

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01299 COA

THOMAS N. HERROD

APPELLANT

v.

ALICE P. HERROD

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. VICKI R. BARNES

COURT FROM WHICH APPEALED: WARREN COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

KAY S. BEENE

ATTORNEY FOR APPELLEE:

SAMUEL DAVID HABEEB

NATURE OF THE CASE: DOMESTIC: DIVORCE

TRIAL COURT DISPOSITION: WIFE AWARDED DIVORCE ON GROUNDS OF ADULTERY.

MANDATE ISSUED: 6/24/97

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

KING, J., FOR THE COURT:

Thomas N. Herrod appeals from the judgment of the Chancery Court of Warren County, which granted his wife, Alice P. Herrod, a divorce on the grounds of adultery. Mr. Herrod was ordered to pay Mrs. Herrod \$20,000.00 as lump sum alimony, \$526.00 per month as periodic alimony, to

provide a survivor annuity in the sum of \$400.00 per month payable upon his death, and to pay \$2,345.00 for investigative services. Mr. Herrod timely filed a notice of appeal framing his issues for appeal as:

I. The chancery court erred in awarding the Appellee, Mrs. Alice Herrod, lump sum alimony of \$20,000.00.

II. The chancery court erred in awarding the Appellee, Mrs. Alice Herrod, permanent periodic alimony in the amount of \$526.00 per month.

III. The chancery court erred in awarding the Appellee, Mrs. Alice Herrod, a survivor annuity in the sum of \$400.00 per month and in requiring the Appellant, Mr. Thomas Herrod, to pay for the cost of said annuity from his retirement annuity.

IV. The chancery court erred in awarding the Appellee, Mrs. Alice Herrod, the sum of \$2,345.00 to be paid by the Appellant, Mr. Thomas Herrod, for investigative services.

Finding no error in the chancery court's judgment, we affirm.

FACTS

Mrs. Herrod and Mr. Herrod were married on December 15, 1989, in Warren County. There were no children born to this union. Mr. Herrod retired from the U.S. Corps of Engineers, and Mrs. Herrod was a housewife after having been declared totally disabled soon after the marriage. The marriage lasted only four years before the two separated. The two separated on July 30, 1993, and Mrs. Herrod filed for divorce on January 27, 1994, on the grounds of adultery. The chancellor ordered Mr. Herrod to pay Mrs. Herrod \$400.00 per month as temporary alimony as well as provide her with medical and hospital insurance. During the trial Mr. Herrod testified that he told Mrs. Herrod on several occasions that he did not love her and wanted her to leave the marital home. Mr. Herrod further admitted that he and his ex-wife, Frances Carollo, had engaged in sexual relations during his marriage to Mrs. Herrod. Mrs. Herrod testified that Frances became a fixed guest at family activities as well as in their home. Frances accompanied the Herrods on camping trips, used their swimming pool and was in the marital home on birthdays and holidays. According to Mrs. Herrod, Mr. Herrod spent more time with Frances and the children born to that first marriage than he did with her. Because Mr. Herrod would not initially admit to his adulterous association with Frances, Mrs. Herrod used an investigative service to obtain evidence of the on going relationship between the two.

Mrs. Herrod and Mr. Herrod lived in the home that Mr. Herrod owned prior to the couple's marriage. It was established that Mrs. Herrod had made considerable improvements to the marital home. According to Mrs. Herrod, she made improvements to the home and/or its surrounding land and to various pieces of equipment on the property totaling \$7,194.49. Mrs. Herrod also testified that she invested another \$7,297.83 in various items owned and retained by Mr. Herrod after the couple's separation.

Upon the trial's end the chancellor granted Mrs. Herrod a divorce on the grounds of adultery and ordered that Mr. Herrod provide Mrs. Herrod with the following:

(1) the exclusive use, possession and ownership of the personal property, household furnishings, appliances and contents presently in her possession.

(2) \$20,000.00 in lump sum alimony.

(3) \$526.00 per month in periodic alimony beginning December 1, 1995.

(4) a survivor annuity in the sum of \$400.00 per month payable upon the death of Mr. Herrod.

(5) \$2,345.00 for investigative services used by Mrs. Herrod.

Mr. Herrod now appeals the chancellor's judgment to this Court.

SCOPE OF REVIEW

Mr. Herrod assigns four points of error in the chancery court's disposition of the divorce, which he requests this Court to review. Our scope of review is limited. This Court views the facts of a divorce decree in the light most favorable to the appellee, and may not disturb the chancellor's decision unless we find it manifestly wrong or unsupported by substantial evidence. *Rawson v. Buta*, 609 So. 2d 426, 429 (Miss. 1992). In cases questioning alimony awards, the law is well-settled and provides that both lump sum and periodic awards are within the chancellor's discretion and will not be disturbed when supported by substantial evidence or unless there is manifest error. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993); *Tilley v. Tilley*, 610 So. 2d 348, 351 (Miss. 1992) (citing *Miller v. Miller* 173 Miss. 44, 64 (1935)).

I.

