

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00077 COA

MONA LISA MARS

APPELLANT

v.

ALBERT MORRIS MARS

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES H. C. THOMAS, JR.

COURT FROM WHICH APPEALED: PEARL RIVER COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

LARRY O. NORRIS

ATTORNEY FOR APPELLEE:

T. JACKSON LYONS

NATURE OF THE CASE: DOMESTIC: EQUITABLE DISTRIBUTION

TRIAL COURT DISPOSITION: DIVORCE GRANTED

MANDATE ISSUED: 6/10/97

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

PAYNE, J., FOR THE COURT:

Mona Lisa Mars (hereinafter "Mona") and Albert Morris Mars (hereinafter "Joe") agreed by written consent to an irreconcilable differences divorce. The parties also consented that they would share legal custody of the four children with Mona having paramount physical custody subject to liberal

and reasonable visitation rights of Joe. The parties agreed to a division of certain items of their personal property but submitted to the court certain other issues for determination, including (1) a division of the parties's real and personal property; (2) the amount of child support; (3) use and possession of the marital home; (4) the party or parties to be responsible for payment for appraisals of real property and timberland; (5) reimbursement, if any, for payment of state and federal tax liens and real property taxes; and (6) payment of liabilities, mortgages and taxes.

The chancellor's final judgment as to the issues submitted to the court for determination are as follows. The chancellor found the parties's total assets to be valued at approximately \$1,966,170. The chancellor found Mona to be entitled to a value of \$785,335 of the total and Joe to be entitled to a value of \$1,180,835, respective percentages of forty percent (40%) and sixty percent (60%) of the total asset value. The amount of the difference between the distributions was the sum of \$395,500 which the chancellor credited to Joe as nonmarital assets acquired prior to the marriage. This amount was made up of \$100,000 in cash which Joe used to acquire shares of stock in the Chrysler Corporation and \$295,500 as the acquisition costs of real property acquired by Joe prior to the marriage. The chancellor awarded Joe credit for the values of his nonmarital assets acquired prior to the marriage but allowed the actual assets in the property division. In other words, Joe was given credit for the dollar amount of these nonmarital assets in the division of property rather than the title of the assets. Neither party complains of this credit except to the extent that Mona challenges the classification of the \$100,000 cash and the \$295,500 in real property as nonmarital assets. We point this out only to prevent confusion in evaluating the actual awards to the parties. Mona's percentage of the assets included the marital residence, pool, and one hundred thirty- seven (137) acres of real property all of which is valued at \$201,000, and forty-six percent (46%) of 1,960 acres of timberland. Joe's percentage of the assets included \$204,000 in real property, the balance due on a promissory note from the purchaser of Mars Motors valued at \$358,281, and fifty-four percent (54%) of 1,960 acres of timberland. In a correction of final judgment, the chancellor amended Mona's percentage of the timberland from forty-six percent (46%) to forty-five and twenty-one one hundredths percent (45.21%) giving Joe an additional seventy-nine one hundredths percent (.79%). This amendment represented one-half (1\2) of an outstanding mortgage and tax obligation totaling \$81,161.74. In the final judgment, the chancellor stated that Joe would be responsible for paying these obligations but failed to adjust Mona's award to reflect one-half (1\2) of the mortgage and tax obligations. The chancellor's adjustment to the percentages of timberland awarded the parties took care of the disparity.

Feeling aggrieved, Mona appeals assigning the following issues on appeal: (1) The real property in question is not subject to distribution since it was owned by M. L. Mars Trust, and the trust was not a party to this litigation; (2) If the conveyances to the M. L. Mars Trust were all void as between the parties, then the \$295,500 in property acquired by Joe prior to the marriage was commingled with assets of the marriage and become a marital asset subject to division; (3) The court should not have allowed Joe credit for \$100,000 which he allegedly brought into the marriage; and (4) The court erred in amending the judgment and giving Joe an additional \$22,000 for payment of income taxes. We find Mona's assignments of error issues I, II, and IV to be without merit and therefore affirm the judgment of the chancery court as to these issues. We find that Mona's assignment of error in issue III does have merit and therefore reverse and remand as to issue III.

STATEMENT OF THE FACTS

Mona and Joe began living together in 1975 when she was nineteen and he was forty-three. They were married in 1979 and separated in 1994. Mona quit school in the tenth grade and Joe is a few hours short of a college degree. Joe has also taken retirement from the Mississippi Highway Patrol. Mona and Joe had one child prior to the marriage and three children after the marriage.

