

IN THE COURT OF APPEALS 10/29/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-01460 COA

JAMES L. RILEY

APPELLANT

v.

LAURA M. RILEY

APPELLEE

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

TRIAL JUDGE: HON. ROBERT L. LANCASTER

COURT FROM WHICH APPEALED: LOWNDES COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

KATHERINE S. KERBY

ATTORNEY FOR APPELLEE:

J. TYSON GRAHAM

NATURE OF THE CASE: DOMESTIC RELATIONS

TRIAL COURT DISPOSITION: DIVORCE GRANTED, LUMP SUM ALIMONY, PERIODIC
ALIMONY AND PARTITION OF PROPERTY GRANTED

BEFORE BRIDGES, P.J., BARBER, AND MCMILLIN, JJ.

MCMILLIN, J., FOR THE COURT:

The Chancery Court of Lowndes County granted Laura M. Riley a divorce and ordered James L. Riley to pay lump-sum and periodic alimony. Mr. Riley appeals, asserting that the periodic alimony is excessive, and that the lump-sum amount awarded should offset the amount of the periodic alimony. Mrs. Riley cross appeals, asserting that the lump-sum award was not sufficient and that the court improperly denied her request for attorney's fees.

I.

FACTS

James and Laura Riley were married for twenty-six years. In 1993, the court awarded Mrs. Riley a divorce on the grounds of adultery and desertion. During most of the marriage, Mrs. Riley was a mother and a homemaker. In 1987, she began teaching school and was earning an annual salary of \$16,347.00 at the time of trial. Mrs. Riley's separate assets included a 1987 Sable automobile valued at \$5,000.00 and an IRA worth \$2,000.00.

Mr. Riley is a fifty percent owner in Omni International, a closely held corporation. The shares are subject to a Stock Redemption Agreement, which places restrictions on the sale, transfer, or other disposition of the stock. According to the agreement, the stock is valued at \$149.97 per share in case of the death of a shareholder. If Mr. Riley voluntarily disposes of the stock or is ordered to transfer the stock by operation of law, he is entitled to only one-half the valuation. As a result, the stock ranges in value from \$250,000.00 to \$500,000.00. Mr. Riley is paid an annual salary of \$48,000.00 plus a \$7,800.00 car allowance by the corporation. The corporation, having elected S-Corporation status for tax purposes, also apparently makes additional distributions to shareholders to cover their tax liability for undistributed profits. Mr. Riley's separate assets include \$47,747.61 in a pension fund, \$15,000.00 in a 401K plan with Omni, and \$2,000.00 in an IRA. In sum, Mr. Riley's net worth at trial was between \$314,747.59 and \$564,747.59, depending on the valuation of the Omni stock.

The court ordered Mr. Riley to pay periodic alimony in the amount of \$2,000.00 per month and \$125,000.00 in lump-sum alimony, payable in installments. The first lump-sum payment of \$25,000.00 was due within one year from the date of the entry of the final decree. The remaining \$100,000.00 was payable in five installments of \$20,000.00 each, together with eight percent interest. The chancellor awarded Mr. Riley separate ownership of his 401K plan, his pension fund, and his Omni International stock, subject to a lien in favor of Mrs. Riley to secure the lump-sum award. The court denied Mrs. Riley's request for attorney's fees.

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 or 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.

PERIODIC ALIMONY

In reviewing an award of periodic alimony there are several factors which the Court considers.

1. The income and expenses of the parties;
2. The health and earning capacities of the parties;
3. The needs of each party;
4. The obligations and assets of each party;
5. The length of the marriage;
6. 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;
7. The age of the parties.
8. The standard of living of the parties, both during the marriage and at the time of the support determination;
9. The tax consequences of the spousal support order;
10. Fault or misconduct;
11. Wasteful dissipation of assets by either party; or
12. Any other factor deemed by the court to be 'just and equitable' in connection with the setting of spousal support.

Armstrong v. Armstrong, 618 So. 2d 1278, 1280 (Miss. 1993) (citations omitted).

