

**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

JAMES PARKER

Defendant-Appellant

Versus

Civil Action No.: 2006-CA-01925

NANCY CAROLYN PARKER

Plaintiff-Appellee

**ON APPEAL FROM THE CHANCERY COURT
OF ITAWAMBA COUNTY, MISSISSIPPI
CAUSE NO. 2002-0397-29**

REBUTTAL BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

JAMES PARKER

Defendant-Appellant

Versus

Civil Action No.: 2006-CA-01925

NANCY CAROLYN PARKER

Plaintiff-Appellee

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

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ISSUE NO. 1

James would respectfully call to this court's attention that the argument of and cases cited by Nancy in response to this issue, while perhaps enlightening on other assignments of error presented herein, are unresponsive to and ignore the crux of this very important issue.

As set forth in his Brief, James urges that it was error for the lower court to order a judicial sale of assets when the nature of such assets were entirely capable of division in kind. James urges the court to look past the impact of its decision in this case on the parties herein, to the effect and precedent its decision will set in how an equitable distribution of assets may be effectuated and the preferred methods thereof in the area of domestic law, and also, perhaps more importantly, its impact in the law of real property.

The cases recited upon by Nancy all involve various problems dealing with the necessity and determination of valuation of marital property prior to making an in-kind distribution of such properties and or other marital assets.

The case of Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994) and its progeny appears to place an affirmative burden on the chancellor to make a determination of the fair market value of marital assets. "A chancellor is responsible for determining the fair market value of the marital assets." Ferguson at p. 929. Here, no such determination was ever made.

While unresponsive to the gist of his argument, James is compelled to address the case of Ward v. Ward, 825 So.2d 713 (Miss. 2002) wherein Appellee maintains the court, upon objection by the husband found no abuse of discretion by the lower court in assigning certain values to marital assets.

In Ward, *id.*, the husband argued that the court failed to "identify, value and divide the

ISSUE NO. 2

James met his burden of establishing the 3 acres of real property deeded to him by Charles & Eunell Digby was his separate property.

The only evidence at trial regarding this property was the deed, solely in the name of James, (Exhibit 11) and the testimony of James and Nancy (Transcript p. 48 and pp. 132-133). Whether the land was a gift to James in appreciation for help he had rendered to the Digby's or deeded to him in exchange for the work as alleged by Nancy is not dispositive of whether or not such property should be determined James' separate property. Nancy herself testified they gave it to him. (Transcript pp. 132-133).

Although there is a presumption that an asset acquired during the marriage is a marital asset subject to equitable distribution, the Hemsley v. Hemsley, 639 So.2d 909 (Miss. 1994) and Langdon v. Langdon, 854 So.2d 485 (Miss. 2003) cases clearly acknowledge there are assets which may be non-marital if purchased with the separate funds of a spouse, gifts or inheritances.

The case of Langdon cited by Nancy is enlightening on this issue. In Langdon, the evidence showed that Helen's father gave Helen a house during her marriage to Kent to facilitate the purchase of a lot. There was no evidence that Helen used any marital funds to acquire the property, such as for a down payment, and no evidence of commingling. Likewise, there was no evidence that any efforts of Kent contributed to the lot's appreciation in value. Citing Carrow v. Carrow, 642 So.2d 901, 906 (Miss. 1994) this court upheld the chancellor's determination that the property was Helen's separate estate though acquired during the marriage.

The only evidence presented at trial was that the 3 acres were acquired by James during the marriage, solely deeded to him either as a gift to James, or, at worst, deeded to him in

exchange for work done by him, his sole efforts. Nancy presented no evidence that any marital funds were used to acquire this property nor that she contributed in any manner whatsoever to the acquisition or value of the property or that the 3 acres were ever commingled.

In A & L, Inc. v. Grantham, 747 So.2d 832 (Miss. 1999) cited by Appellant, the evidence showed that the wife's efforts in raising a family contributed toward the accumulation of a home which was claimed by the husband as his separate estate and therefore, the asset was in fact marital property. The court also found that the increase in interest in property owned by John prior to the marriage was due in part to the marital efforts of Lynn.

In the present case, no such factual findings were made by the Court. Though the lack of such findings alone constitute error under Ferguson, supra., absent such findings, supported by the record, James clearly established that the acquisition of this acreage was attributable to him outside the marriage, should have been classified as non-marital and not subject to equitable division.

ISSUE NO. 3

Nancy argues that James failed to meet his burden of proof to show the following property should be excluded from the marital estate: (a) 21½ acres purchased by James in 1994 from Wayne and Lavelle Young for \$12,000.00, (b) a house and 3 acres of land purchased by James from Jimmy and Barbara Parker in 1997 for \$26,000.00 and (c) 60 acres of land purchased by James in 1997 from Rickey Grissom for \$20,218.00.

The inclusion of the above parcels of real estate in the property determined by the court to constitute marital property is not cited as error by James. Rather, the property which is the subject of this issue is particularly described in James' Brief as (b) a tract consisting of 36 acres, more or less (described as 48 acres less and except 12 acres and one lot) (c) a tract of 5.7 acres and (d) a tract of 34 acres, more or less. (Exhibit 10). The above tracts do not constitute any part of the tracts purchased during the marriage from the Youngs, Parkers, or Grissom.

Nancy rightfully points out that at the time of her marriage to James, he already owned an undivided interest in and to the roughly 85 acres, at issue with his former spouse, Donna, and Robert Hood.

