

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00553 COA**

CONNIE BYRNE

APPELLANT

v.

STEPHEN BYRNE

APPELLEE

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

DATE OF JUDGMENT:	08/02/96
TRIAL JUDGE:	HON. J. N. RANDALL JR.
COURT FROM WHICH APPEALED:	HARRISON COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	JOSEPH R. MEADOWS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: HERBERT J. STELLY
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	DIVORCE GRANTED TO APPELLANT; APPELLANT AWARDED \$1250 IN PERIODIC ALIMONY AND OTHER PROPERTY; APPELLEE TO PAY CERTAIN MEDICAL AND EDUCATION EXPENSES
DISPOSITION:	AFFIRMED - 11/4/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	11/25/97

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

BRIDGES, C.J., FOR THE COURT:

The Chancery Court of the First Judicial District of Harrison County, Mississippi, granted Connie Byrne a divorce from Stephen Byrne on grounds of habitual, cruel and inhuman treatment. Aggrieved by certain aspects of the chancellor's ruling, Connie appeals on the following grounds:

I. THE CHANCELLOR ERRED IN FAILING TO AWARD CONNIE BYRNE LUMP SUM ALIMONY.

II. THE CHANCELLOR ERRED IN FAILING TO AWARD CONNIE BYRNE ADEQUATE PERIODIC ALIMONY.

III. THE CHANCELLOR ERRED IN NOT REQUIRING STEPHEN BYRNE TO MAINTAIN A LIFE INSURANCE POLICY WITH CONNIE BYRNE AS THE NAMED BENEFICIARY UNTIL SUCH TIME AS HE DISCHARGED ALL FINANCIAL OBLIGATIONS TO HER.

IV. THE CHANCELLOR ERRED IN FAILING TO AWARD CONNIE BYRNE ATTORNEY FEES.

Finding no error, we affirm.

FACTS

Stephen and Connie Byrne were married on September 9, 1972, in Pass Christian, Mississippi. A son, emancipated at the time of the divorce, and a daughter, emancipated at the time of the appeal, were born during the marriage. The parties separated on or about November 11, 1993, and Connie Byrne filed her complaint for divorce on May 27, 1994. Stephen answered the complaint, and the trial was initiated on January 24, 1995. The chancellor recessed the trial after a half day of testimony to give the parties an opportunity to reconcile their marriage. The parties were unable to reconcile, and a final judgment of divorce was entered on August 2, 1996. Connie filed a post-trial motion to reconsider the findings of fact and conclusions of law, which was denied by the chancellor. Feeling aggrieved, Connie has perfected this appeal.

ARGUMENT AND DISCUSSION OF LAW

I. THE CHANCELLOR ERRED IN FAILING TO AWARD CONNIE BYRNE LUMP SUM ALIMONY.

Connie appeals from the chancellor's denial of her request for lump sum alimony. She contends that she worked the entire term of their marriage, made substantial contribution to the marriage, and is entitled to lump sum alimony because of the great disparity in the parties' estates. Stephen responds by arguing that the chancellor awarded Connie periodic alimony, and the chancellor's denial of lump sum alimony was not manifest error or abuse of discretion. Furthermore, Stephen argues that lump sum alimony was appropriately denied since the parties did not accumulate the amount of assets necessary to support it, nor did Connie demonstrate that she was financially insecure without it.

This Court's standard of review is limited in domestic relations cases where the chancery court has decided to award alimony. As an error-corrections court, it is our task to review the chancellor's decision under the well known standard set forth by the Mississippi Supreme Court: "This Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Brennan v. Brennan*, 638 So. 2d 1320, 1323 (Miss. 1994). Likewise, because this Court's power to review a chancellor's award of alimony is limited, so is this Court's power to review a chancellor's refusal to grant alimony. *See Smith v. Smith*, 614 So. 2d 394, 397 (Miss. 1993) (stating that whether to award alimony is matter largely within discretion of chancellor). The following factors must be considered in determining whether to award 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, 516 (Miss. 1995). The disparity of the separate estates has been the most compelling factor in determining whether to award lump sum alimony. *Id.* The chancellor has authority to grant lump sum alimony if he deems it appropriate under the guidelines.

It is apparent that the chancery court considered each factor in determining the amount of alimony to award. The court found that it must consider the present financial situation of the parties. Although Connie had substantially contributed to the marriage, at the time of the divorce there was no accumulation of assets. What the court found was an extreme amount of debt which Stephen was ordered to pay. The disparity between the estates of Stephen and Connie is not so great as to warrant an award of lump sum alimony. However, the court stated that the needs and financial abilities of the parties could be considered at a later date if shown that a material change had taken place. Connie has failed to prove that the chancellor was manifestly wrong or clearly erroneous. This issue is without merit.