THE CHANCERY COURT ERRED IN AWARDING THE APPELLEE, ALICE HERROD, LUMP SUM ALIMONY OF \$20,000.00.

Mr. Herrod contends that the chancery court erred in awarding Mrs. Herrod \$20,000.00 in lump sum alimony, in light of the couple's brief marriage and the fact that they had no jointly acquired assets. He contends that the award was excessive and inequitable, particularly since the value of Mrs. Herrod's estate exceeded that of his own. The court may award a spouse an equitable portion of assets jointly acquired during the marriage where the net worth of assets have increased due to the efforts of the divorcing spouse. *Jones v. Jones*, 532 So. 2d 574, 580 (Miss. 1988). The chancellor's decision to award lump sum alimony was based on Mrs. Herrod's effort and money expended to maintain the couple's marital home. Even though Mr. Herrod owned the house and five acres of land prior to the couple's marriage, testimony revealed that Mrs. Herrod spent \$7,194.49 of her own money to make certain renovations and to maintain the property. In addition, Mrs. Herrod spent \$7,297.83 on various personal property owned by Mr. Herrod or retained by him after the couple's separation. The chancellor also found that Mrs. Herrod's labor and services as cook and housekeeper entitled her to equitable compensation. Our supreme court has said that it "seeks equity by reference to the economic contributions made by each to the acquisition and maintenance of the property, and may not disregard a spouse's economic contributions just because they were not monetary in form." *Pittman v. Pittman*, 652 So. 2d. 1105, 1109 (Miss. 1995).

Our review of the chancellor's award of lump sum alimony invokes our adherence to the aforementioned standard of review. That standard dictates that an award of alimony is within the discretion of the chancellor, and this Court should not disturb the chancellor's decision unless unsupported by substantial evidence or there is manifest error. *Armstrong*, 618 So. 2d at 1280. Based upon the chancellor's findings of fact and application of those facts to the applicable law, we find substantial evidence to support the lump sum alimony award. Finding no abuse of discretion or manifest error, we determine that Mr. Herrod's argument is without merit.

II.

THE CHANCERY COURT ERRED IN AWARDING THE APPELLEE, MRS. ALICE HERROD, PERMANENT PERIODIC ALIMONY IN THE AMOUNT OF \$526.00 PER MONTH.

In the disposition of this case, the chancellor awarded Mrs. Herrod the sum of \$526.00 per month in periodic alimony. In deciding whether to award Mrs. Herrod alimony, the chancellor applied the twelve factors outlined in *Armstrong v. Armstrong*, 618 So. 2d at 1280. Those factors include:

1. Income and expenses of the parties;
2. Health and earning capacity of the parties;
3. Needs of each party;
4. Obligations and assets of each party;
5. Length of the marriage;
6. Presence or absence of minor children in the home;
7. Age of the parties;
8. Standard of living of the parties both during the marriage and at the time of the support determination;
9. Tax consequences of the spousal support order;
10. Fault or misconduct;
11. Wasteful dissipation of assets by either party;
12. Any other factor deemed by the court to be "just and equitable" in connection with the setting of spousal support.

The court determined that \$526.00 per month would furnish Mrs. Herrod with the standard of living commensurate to that which she enjoyed during her marriage to Mr. Herrod. "A wife is due reasonable alimony, commensurate with her standard of living, and the husband's ability to pay." *Branton v. Branton*, 559 So. 2d 1038, 1040 (Miss.1990) (citing *Banks v. Banks*, 511 So. 2d 933, 936 (Miss. 1987)). Nonetheless, Mr. Herrod contends that the chancery court erred in granting Mrs.

Herrod \$526.00 per month in periodic alimony. He contends that the court did not give adequate and full consideration to all of the factors designated in the present case law when it made this award. Mr. Herrod opines that factors such as the length of the marriage, the size of Mrs. Herrod's estate, and the fixed nature of his income were not given proper consideration.

Awards of periodic alimony are within the chancellor's discretion, and will not be disturbed when supported by substantial evidence or unless there is manifest error. *Armstrong*, 618 So. 2d at 1280. Mr. Herrod complains that of the twelve factors cited in *Armstrong*, the chancellor failed to fully consider three in granting Mrs. Herrod periodic alimony. He first complains that the length of his marriage to Mrs. Herrod did not warrant the amount awarded. Our perusal of the record indicates that the chancellor considered the six year duration of the marriage and determined it sufficient to qualify for alimony. In making this determination, the court relied on relevant case law such as *Brendel v. Brendel*, 566 So. 2d 1269 (Miss. 1990), *Owen v. Owen*, 88 So. 2d 100 (Miss. 1956), and *Shows v. Shows*, 133 So. 2d 294 (Miss. 1961). The couples in these cases were married three and five years respectively, and the Court awarded alimony in each case. We find the chancellor's consideration of this factor well within the bounds of the current law.

