IN THE COURT OF APPEALS 04/23/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00865 COA

CHRISTOPHER SCOTT MILLER

APPELLANT

v.

TERESA A. FORSMAN MILLER

AND DON FORSMAN

APPELLEES

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:

KEITH ROBERTS

ATTORNEY FOR APPELLEE:

MARCUS P. PITTMAN, JR.

NATURE OF THE CASE: DOMESTIC RELATIONS

TRIAL COURT DISPOSITION: DENIAL OF APPELLANT'S MOTION FOR CONTEMPT AND REQUEST FOR CHANGE OF CUSTODY; VISITATION TIME REDUCED TO HALF OF PREVIOUS AMOUNT; APPELLEE-INTERVENOR'S EQUITABLE LIEN AWARDED TO APPELLEE.

BEFORE FRAISER, P.J., MCMILLIN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

The Jackson County Chancery Court decided this domestic case by consolidating numerous issues, involving more than one complaint, for final decision. We find that the chancery court did not err in its judgment, nor abuse its discretion, and therefore affirm.

FACTS

The chancery court granted Christopher Miller and Teresa Forsman Miller a divorce on the ground of irreconcilable differences on May 19, 1992. The judgment also provided that (1) Teresa would maintain custody of their minor daughter; (2) Christopher would have visitation rights; (3) Christopher would pay child support and lump-sum alimony; (4) Christopher would pay periodic alimony to Teresa and health insurance and medical bills for the minor child at least to October 1994, when these items would again be reviewed; and (5) Teresa would have use and possession of the marital home until sold. In October 1992, Christopher filed a motion for contempt, alleging unreasonable interference with visitation rights, and a complaint to partite the marital home, both allegations of which were answered by Teresa. The court held a conference on the motion with no recorded order. In January 1993, Teresa's father, Don Forsman, filed an intervention and complaint requesting that an equitable lien of $6,272.32 be imposed on the marital home for improvements he had either paid for or completed himself. Christopher timely answered this complaint. Also in January, Christopher filed a complaint to modify, alleging visitation interference and requesting that he be given custody of their minor child. In November 1993, Teresa filed her answer to this complaint and also filed a motion for citation of contempt alleging failure to pay alimony; Christopher timely answered this motion. In November 1993, the court approved the sale of the home and placed the sale proceeds into the court registry until final disposition of the partition and intervention litigation. Subsequently, the court issued a verbal order consolidating all issues for discovery and trial.

In December 1993, the court held a hearing on all matters. The January 1994 opinion stated that (1) Christopher was denied custody; (2) visitation was to remain the same as in the original divorce decree unless the court was advised of material complications; (3) half of the home sale proceeds, plus $3,000.00 for improvements made on Teresa's behalf, would be awarded to Teresa; and (4) although not wilful, Christopher was in contempt of court for failure to pay alimony and was ordered to pay all arrearage within thirty days. In July 1994, the court entered a judgment incorporating its opinion and, in addition, provided (1) any interest of the intervenor Forsman in the marital home would merge with Teresa's interest; (2) Teresa would pay the first $25.00 per month of their child's known medical expenses; and (3) bi-weekly visitation would effectively include one less overnight stay, and holiday and summer visitations were modified as well. Christopher's motion to reconsider opinion and motion for new trial were overruled, and he now appeals.

ANALYSIS

> I. DID THE CHANCERY COURT ERR BY EXCLUDING CHRISTOPHER'S WITNESSES FROM TRIAL UNDER MISSISSIPPI RULE OF EVIDENCE 615?

Christopher argues that the court incorrectly excluded his mother and current wife from testifying on his behalf. He contends that the court should not have sanctioned him until a witness violated Rule 615 of the Mississippi Rules of Evidence. He believes no prejudice existed against Teresa, yet great prejudice occurred against him because he lost both witnesses' presentations and all related evidence. Christopher contends that the chancellor abused his discretion by not ordering a new trial to remedy the alleged error. Finally, he argues that the exclusion was unjustified when other alternatives, such as an extensive cross-examination, were available and should have been used.