In the case at bar, Mr. Riley earns a salary of \$48,000 and receives a car allowance of \$7,800. In addition, Mr. Riley is a fifty percent owner in a closely held corporation valued between \$250,000.00 and \$500,000.00. Tax returns indicate that the corporation is profitable on a regular basis, and profits are reinvested in the corporation, thus increasing Mr. Riley's equity. In contrast, Mrs. Riley earns a salary of only \$16,347.00, and she has meager retirement benefits and no investments or other assets beyond her earning potential.

The record reveals no health problems affecting Mr. Riley's future earning abilities. Mrs. Riley suffers from some health problems, but there is no indication that these problems have affected her ability to pursue gainful employment as a teacher.

Mrs. Riley testified to monthly living expenses of \$3,479.51 with a net take home pay of \$959.11. Mr. Riley's monthly expenses, according to his testimony, total \$3,480.52. Mr. Riley's net monthly income is \$2,234.72. However, unlike Mrs. Riley, Mr. Riley has other avenues of income available.

The chancellor found that Mr. Riley's relationship with Omni and its creditors was such that he should be able to secure a salary increase or receipt of a distribution of profits of Omni to meet his financial needs.

The chancellor ordered the sale of the jointly owned home, with the equity to be divided equally between the parties. The chancellor also awarded the 1987 Sable automobile, valued at approximately \$5,000.00 to Mrs. Riley, which stands in sharp contrast to Mr. Riley's annual car allowance of \$7,800.

Based on consideration of the relevant factors, the chancellor's award of \$2,000.00 per month in periodic alimony to Mrs. Riley does not appear excessive. The chancellor concluded, based upon his assessment of the proof, that Mr. Riley's financial condition was substantially better than was indicated based solely upon consideration of his present salary from his corporation. This does not appear manifestly in error. The corporation appears to have a history of profitability beyond merely earning enough to meet Mr. Riley's rather modest salary. Whether, under present arrangements, those profits are left in the corporation rather than withdrawn as dividends or larger salary payments, would appear a matter largely within the discretion of the shareholders, subject only to obtaining approval of the shareholder's major creditor under an existing loan agreement. There was no proof and no indication in the record that the corporation's bank would be uncooperative in permitting a reasonable salary adjustment to allow Mr. Riley to meet his obligation, which is not unreasonable, under the chancellor's judgment. As a result, we conclude that Mr. Riley's assignment of error on this issue is without merit. Conversely and for essentially the same considerations, we determine that Mrs. Riley's assignment of error that the alimony was insufficient is also without merit.

IV.

LUMP-SUM ALIMONY

Mr. Riley further asserts that the lump-sum alimony award, in combination with the periodic alimony award, is excessive. In granting an award of lump-sum alimony, there are four factors which the court must consider. These factors include the following:

1. Substantial contribution to accumulation of total wealth of the payor either by quitting a job to become a housewife, or by assisting in the spouse's business.
2. A long marriage.
3. Where recipient spouse has no separate income or the separate estate is meager by comparison.
4. Without the lump sum award the receiving spouse would lack any financial security.

Pratt v. Pratt, 623 So. 2d 258, 262 (Miss. 1993) (citations omitted).

In applying these factors to the case now before us, we find that the chancellor did not abuse his discretion. During their twenty-six year marriage, Mrs. Riley's primary role was that of a housewife and a mother. Additionally, Mrs. Riley assisted Mr. Riley in his business by entertaining clients and aiding him in various areas of his business. Mr. Riley and Mrs. Riley had a lengthy marriage by modern standards. Mrs. Riley's separate estate, without this lump-sum award, would be only approximately \$7,000.00, which is disproportionately small when compared to Mr. Riley's substantial separate estate. Finally, the record reflects that Mrs. Riley was having serious financial problems trying to survive on her separate income. She had borrowed money from her mother to make her mortgage payment, and she relied on her credit cards to get her through the months when Mr. Riley did not provide her with any assistance. This lump-sum award appears calculated to provide Mrs. Riley with a reasonable measure of financial security she would not otherwise enjoy. At the same time, it does not appear calculated to unfairly deprive Mr. Riley of the means of maintaining a comfortable lifestyle for himself with a reasonable measure of financial security for the future.