At the time Joe met Mona, he claims that he had approximately \$175,000 - \$180,000 in assets excluding his real property. Included in this amount was an account with Bankers' Trust in Jackson having a balance of \$102,804 as of December 20, 1974. The account was styled "Joe M. Mars, Trustee for Rena M. Pasentine." In subsequent litigation regarding the trust, the Pearl River Chancery Court held that the bank account was not subject to any trust and belonged entirely to Joe. This ruling by the chancery court was made in 1984 and later affirmed by the Mississippi Supreme Court. *In the Matter of the Adoption of R. M. P. C., a Minor Child*, 512 So. 2d 702 (Miss. 1987).

At the time Joe and Mona began living together, he owned Quality Used Cars which he purchased in 1974 and operated until 1977. In December of 1977, Joe acquired the Chrysler franchise and established Mars Motors, Inc. Joe was the only shareholder and as consideration for the shares, Joe paid \$100,000. Joe claims this \$100,000 came from the dissolved trust of Rena M. Pasentine. Joe claims further that he put a total of \$238,000 in premarital assets into Mars Motors. Joe concedes that Mona assisted him in building up the car business as well as working at the family farm, taking care of apartments that they owned, and raising the family. In 1988, Joe sold Mars Motors for \$160,000. This did not include buildings and land on which Mars Motors occupied. Joe later sold the land and buildings to the same purchaser for \$550,000. As payment for the land and buildings, Mr. Herring paid \$150,000 down and took out a mortgage for \$400,000. The balance currently due on the mortgage note is \$358,281.

Also in dispute are six parcels of land purchased by Joe prior to his marriage to Mona for \$295,500. After the marriage, the parties conveyed all of his property to Mona, including the six parcels purchased prior to the marriage, who in turn conveyed all of the property to the M. L. Mars Trust. Subsequently, however, a creditor, Mack R. Hester, Sr., filed suit to cancel the conveyance as against the creditor on the ground that the properties within the trust were fraudulently conveyed. In an order dated April 7, 1994, the Chancery Court of Pearl River County voided the conveyances indicating that both the conveyance to Mona and the subsequent conveyance from Mona to the M. L. Mars Trust were "void and should be canceled."

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 process regarding equitable distribution is governed by *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994):

Although this listing is not exclusive, this Court suggests the chancery courts consider the following guidelines, where applicable, 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 marital 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. In order for property to be divided, it must be "marital property." The Mississippi Supreme Court defined marital property in *Hemsley v. Hemsley*:

Assets 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). "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. THE REAL PROPERTY IN QUESTION IS NOT SUBJECT TO DISTRIBUTION SINCE IT WAS OWNED BY M. L. MARS TRUST AND THE TRUST WAS NOT A PARTY TO THIS LITIGATION.

II. IF THE CONVEYANCES TO THE M. L. MARS TRUST WERE ALL VOID AS BETWEEN THE PARTIES, THEN THE \$295,500 IN PROPERTY ACQUIRED BY JOE PRIOR TO THE MARRIAGE WAS COMMINGLED WITH ASSETS OF THE MARRIAGE AND BECAME A MARITAL ASSET SUBJECT TO DIVISION.

Mona argues, on the one hand, that the property that was conveyed to the M. L. Mars Trust is not subject to equitable distribution because the trust was not made a party to the litigation. Mona recognizes that the chancery court voided the trust on the grounds that the conveyance was fraudulent but argues that the trust is only voided as to the judgment creditor. Mona contends that the conveyance is still good between the grantor (Joe) and the grantee (Mona), and was only set aside as to the creditor, Mack Hester.

On the other hand, Mona argues that even if the judgment of April 7, 1994, voided the conveyances to the trust, the trust had held title to the property from the time of the conveyance on April 4, 1988, until the judgment voiding the conveyances, six years later. Mona contends that conveyance to the trust of nonmarital property along with marital property is in effect a commingling of the marital and nonmarital property and therefore results in the nonmarital property becoming marital assets subject to equitable distribution.