II. THE CHANCELLOR ERRED IN FAILING TO AWARD CONNIE BYRNE ADEQUATE PERIODIC ALIMONY.

Connie argues that the amount of periodic alimony was inadequate to cover her monthly expenses. Stephen responds by arguing that the amount in periodic alimony was adequate and sufficient to allow her to maintain her accustomed standard of living while allowing him to maintain a decent living.

"The right to an award of periodic alimony flows from the duty of the husband to support his wife." *Brennan*, 638 So. 2d at 1324. It is designed to support the wife in the manner to which she has become accustomed to the extent of the husband's ability to pay. *Brendel v. Brendel*, 566 So. 2d 1269, 1272 (Miss. 1990). In determining if an award of alimony is appropriate, "[t]he chancellor should consider the reasonable needs of the wife and the husband's right to lead a normal life with a decent standard of living." *McEachern v. McEachern*, 605 So. 2d 809, 815 (Miss. 1992). "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). In *Crowe v. Crowe*, 641 So. 2d 1100, 1102 (Miss. 1994), the Mississippi Supreme Court reiterated the factors to be considered when evaluating an award of periodic alimony:

(1) the health and earning capacity of the husband, (2) the health and earning capacity of the wife, (3) the reasonable needs of the wife, (4) the husband's necessary living expenses, (5) other factors such as estimated amount of income taxes, the use of the family home or automobile, and the payment of insurance.

It is very clear from the record that the chancellor took all of these factors into account when awarding Connie the amount of alimony that he did. Connie has failed to prove that the chancellor was manifestly wrong or clearly erroneous. This issue is without merit.

III. THE CHANCELLOR ERRED IN NOT REQUIRING STEPHEN BYRNE TO MAINTAIN A LIFE INSURANCE POLICY WITH CONNIE BYRNE AS THE NAMED BENEFICIARY UNTIL SUCH TIME AS HE DISCHARGED ALL FINANCIAL OBLIGATIONS TO HER.

Connie argues that the chancellor erred in not requiring her husband to maintain a life insurance policy with her named as the beneficiary in the event that something was to happen to him, she would be left destitute. Stephen responds by arguing that the chancellor adequately settled all financial issues between the parties through property division, allocation of debt and a periodic alimony award.

As stated above, this Court reviews the chancellor's decision under the manifest error standard of review. *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994). The process regarding equitable distribution is governed by *Ferguson*:

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 the 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 chancellor reviewed all of the evidence and kept in mind the financial and familial contributions of both parties when considering the distribution of property. After reviewing the record, we are satisfied that the chancellor's equitable division of property was not manifest error. Connie had failed to prove that the chancellor's decision in not requiring Stephen to maintain a life insurance policy with Connie named as the beneficiary was clearly erroneous. This issue is without merit.

IV. THE CHANCELLOR ERRED IN FAILING TO AWARD CONNIE BYRNE
ATTORNEY FEES.

Connie argues that she had no separate estate with which to pay her attorney's fees and thus, she was forced to use the money she received from the sale of the parties' homestead. Furthermore, Stephen was able to make a reasonable contribution toward her attorney's fees, and in fact, his portion of the money received from the sale of the parties' homestead was used as a down payment on a condominium. Stephen responds by arguing that Connie not only had the ability to pay her attorney, but had paid all but a very small portion of her attorney's fees at the time of trial.

The award of attorney's fees and other costs in a divorce action is generally left to the discretion of the chancellor. *Brooks v. Brooks*, 652 So. 2d 1113, 1120 (Miss. 1995). The Mississippi Supreme Court, however, has held that "if a party is able to pay attorney's fees, [the] award of attorney's fees is not appropriate." *Martin v. Martin*, 566 So. 2d 704, 707 (Miss. 1990). On the other hand, "where the record shows an inability to pay and a disparity in the relative financial positions of the parties, we find no error" in the award of attorney's fees. *Brooks*, 652 So. 2d at 1120. Importantly, "consideration of the net worth of the parties, standing alone is insufficient" to support an award of attorney's fees. *Benson v. Benson*, 608 So. 2d 709, 712 (Miss. 1992). Under such circumstances, "[t]he record must [also] reflect the requesting spouse's inability to pay his or her own attorney's fees." *Brooks*, 652 So. 2d at 1120. We are reluctant to disturb a chancellor's discretionary determination whether to award attorney's fees and the amount of any award. After the equitable distribution property and her award of periodic alimony, Connie's and Stephen's estates are such that they are equally able to pay their attorney's fees. Considering the record, we cannot say that the chancellor abused his discretion in not awarding attorney's fees. We find no merit to this issue.

**THE JUDGMENT OF THE HARRISON COUNTY CHANCERY COURT IS AFFIRMED.
COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.**

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