Mississippi Rule of Evidence 615 states that "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." M.R.E. 615. The rule does not discuss sanctions for violation of the rule, but the court has the discretion to exclude an offending witness from testifying. *Id.* cmt. The exclusion of the witness for violating the rule is within the sound discretion of the trial judge. *Douglas v. State*, 525 So. 2d 1312, 1317 (Miss. 1988) (citing *United States v. Warren*, 578 F.2d 1058, 1076 (5th Cir. 1978)). A judge should not exclude a witness unless he believes that that witness's testimony will result in prejudice to the other party. *Id.* The purpose of the rule is to avoid witnesses' tailoring their testimony to fit previous testimony. *Id.*

In the present case, Rule 615 had been invoked at the beginning of trial. The trial court observed an audience member, Christopher's sister, taking notes during Christopher's direct testimony. The record shows the following account:

> MR. ROBERTS:
>
> Q. It is not unusual at all. Okay, Mr. Miller, as far as visitation is concerned have you ever asked Mrs. Miller to allow someone other than yourself to pick your daughter up?
>
> A. Yes, sir.
>
> Q. What was -- who did you ask to pick your daughter up?
>
> A. Uh --
>
> THE COURT: Hang on just a minute. Ma'am , you are taking notes here in the courtroom. Are you passing the notes to the people in the hall?
>
> UNIDENTIFIED OBSERVER: Yes. I did give --
>
> MR. SPIRITI: Yes. Here they are.
>
> THE COURT: Ma'am you are going to have to get out of here.
>
> UNIDENTIFIED OBSERVER: Okay.
>
> THE COURT: That is highly improper.
>
> UNIDENTIFIED OBSERVER: All right.
>
> THE COURT: You may very well -- who have you passed the notes to?

UNIDENTIFIED OBSERVER: Just my mother and my sister-in-law.

THE COURT: Okay. Well, they are disqualified from testifying in this case.

THE WITNESS: Okay.

THE COURT: You are going to have to wait out in the hall.

UNIDENTIFIED OBSERVER: I didn't know I couldn't do that.

MR. ROBERTS: Your Honor, I assure you I had absolutely no knowledge.

THE COURT: Well, here are the notes right here.

MR. ROBERTS: No, I believe you.

THE COURT: I'm going to have to add that to my list of things to tell people not to do. That just completely thwarts what we are trying to do in here.

MR. ROBERTS: Well, your Honor, I sincerely apologize. I had no idea. And if I had any I would have not allowed it.

THE COURT: I understand that. That just takes two witnesses out of this. Who was that the notes were were [sic] passed to?

THE WITNESS: My mother and my wife.

THE COURT: Okay. What is your mother's name?

THE WITNESS: Maxine Smith.

THE COURT: All right. She cannot testify. And what is your wife's name?

THE COURT: Okay. Tracey Miller cannot testify. Go ahead. Mr. Roberts.

MR. ROBERTS:

Q. Were you telling me that you had asked other people to be able to pick up your daughter. And what had happened when you asked for other people to pick up your daughter?

We believe that the trial judge properly exercised his discretion in effectively determining that Teresa would have been prejudiced if Christopher's witnesses were allowed to testify. Although a typical, less-serious sanction might have been to allow an extensive cross-examination of the violating witness, we believe that the judge did not abuse his discretion in ordering this particular sanction. The chancellor expressed his belief on the record that taking notes and passing them to witnesses waiting in the hall thwarted the truth-finding mission of the court itself. He clearly felt this conduct would directly prejudice Teresa's case.

Moreover, it is well-settled that a trial judge cannot be put in error if not given the opportunity to address the issue. *Robinson v. State*, 662 So. 2d 1100, 1104 (Miss. 1995). A complaining party must make a contemporaneous objection at trial in order to preserve an alleged error for appellate review. *King v. State*, 615 So. 2d 1202, 1205 (Miss. 1993) (citation omitted). Here, Christopher failed to preserve by objection, for appeal purposes, the issue of the exclusion of evidence regarding these two witnesses. Although we have addressed the merits of the issue, we are not obligated to do so. Furthermore, no proffer was placed in the record as to what would have been the two excluded witnesses' testimony. We cannot assess whether the exclusion was error based simply on the lack of trial record information. Although Christopher contends in his appellate brief that he discussed the issue in both his motion to reconsider and motion for new trial, we still are not obligated to consider it. Additionally, we can find no proffer, argument, or objection concerning this issue in Christopher's motion to reconsider. Likewise, we find no argument on this issue in Christopher's motion for new trial, except for his statement that he was greatly prejudiced, and that Teresa was not prejudiced, by the exclusion of the two witnesses. Finally, nothing in the motion for new trial indicates what would have been the substance of these two witnesses' testimony. This issue is without merit.