Joe submits that the chancellor was not manifestly in error in granting a credit in the amount of \$295,500 to him for the acquisition value of the real property he acquired before the marriage for the reasons that it was not mixed, blended or otherwise commingled with assets of the marriage, that it retained its separate status, and that any transmutation which may be construed to have occurred upon the conveyances to the trust was reversed when the conveyances were voided and the property was fully restored to a status of separate property. We agree.

The order voiding the conveyances of property to the trust specifically indicated that both the conveyance of nonmarital property from Joe to Mona and the subsequent conveyance of this property along with marital property to the trust by Mona were voided. Therefore we find no merit in Mona's first assignment of error.

We also find no merit in Mona's second assignment of error. Mona's perception, if true, that the parcels of land purchased by Joe prior to the marriage became commingled with marital properties during the six year life of the trust is of no import to us now. Once the conveyance of Joe's nonmarital properties to Mona and its subsequent conveyance to the trust were declared void by the Pearl River Chancery Court, the six parcels of land retained its status as nonmarital property which is not subject to equitable distribution. *See Johnson v. Johnson*, 650 So. 2d 1281, 1286 (Miss. 1995) and *Heigle v. Heigle*, 654 So. 2d 895, 897 (Miss. 1995). In both *Johnson* and *Heigle*, the separate funds which were transmuted into marital property through the commingling of cash regained a status

of separate property upon repayment of the funds to the contributing spouse; the status of the property was restored upon reversal of the commingling. *Id.*

We therefore find that the six parcels of land purchased by Joe prior to his marriage to Mona were correctly classified as nonmarital property. We find further that the chancellor did not err in allowing Joe a credit of \$295,500, the acquisition value of the six parcels of land. We note that the chancellor divided equally all of the assets with the exception of the acquisition value of the six parcels of land purchased by Joe prior to the marriage and \$100,000 in cash (we will discuss the status of the \$100,000 in cash in the next issue). Thus, any appreciation value acquired by the land and facilities thereon was equally divided between the parties.

III. THE COURT SHOULD NOT HAVE ALLOWED JOE CREDIT FOR \$100,000 WHICH HE ALLEGEDLY BROUGHT INTO THE MARRIAGE.

Prior to the marriage, Joe established Mars Motors, Inc., for \$238,000. This \$238,000 consisted of \$175,000 in liquidated assets, \$33,000 acquired from the sale of a house, \$5,000 from a Mississippi Highway Patrol check, and \$25,000 in the form of a bank loan. Included within the \$175,000 in liquidated assets is \$100,000 from a Banker's Trust account. This account was previously in the form of a trust account for Joe's step-daughter with Joe serving as trustee. However, an order dated October 30, 1984, issued by the Pearl River Chancery Court indicated that funds in the account totaling a little more than \$100,000 belonged to Joe and were not subject to any trust. It is this \$100,000 with which Mona takes issue because the chancellor allowed Joe a credit of \$100,000 before dividing the assets of the marriage. Joe established, apparently to the satisfaction of the chancellor, that he paid \$100,000 for shares of stock in Mars Motors, Inc. Joe established further that he was the only shareholder and used the stock as security for the Chrysler franchise and for Chrysler Credit Corporation. The establishment of Mars Motors and the purchase of the stock took place one and one-half (1 1/2) years prior to Joe's marriage to Mona. Although Joe concedes that Mona played a valuable role in building up the car business as well as other endeavors the monies from Mars Motors allowed them to participate in, he argues that the chancellor was correct in allowing him a \$100,000 credit. Joe contends that the chancellor simply recognized his significant financial contribution and responsibility for beginning the business and gave him credit for less than half of his original capital investment from nonmarital funds. Joe argues that the chancellor did not commit manifest error in awarding him the \$100,000 credit particularly since Mona was awarded asset value equal to one-half (1/2) of any appreciated value the car business had acquired during the marriage as well as one-half (1/2) of the assets which the business's success allowed them to acquire.

Mona first argues that the \$100,000 is not rightfully Joe's as it belongs to the Rena M. Pasentine Trust. This argument, however, is moot in light of the 1984 chancery court order ruling that the monies were not subject to any trust and belonged entirely to Joe. Mona next argues that the \$100,000 was commingled with marital assets as the income from Mars Motors was used to support the family. With this argument, we must agree. Mona testified that the Mars Motors franchise was sold in 1987 for \$160,000. She then testified that the money received in this sale went to pay IRS liens and various outstanding mortgages which she and Joe had accumulated during their marriage. A review of the record indicates nothing to rebut Mona's assertions regarding the sale of the franchise and expenditure of the monies received in payment thereof.