Mr. Herrod next complains that the size of Mrs. Herrod's personal estate should have precluded her from receiving \$526.00 monthly in alimony. Once a couple enters into the state of matrimony, the husband assumes the duty of provider, and upon separation or divorce the wife's right to alimony emerges. *Brennan v. Brennan*, 638 So. 2d 1320, 1324 (Miss. 1994). "The husband is required to support his wife in the manner to which she has become accustomed, to the extent of his ability to pay. The value of the wife's assets and income should be determined in order to ascertain her needs to maintain her position in life to which she had become accustomed, and such value is considered by the trial court in assessing both alimony and support." *Id.* (citing *Brendel v. Brendel*, 566 So. 2d 1269 (Miss. 1990)).

The court determined the value of Mrs. Herrod's nonmarital estate to be about \$200,000.00 in stocks, bonds and securities. She indicated that she assumed that her marriage to Mr. Herrod would last, and they would be able to rely on their dual estates and marital assets for support. Because of the divorce, Mrs. Herrod testified that she intended to use these assets for her future care and living if she should become confined to a nursing home due to her disabilities. Presently, Mrs. Herrod has a monthly income of \$1,300.00, which includes \$400.00 temporary alimony and expenses totaling \$2,566.42, excluding medical insurance. Because she has been declared totally disabled, Mrs. Herrod cannot work to support herself; therefore, outside of her investment income, she has no way to increase her assets in order to provide herself with adequate living income.

Finally, Mr. Herrod complains that the chancellor failed to give adequate consideration to the fixed nature of his income. The record indicates that Mr. Herrod received an annual retirement annuity in the sum of \$30,000.00 or \$2,472 per month and held a total of \$225,051.00 in assets. The chancellor found that Mr. Herrod's monthly expenditures totaled \$1,835.31, but were overstated because this included nonessential recreational activities and \$300.00 for miscellaneous expenses. Even so, the chancellor determined that Mr. Herrod could work and increase his income to cover his expenses. Unlike Mrs. Herrod, who involuntarily left the workforce, Mr. Herrod voluntarily retired and could reenter if he so desired.

We find that there is credible and substantial evidence contained in the record to support Chancellor Barnes' findings of fact and award of \$526.00 per month in alimony. Chancellor Barnes meticulously presented her findings of fact and conclusions of law reflecting the in depth consideration given to the factors, which Mr. Herrod now complains of. We find neither an abuse of discretion nor manifest error in the chancellor's decision.

III.

THE CHANCERY COURT ERRED IN AWARDING THE APPELLEE, MRS. ALICE HERROD, A SURVIVOR ANNUITY IN THE SUM OF \$400.00 PER MONTH AND IN REQUIRING THE APPELLANT, MR. THOMAS HERROD, TO PAY FOR THE COST OF SAID ANNUITY FROM HIS RETIREMENT ANNUITY.

During trial the parties stipulated that the chancellor "may issue its order directing that Mrs. Herrod be awarded a survivor annuity which will pay to her the sum of \$400.00 per month upon the death of Mr. Herrod. The cost of this survivor annuity to Mr. Herrod would be the sum of \$53.00 per month, which would be deducted monthly from his retirement annuity of \$2,472.00." We recognize stipulated facts or agreements as those that the parties agree upon as true and acceptable in litigation, which establish factual boundaries that we will not cross. *Wilbourn v. Hobson*, 608 So. 2d 1187, 1189 (Miss. 1992). "Courts are bound to enforce stipulations which parties may validly make, where they are not unreasonable or against good morals or against public policy." *Id.* We do not find that the complained of stipulation falls within either of these categories, but rather to be that which both parties concertedly agreed upon.

IV.

THE CHANCERY COURT ERRED IN AWARDING THE APPELLEE, MRS. ALICE HERROD, THE SUM OF \$2,345.00 TO BE PAID BY THE APPELLANT, MR. THOMAS HERROD, FOR INVESTIGATIVE SERVICES.

The record shows that in the initial divorce proceedings Mr. Herrod would not admit that he had resumed his sexual relationship with his ex-wife. As a result, Mrs. Herrod employed an investigator to obtain evidence of Mr. Herrod's adulterous behavior and incurred costs of \$2,845.00. Mrs. Herrod has remitted \$500.00 of these costs, and the chancellor ordered Mr. Herrod to pay the remaining \$2,345.00. Pursuant to Rule 37(c) of the Mississippi Rules of Civil Procedure if a party fails to admit that which he knows to be true and it is later proven genuine, the court may order the withholding party to pay reasonable expenses incurred in making the proof. *See* M.R.C.P 37(c). In this case, Mr. Herrod later admitted to having an adulterous relationship with his ex-wife, but not before Mrs. Herrod sought the services of an investigator. We find that the chancellor did not abuse her discretion in ordering Mr. Herrod to pay for the services, particularly since proof of his indiscretion was of substantial importance to the disposition of the divorce action brought on the grounds of adultery. We affirm.

**THE JUDGMENT OF THE CHANCERY COURT OF WARREN COUNTY IS AFFIRMED.
THE COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT. STATUTORY**

PENALTIES AND INTEREST ARE ASSESSED.

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