> II. DID THE CHANCERY COURT ERR BY DENYING CHRISTOPHER A NEW TRIAL AFTER HE FILED A MOTION OBJECTING TO HIS WITNESSES' EXCLUSION?

Christopher contends that the trial court erred when it denied him a new trial based on his objections to (1) the exclusion of his two witnesses and (2) the admission of the intervenor's, Forsman, exhibits and testimony.

The Mississippi Supreme Court has stated that a motion for a new trial is addressed to the sound discretion of the trial judge. *Caruso v. Picayune Pizza Hut, Inc.*, 598 So. 2d 770, 773 (Miss. 1992) (citation omitted); *see also Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n*, 560 So. 2d 129, 132 (Miss. 1989) (citation omitted) (court will reverse a trial judge's denial of a request for a new trial only if denial is an abuse of discretion).

In the present case, we have stated that we found that the trial judge did not abuse his discretion in excluding Christopher's witnesses at trial. This determination also holds true regarding his argument in his motion for new trial regarding the same issue. No abuse of discretion was evident, so a new trial is not warranted.

Regarding the second point of Christopher's request for a new trial, we find again that a new trial is not justified. At trial, the court admitted documents that Forsman claimed would prove his right to intervene. Christopher objected on a discovery violation, but the court overruled the objection. The court admitted the documents but declined to rule on the equitable lien portion of the case, thereby allowing Christopher time to investigate and review the documents and to subsequently cross-examine Forsman on the material. Christopher failed to set up a hearing for this purpose from the hearing date of December 6, 1993, to January 13, 1994. On January 13, the court filed its opinion and, on January 19, Christopher filed a motion to reconsider that opinion and again requested a hearing to cross-examine Forsman. The court held a hearing on March 11 in which it gave Christopher another opportunity to set up a deposition of Forsman and submit it to the court. The

court issued its final order on July 29, 1994. No record exists that Christopher ever submitted any deposition of Forsman to the court.

Christopher's August 15 motion for new trial was overruled by the court on September 16. We believe that he had ample time to take Forsman's deposition for submittal. The court did not abuse its discretion when it overruled Christopher's motion for new trial on this second point.

Finally we note that, under Mississippi Rule of Evidence 103, we can take notice of plain error although not brought to the court's attention. M.R.E. 103(d). Here, the chancery court entered its judgment on July 29, 1994. Christopher filed his motion for new trial on August 15, 1994, a total of seventeen days after entry of judgment. Under Mississippi Rule of Civil Procedure 59, a motion for a new trial must be served no later than ten days after the entry of judgment. M.R.C.P. 59(b). Although we have discussed the merits of this issue herein, we are not obligated to do so under the clear or plain error doctrine. Christopher clearly failed to timely file his motion for a new trial.

III. DID THE CHANCERY COURT ERR BY MERGING THE INTERVENOR'S INTEREST IN THE MARITAL HOME, AS AN EQUITABLE LIEN, WITH TERESA'S INTEREST AND AGAINST CHRISTOPHER'S INTEREST?

Christopher argues that Forsman should not be given an equitable interest in the marital home because Christopher (1) could not utilize his witnesses at trial and (2) could not challenge Forsman's testimony and evidence. He contends that the court improperly applied standards for equitable liens.

It is well-settled that a chancery court has the authority to impose equitable liens. *Pittman v. Pittman*, 652 So. 2d 1105, 1110 (Miss. 1995) (citation omitted). Regarding the theory of unjust enrichment, the Mississippi Supreme Court has stated that "the basis for an action for 'unjust enrichment' lies in a promise, which is implied in law, that one will pay to the person entitled thereto which in equity and good conscience is his." *Koval v. Koval*, 576 So. 2d 134, 137 (Miss. 1991) (quoting *Magnolia Fed. Sav. & Loan Ass'n v. Randal Craft Realty Co.*, 342 So. 2d 1308, 1311 (Miss. 1977)).

In the present case, because Forsman claimed he expended considerable time, money, and effort toward improving Christopher and Teresa's marital home, the issue of his equitable lien necessarily involves a question of unjust enrichment in favor of either Christopher or Teresa. We stated previously that the court properly excluded Christopher's witnesses and admitted Forsman's documentary evidence, the latter of which was never contradicted by Christopher. We believe that the trial court properly determined that Forsman was entitled to the value of his work, and additionally, did not err in merging Forsman's interest with that of Teresa's interest. Moreover, Christopher is not a proper party to complain about the merger itself -- only Forsman has that power, which he clearly chose not to exercise.