While we recognize that Joe used nonmarital assets acquired prior to the marriage to establish Mars Motors, we cannot overlook the fact that he was reimbursed \$160,000 when he sold the Chrysler franchise. Instead of setting aside \$100,000, the nonmarital sum he claims he used to purchase Chrysler stock when establishing Mars Motors, Joe spent this money on debts that he and Mona had accumulated. We therefore find that the chancellor erred in giving Joe a \$100,000 credit. The law is clear that nonmarital assets later commingled with marital assets lose their nonmarital status. *Johnson v. Johnson*, 650 So. 2d 1281, 1286 (Miss. 1994). We therefore reverse and remand as to this issue and instruct the chancellor to recalculate the awards consistent with this opinion.

IV. THE COURT ERRED IN AMENDING THE JUDGMENT AND GIVING JOE AN ADDITIONAL \$22,000 FOR PAYMENT OF INCOME TAXES.

Mona contends that the chancellor gave Joe an additional \$22,000 when he amended the judgment by increasing Joe's interest in 1,960 acres of timberland from fifty-four percent (54%) to fifty-four and seventy-nine one-hundredths percent (54.79%) thereby reducing her interest from forty-six percent (46%) to forty-five and twenty-one one-hundredths percent (45.21%). We discussed the reasoning for this amendment at the beginning of this opinion and see no need to revisit it here.

Mona argues further that this amendment is even more egregious in light of the fact that the chancellor refused to give her credit for the \$134,568.83 that Joe collected from their income producing properties during the period of separation prior to the finalization of the divorce. Joe argues that Mona's calculations are incorrect in that during the separation he only collected \$37,458.75 not \$134,568.83. Joe contends further that the majority of these monies were expended for the benefit of Mona and the children.

We decline to get into a mathematical duel with the chancellor. A review of the record indicates that the chancellor had before him a great deal of information regarding the assets and expenditures of these parties. We find nothing in the record to indicate that the chancellor failed to consider the *Ferguson* factors or that he failed to follow *Hemsley* in determining what was or was not marital property. It is well established 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*, 650 So. 2d at 1285. We find no such manifest error in the chancellor's decision to amend the judgment.

CONCLUSION

Essentially, the chancellor determined the value of the marital assets and divided by two. This equal division is supported by the fact that both parties recognize the respective contributions of the other in regard to accumulation of the marital assets. On appeal, Mona simply challenges the chancellor's classification of the \$100,000 Joe used to purchase stock in the Chrysler Corporation and \$295,500 in real property as nonmarital assets. We cannot say that the chancellor erred in classifying the \$295,500 in real property as nonmarital assets because the record amply supports his conclusion. We do, however, find that the chancellor erred in classifying the \$100,000 as nonmarital. Because the chancellor is in the best position to distribute the assets, we are reversing and remanding this issue to the chancery court for recalculation consistent with this finding. Finally, the amendment to the final

judgment merely conformed the dollar figures to the intention of the chancellor and we therefore find no error in this calculation.

THE JUDGMENT OF THE PEARL RIVER COUNTY CHANCERY COURT IS AFFIRMED IN PART AND REVERSED AND REMANDED IN PART. THE FINDING THAT THE APPELLEE IS ENTITLED TO A \$295,500 CREDIT FOR THE ACQUISITION COST OF SIX PARCELS OF LAND PURCHASED PRIOR TO THE MARRIAGE IS AFFIRMED. LIKEWISE, THE CHANCELLOR'S AMENDMENT OF THE FINAL JUDGMENT IS ALSO AFFIRMED. THE FINDING THAT THE APPELLEE IS ENTITLED TO \$100,000 AS CREDIT FOR THE PURCHASE OF CHRYSLER STOCK PRIOR TO THE MARRIAGE IS REVERSED AND REMANDED WITH INSTRUCTIONS THAT THE DISTRIBUTION OF ASSETS BE RECALCULATED IN A MANNER CONSISTENT WITH THIS OPINION. TWO-THIRDS (2/3) OF THE COSTS OF THIS APPEAL SHALL BE TAXED TO THE APPELLANT AND ONE-THIRD (1/3) OF THE COSTS OF THIS APPEAL SHALL BE TAXED TO THE APPELLEE.

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