Mr. Riley is incorrect in his assertion that the chancellor abused his discretion when he included the Omni stock in the valuation of the marital estate. Mr. Riley argues that Mrs. Riley made no contributions to Omni, and that Omni has been an asset for only twelve years of their twenty-six year marriage. The Mississippi Supreme Court has held that "[a]ssets acquired or accumulated during the course of a marriage are subject to equitable division unless it can be shown by proof that such assets are attributable to one of the parties' separate estates prior to the marriage or outside the marriage." *Hemsley v. Hemsley*, 639 So. 2d 909, 914 (Miss. 1994). Furthermore, the court concluded that "marital partners can be equal contributors whether or not they both are at work in the marketplace." *Hemsley*, 639 So. 2d at 915. The Omni stock would have been subject to equitable division by the chancellor under *Hemsley*. The chancellor, rather than awarding her a proportionate share of the stock itself, exercised his reasonable discretion to award Mrs. Riley a lump-sum cash award in an amount based, in part, upon a valuation of the stock. While this relief may result in some degree of short-term financial hardship to Mr. Riley by causing him to make certain adjustments in his method of doing business, it has the advantage of preventing future conflicts between the parties concerning ownership and control of the corporation, management salary levels, dividend policy and such matters that would appear, in all but the best situations, inevitable. The chancellor has wide latitude in fashioning relief in cases such as this, and we can discover no abuse of discretion in his award. *Ethridge*, 648 So. 2d at 1145-46.

Furthermore, we find that Mr. Riley's reliance on the security agreement with AmSouth to shield him from payment of the lump-sum alimony is without merit. The Omni stock was subject to a security agreement which restricts salary raises and distribution of profits. In accordance with the court's holding in *Hemsley*, the stock was subject to equitable division and, as we have observed, had he so chosen, the chancellor could have awarded a portion of the stock to Mrs. Riley, instead of awarding her a monetary settlement. The record is clear that Mr. Riley is, directly or indirectly, reaping substantial gain from his Omni stock ownership. The chancellor's decision permits Mrs. Riley, albeit indirectly, an equitable participation in the benefits of this stock ownership. There is no abuse of

discretion in doing so. The bank agreement does not permanently deprive Mr. Riley of the profits of his corporation and may not be used as a tool to deprive Mrs. Riley of financial benefits to which she would otherwise have been entitled under the facts of this case.

Finally, Mr. Riley's contention that the chancellor committed reversible error when he valued the Omni stock at nearly \$500,000.00 does nothing to convince us that the chancellor abused his discretion in his financial awards. According to the court in *Creekmore*, the primary purpose of lump-sum alimony is to alleviate the disparity in the separate estates. *Creekmore v. Creekmore*, 651 So. 2d 513, 517 (Miss. 1995) (citations omitted). The record clearly reflects that there was a gross disparity in the estates of Mr. and Mrs. Riley. Hence, the chancellor was within the bounds of his discretion when he awarded Mrs. Riley \$125,000.00. Whether the stock was valued at \$500,000.00 as the chancellor valued it or \$250,000.00 as Mr. Riley valued it, \$125,000.00 was a fair award within the chancellor's discretion when taking into consideration that Mrs. Riley's separate estate, without such an award, was valued at only \$7,000.00.

V.

ATTORNEY'S FEES

The decision to award attorney's fees is a matter that rests in the chancellor's sound discretion. *Magee v. Magee*, 661 So. 2d 1117, 1127 (Miss. 1995) (citations omitted). "If a party is financially able to pay her attorney, an award of attorney's fees is not appropriate." *Magee*, 661 So. 2d at 1127 (quoting *Martin v. Martin*, 566 So. 2d 704, 707 (Miss. 1990)). Since Mrs. Riley is to receive \$2,000.00 per month periodic alimony and \$125,000.00 in lump-sum alimony, she should be able to pay her attorney's fees, and this fact must have been a consideration by the chancellor in denying attorney's fees. As a result, we find that the chancellor did not abuse his discretion in denying Mrs. Riley's request.

THE JUDGMENT OF THE LOWNDES COUNTY CHANCERY COURT IS AFFIRMED ON DIRECT AND CROSS APPEALS. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

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