IV. DID THE CHANCERY COURT ERR BY CONTINUING TERESA'S ORIGINAL AWARD OF ALIMONY?

Christopher contends that the chancellor erred by continuing Teresa's alimony awarded in the

original judgment of divorce. He believes this was error because no evidence supported such an award or continuation. He argues that, although the decision was within the chancellor's authority, the chancellor abused his discretion.

The Mississippi Rules of Civil Procedure state:

> A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain
>
> > (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and,
> >
> > (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

M.R.C.P. 8(a). The purpose of Rule 8 is to give notice and not to state facts and narrow issues. *Id.*

cmt. Rule 8 abolishes many technical requirements but does not eliminate the requirement of stating circumstances and events supporting the proffered claim. *Id.* This rule allows claims to be stated in general terms so that the client's rights are not hindered by counsel's poor drafting skills. *Id.*

From a review of the record, we find that Christopher failed to plead his claim for relief regarding either the original award or the reduction of alimony. He therefore failed to bring this issue before the trial court. No evidence exists in his motions or pleadings to the court regarding a request for modification or termination of alimony. However, the court's opinion held Christopher in contempt of court for failure to pay alimony and ordered him to pay all arrearage within thirty days. Christopher's motion to reconsider the court's opinion stated that "[b]oth the defendant and the plaintiff agreed in the pre-trial conference with this Honorable Court, that the issue of alimony, among others, required a fresh and *de novo* judgment by the Court to which both parties agreed to be bound." The court's judgment also included its finding, by reference to its opinion, that Christopher was in arrears and ordered payment. Christopher's motion for new trial included no mention of alimony. Considering the existing record evidence, we find that Christopher failed to plead a modification of alimony. This issue was therefore not properly before the lower court, and we will not consider it on appeal.

> V. DID THE CHANCERY COURT ERR IN CHANGING CHRISTOPHER'S VISITATION RIGHTS?

Christopher argues that the chancellor erred when he changed overnight visitation such that Friday nights were eliminated from the weekend visitation schedule. He contends that no substantial evidence exists in the record to support this modification. Finally, he believes that the decision was an abuse of discretion and contrary to the best interests of the minor child.

Mississippi caselaw holds that a trial judge's denial of a request for a new trial is subject to the abuse

of discretion standard. *Caruso*, 598 So. 2d at 773 (citation omitted); *Bobby Kitchens, Inc.*, 560 So. 2d at 132 (citation omitted). In the present case, the parties stipulated to determination of the custody and visitation issues. The chancellor decided that Teresa would retain custody of the minor child. He also modified visitation because both parties agreed that it should be changed but neither party could agree to any terms. Christopher requested in his motion to reconsider that the court reevaluate its decision on visitation, but he failed to request reconsideration of that issue in his motion for new trial. We apply the same abuse of discretion standard of review regarding the court's overruling his motion to reconsider as we do regarding the court's overruling his motion for new trial. The chancellor's decision regarding custody and visitation modification was supported by substantial evidence and was not an abuse of discretion.

VI. DID THE CHANCERY COURT ERR IN NOT AWARDING CHRISTOPHER ONE-HALF OF THE RENTS COLLECTED ON THE MARITAL HOME?

Christopher argues that, as a joint tenant in the marital home, he was entitled to half of the rents paid to Teresa when she rented the marital home.

The court has held that "fairness is the prevailing guideline in marital division." *Pittman v. Pittman*, 652 So. 2d 1105, 1110 (Miss. 1995) (quoting *Ferguson v. Ferguson*, 639 So. 2d 921, 929 (Miss. 1994)). The goal of a chancellor in a divorce case is to do equity. *Id.* A trial judge's denial of a request for a new trial is subject to the abuse of discretion standard. *Caruso*, 598 So. 2d at 773 (citation omitted); *Bobby Kitchens, Inc.*, 560 So. 2d at 132 (citation omitted).

In the present case, the original divorce judgment awarded Teresa exclusive use and possession of the marital home. It further required both parties to pay half of the note, taxes, and insurance. The judgment ordered that the home be sold, and if the parties could not agree on a sales price, the property was to be partited upon motion of either party. Each party was to equally divide any equity from the sale. Teresa's subsequent decision to move herself and her child in with her father and rent the marital home may not have been anticipated by the divorce judgment. However, that judgment clearly gave Teresa exclusive use and possession of the home. We believe that it also encompassed renting the home and retaining the rent proceeds for herself and her child, particularly since Forsman provided shelter that the court had ordered Christopher to provide. If Teresa had remained in the marital home and Forsman had given her financial support to help ends meet, Christopher would clearly not have been entitled to that benefit. Christopher clearly had a right to force partition of the property, but he had no right to benefit from Forsman's beneficial offer to Teresa. His financial situation was unaffected under the judgment, because he still was required to pay one-half of the mortgage note, taxes, and insurance on the home. We believe that Teresa's decision to move herself and her child in with Forsman rent-free, and to subsequently rent the marital home, provides Christopher with no claim to Forsman's benevolence.

