumulation of Dewan's sizeable estate spanned the eighteen years of marriage. Second, the large bulk of Dewan's wealth results from his cash assets held in First National Bank of Lucedale and a Prudential Bache account. These cash assets are the settlement monies from an injury Dewan received while employed by Child's Drilling Company. Dewan was injured and received a twenty-five percent (25%) disability as a result. Dewan argues that these monies are his personal property. Regardless, "[t]he source of one party's ownership of assets has never been a factor in the determination of a lump sum alimony award." *Creekmore*, 651 So. 2d at 517 (citations omitted). While Brenda may not have contributed to the accumulation of the large cash assets held by Dewan, neither did Dewan. *Id*. Third, Brenda did contribute to the maintenance of the household during the eighteen years of marriage. Throughout the marriage (except for a short period when Mollie was born) Brenda worked at the community college. Brenda testified that her salary went to support her and Mollie's personal expenses. Brenda testified that she paid household expenses, paid for her automobile, and paid for household furnishings. Thus, with Brenda paying such expenses, Dewan was free to use his income to acquire more rental properties and trailers. Finally, there is little doubt that the family home expanded from a shack to a large home of approximately 3500 square feet. While a significant portion of the home remains unfinished, both parties contributed to the expansion.

The chancellor found that Dewan has dividend and interest income in excess of $5,000.00 per month. Additionally, Dewan has a large amount of income from his rental properties which include the trailer park, the Torres Street home, the Dantzler Street duplex, the apartments on Cornwood Drive, and a duplex on Seneca Street in Pascagoula. Dewan also owns two rented mobile home lots in Escatawpa, a house with 35 acres of land (which he purchased from his mother), and an improved 40 acres plot in Agricola. Additionally, Dewan has a Prudential Bache account in excess of a half million dollars and various pieces of farm equipment and vehicles.

The chancellor found that Brenda has three acres of unimproved land in Vancleave given to her by

her mother. Brenda is employed at Gulf Coast Community College where she earns approximately $24,000.00 annually. Brenda has a retirement account which consists of approximately $27,000.00.

The chancellor determined that after eighteen (18) years of marriage, the assets of the parties are "extremely unequal." Specifically, the chancellor found that there had been a long marriage; that Brenda's estate was meager in comparison to Dewan's estate; that Brenda has made a substantial contribution to the accumulation of the wealth of the parties by her efforts as a homemaker and mother, and financial contributor to the marriage by working outside the home. Upon review of the record before us, we cannot say that the chancellor erred in requiring Dewan to pay Brenda $100, 000.00 in lump sum alimony, especially in light of the great disparity in the estates of the parties. This issue is without merit.

> II. DID THE CHANCELLOR ERR IN AWARDING PERIODIC ALIMONY OF FIVE HUNDRED DOLLARS PER MONTH FOR A PERIOD OF TEN YEARS?

The Mississippi Supreme Court has set out nine factors which are to be considered in determining a reasonable award for alimony:

(1) the health of the husband and his earning capacity;

(2) the health of the wife and her earning capacity;

(3) the entire sources of income of both parties;

(4) the reasonable needs of the wife;

(5) the reasonable needs of the child;

(6) the necessary living expenses of the husband;

(7) the estimated amount of income tax that the respective parties must pay on their incomes;

(8) the fact that the wife has the free use of the home, furnishings, automobile; and

> (9) such other facts and circumstances bearing on the subject that might be shown by the evidence.

Hemsley v. Hemsley, 639 So. 2d 909, 912-13 (Miss. 1994). Brenda introduced evidence that her gross income was $1,856.16 per month. Her only source of income is from her secretarial job. Brenda's listed expenses totaled $2,420.44 per month. With her adjusted gross income amounting to $1,432.14 per month and her monthly expenses totaling $2,420.44, Brenda is unable to meet her monthly expenses.

Dewan indicated that his monthly gross income to be $8,205.00 from interest earned on his cash assets and rental properties. Dewan's listed expenses totaled $ 6,375.65 per month on his updated "Monthly Expenses" list entered into evidence.

"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) (citing *Rainer v. Rainer*, 393 So. 2d 475, 478 (Miss. 1981)). After eighteen years (18) of marriage and evaluation of the parties' relative incomes and expenses, the chancellor determined that Dewan was to pay Brenda $500.00 a month in periodic alimony for a period of ten (10) years. This is a small amount in comparison to Dewan's monthly gross income of $8,205.00 which Dewan can comfortably meet. A careful review of the record reveals that the chancellor did not abuse his discretion in awarding Brenda $500.00 per month in periodic alimony. Thus, this issue is without merit.