We believe that the chancery court did not abuse its discretion in determining that Christopher was not entitled to the rent proceeds. The court heard testimony regarding Forsman's lien, equity in the home, the sales price, past due alimony, and rents collected on the marital home. We believe that the chancellor did consider financial equities in this case in making his determination. Christopher requested his share of rent proceeds in the motion to reconsider the court's opinion, but failed to

argue that issue in his motion for new trial. However, we again apply the same abuse of discretion standard of review regarding the court's overruling his motion to reconsider as we do regarding the court's overruling his motion for new trial. We find no abuse of discretion in either of the court's rulings.

CONCLUSION

We affirm the judgment of the chancery court for the reasons discussed herein. No abuse of discretion is evident in the lower court's denial of Christopher's motion to reconsider or motion for new trial.

THE ORDER OF THE CHANCERY COURT OF JACKSON COUNTY IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

FRAISER, C.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR. BRIDGES, P.J., DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, P.J.

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BRIDGES P.J., DISSENTING IN PART:

I must respectfully dissent from the sixth issue discussed in the majority opinion.

In this case, the majority decided that Christopher was not entitled to half of the rents paid to Teresa when she rented the marital home. I must disagree with the majority's decision on this issue for the following reasons.

First of all, although Teresa had exclusive use and possession of the home, this did not mean that Christopher could be divested of his ownership of the property as a joint tenant. Based on simple property law, a joint tenant is entitled to recover his or her share of the rents and profits when leasing the property. *Gates. v. Gates*, 616 So. 2d 888, 890 (Miss. 1993). In Mississippi, it is well settled that a divorce does not affect title of the respective parties to real estate owned by them. *Blackmon v. Blackmon*, 350 So. 2d 44, 45 (Miss. 1977). The property had not yet been partititioned, nor had the chancellor awarded title to the property to Teresa. He merely awarded her exclusive use and possession of the property. Based on the above, Christopher should have received one-half of the rents and income based on his joint ownership of the marital home.

Furthermore, the chancellor had already made an equitable division of all marital property as he saw fit. The chancellor had already made a decision as to ownership and title of the marital home. He had not awarded sole title to Teresa, but only allowed her exclusive use and possession of the home. The chancellor should be not be allowed to deprive Christopher of a property right after the fact. In *Sartin v. Sartin*, our supreme court stated:

> In the usual case, the question of the sale of the marital home or other property of the spouses should be decided at the time of the making of the judgment. At that point in the marital career of the parties all questions at issue are better resolved, so that disputes and irritants do not linger and present further incentives for litigation.

Sartin v. Sartin, 405 So. 2d 84, 85 (Miss. 1981). At the time in question, the home had not been partitioned nor had complete title been given to Teresa. The chancellor should have adjudicated the issue in the divorce decree or allowed Christopher one-half the rental income derived from his property.

The majority cites cases which allow the chancellor broad discretion in deciding matters of equity. However, here, the chancellor's decision to allow Teresa to keep all rental payments caused an increase in Teresa's income. The majority concedes that the rental of the marital home was not anticipated in the divorce decree. If the rental of the home had been anticipated, then it surely would have materially affected Christopher's alimony obligations to Teresa. In fact, use of the family home is one of the factors used in determining the amount of alimony awarded in a divorce. *Crowe v. Crowe*, 641 So. 2d 1100, 1102 (Miss. 1994). Here, at the time of the divorce judgment, Teresa was given exclusive use and possession of the home until it was sold, but was not given ownership of all rental income from leasing the home to another party. If the lease of the home had been anticipated in the divorce decree, then the chancellor would have ordered that the income be divided or decided to use another equitable tool in taking into account the rise in Teresa's income. Teresa's financial condition had not changed in order to warrant a rise in her income at Christopher's expense. For the foregoing reasons, I would reverse this case on this issue alone.

THOMAS, P.J., JOINS THIS SEPARATE WRITTEN OPINION.