III. DID THE CHANCELLOR ERR IN AWARDING ATTORNEY'S FEES?

"The award of attorney's fees in a divorce case is generally left to the discretion of the chancellor." *Brooks v. Brooks*, 652 So. 2d 1113, 1120 (Miss. 1995) (citation omitted); *see also Hemsley*, 639 So. 2d at 915. The Mississippi Supreme Court has held:

> [W]hen a party is able to pay attorney's fees, award of attorney's fees is not appropriate. *Martin v. Martin*, 566 So. 2d 704, 707 (Miss. 1990). However, where the record shows an inability to pay and a disparity in the relative financial positions of the parties, we find no error. *Powers v. Powers*, 568 So. 2d 255 (Miss. 1990).

Brooks, 652 So. 2d at 1120 (citing *Hammett v. Woods*, 602 So. 2d 825, 830 (Miss. 1992)).

At trial, Dewan stipulated to the reasonableness of the attorney's fees. Brenda showed insufficient resources from which to pay her attorney's fees. Given the fact that Brenda's take-home pay and alimony will not cover her monthly expenses, the chancellor did not err in awarding Brenda partial reimbursement of her attorney's fees. Thus, this issue is without merit.

IV. DID THE CHANCELLOR ERR IN DIVESTING TITLE OF ONE-HALF INTEREST IN THE HOMESTEAD AND TRAILER PARK FROM THE APPELLANT IN ORDER TO CONVEY THAT INTEREST TO THE APPELLEE?

The Mississippi Supreme Court has long recognized that chancellors have the authority to order an equitable division of the property accumulated through the joint efforts of both husband and wife in a divorce action. *Ferguson*, 639 So. 2d at 934. To complete an equitable division of such property, the chancery court has the authority to divest title to real estate. *Id.* (citing *Draper*, 627 So. 2d at 305). Additionally, the matter is within the chancellor's discretion, considering all the equities and other relevant facts. *Id.* (citing *Bowe v. Bowe*, 557 So. 2d 793, 794 (Miss. 1990)). The chancery court "has the authority to order an equitable division of jointly accumulated property and in doing so to look behind the formal state of title." *Ferguson*, 639 So. 2d at 935 (quoting *Johnson v. Johnson*, 550 So. 2d 416, 420 (Miss. 1989)). However, we are reminded "that non-marital property is not subject to equitable division." *Ethridge v. Ethridge*, 648 So. 2d 1143, 1145 (Miss. 1995). The Mississippi Supreme Court has stated:

> We define marital property for the purpose of divorce as being any and all property acquired or accumulated during the marriage. Assets so acquired or accumulated during the course of the marriage are marital assets and are subject to an equitable distribution by

> the chancellor. We assume for divorce purposes that the contributions and efforts of the marital partners, whether economic, domestic or otherwise are of equal value.

Hemsley, 639 So. 2d at 915. "A spouse who has made a material contribution toward the acquisition of property which is titled in the name of the other may claim an equitable interest in such jointly accumulated property incident to a divorce proceeding." *Ferguson*, 639 So. 2d at 935 (quoting *Jones v. Jones*, 532 So. 2d 574, 580 (Miss. 1988) (citations omitted)).

The Mississippi Supreme Court set guidelines to be considered by the chancery courts 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 martial 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 court also noted that this list is not exclusive. *Id.* The chancellor found that both Dewan and Brenda made material contributions to the improvements to the family home. The chancellor further found that while the land on which the house is located was acquired by

Dewan prior to marriage, Brenda was entitled to an equitable interest in the real estate (the family home and the seventeen (17) acres upon which it is located) because of her material contributions during the eighteen (18) year marriage. Additionally, the trailer park (located on three acres and adjacent to the family home at the northwest corner of the seventeen acres) was developed during the marriage. The chancellor awarded Brenda one-half interest in the real property and the improvements made to the property including the mobile homes located thereon. Taking into account that fairness is the prevailing guideline in marital division, this Court cannot say that the chancellor erred in granting Brenda a one-half equitable interest in the family home and its surrounding land and the land and mobile homes of the trailer park. *Ferguson*, 639 So. 2d at 929. There was no abuse of discretion in the chancellor's findings here. Thus, this issue is without merit.

THE JUDGMENT OF THE CHANCERY COURT OF GEORGE COUNTY IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. COSTS ARE ASSESSED TO APPELLANT.

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