Upon the total acreage, there was a house located upon a tract of land approximately 10.4 acres. This became the marital home of the parties herein. (Transcript p. 45). Testimony revealed that improvements were made on the marital dwelling and a shed was erected on this tract. (Transcript pp. 50-54). Although James submits that some consideration or allowance should have been given him for the interest in this home and 10.4 tract of land which he brought into the marriage, for purpose of this issue, James concedes that the home and 10.4 acre tract was certainly commingled so as to become marital property subject to equitable Heigle v. Heigle, 654

So.2d 895 (Miss. 1985).

The tracts of property at issue in this assignment are found in the deed from Donna J. Parker conveying her interest to James P. Parker (Exhibit 10).

The evidence is uncontradicted that James owned an undivided one-half interest in the above tracts of land prior to his marriage to Nancy (Transcript p. 45). The other one-half (½) interest was purchased by James during the marriage from his ex-wife for \$12,000.00 (Transcript pp. 45-47).

Albeit the 10.4 acre tract upon which the marital home is situated was commingled, the record is devoid of any evidence that commingling of James' one-half interest in the remaining tracts (b) 36 acres (c) 5.7 acres or (d) 34 acres ever took place. Further, there was no evidence of any efforts by Nancy which would have improved or affected the value of James' one-half interest in these tracts or any marital funds that were expended which directly or indirectly affected James' pre-marriage interest in these tracts.

Nancy seemingly argues that James failed to offer testimony or evidence concerning his separate estate in the above tracts and therefore did not meet his burden of establishing that his ½ interest in these was non-marital and thus not subject to equitable distribution. However, such argument overlooks the fact that as James owned the ½ interest at issue here prior to his marriage, it was presumptively non-marital until and unless proof of commingling, sufficient to transform the property into a marital asset was proven. Hemsley v. Hemsley, 639 So.2d 909 (Miss. 1994), Heigle v. Heigle, 654 So.2d 895 (Miss.1985) .

As no factual findings were made by the trial court and no analysis made as required by

Ferguson, supra., there is no way to determine if the trial court properly considered this issue and the courts failure to make said findings is such that requires reversal and remand Heigle v. Heigle, 654 So.2d 895 (Miss. 1985), Kilpatrick v. Kilpatrick, 732 So.2d 876, 881 (Miss. 1999), Baker v. Baker, 807 So.2d 476, 478 (Miss. 2001), Horn v. Horn, 905 So.2d 1151 (Miss. 2005).

ISSUE NO. 4

Although no authority is cited by James in support of his assertion that he should be given credit for his interest of ownership in Lube #1 prior to his marriage, he does cite authority in this assignment which requires reversal on this issue.

Citing Owen v. Owen, 928 So.2d 156 (Miss. 2006), the courts failure to make specific finding of fact and conclusions of law as to this asset, factoring same into the considerations required by Ferguson, supra, alone, requires reversal.

ISSUE NO. 5

Nancy calls attention that in his initial division of the proceeds of the sale of marital assets, the trial court determined that a 50/50 division was equitable. Without a detailed finding of fact as to each asset and the proper Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994), Horn v. Horn, 905 So.2d 1151 (Miss. 2005) analysis, the property of such division can not be reviewed and must be reversed. Horn v. Horn.

Nevertheless, in making the “adjustments” alleged to be necessary in order to recognize Nancy’s equitable interest in assets disposed of by James, the court did so without an evidentiary basis, and in a manner which disregarded the debt on the properties. Such action constitutes an abuse of discretion requiring reversal Pittman v. Pittman, 652 So.2d 1105 (Miss. 1995).

Although the parties stipulated that the value of Lube Center #3 was \$145,000.00, the only evidence presented at trial was that transfer of this property was in consideration for payment of the debt thereon owed to People’s Bank & Trust (Transcript p. 177-180, Exhibit 6). The “adjustment” made by the trial court credited Nancy with \$12,500.00 equity which did not exist in Lube Center #3 as the evidence reflected the transfer was made in consideration of the assumption of the debt owed thereon and the trial court made no deduction for the debt owed on the property.

Likewise, there was no evidentiary basis for imputing a realization of \$36,000.00 gain on the property reconveyed to the Parkers as the trial court once again failed to consider the debt on said property when deducting one-half ($\frac{1}{2}$), or \$18,000.00 from James’ share of the proceeds (Exhibit 14).

Although James submits the trial court abused its discretion in making the above

adjustments, he submits that the most flagrant error was made by deducting \$22,075.00 from James' share of the proceeds of the judicially mandated sale of Lube Center #2.

The court apparently determined the fair market value of Lube Center #2 to be \$100,000.00. The record reflects that there was also a mortgage owed on this property. However, this property was actually sold of that fact at public auction and only \$55,000.00 received therefrom (Transcript pp. 32, 235, 397-399, Record p. 265 and Exhibit 45). For trial court to base an adjustment in favor of Nancy on the total fair market value rather than the actual value received constitutes an abuse of discretion and is unsupported by the evidence Pittman v. Pittman, 652 So.2d 1105 (Miss. 1995), Pucylowski v. Pucylowski, 741 So.2d 998 (Miss. 1999).

ISSUE NO. 6

While James concedes that Watson v. Watson, 882 So.2d 95 (Miss. 2004) did not require a party to be credited with debt reduction which benefited both parties, the court in Watson certainly acknowledged that this factor was appropriate for the court to consider in adjusting the equities of the parties property division.

The fact remains for approximately three and one-half (3½) years (Record p. 279-281) James kept the businesses afloat to the extent possible, and paid all debt and taxes owed thereon as well as the total marital debt solely through his own efforts with no contribution whatsoever by Nancy. (Transcript pp. 220-230, Exhibit 28).

The trial judge failed to make findings as to the above factors under the Ferguson, *supra.*, analysis, and there appears to be no evidence that these facts were considered by the court, (Transcript pp. 388-402) (Record p. 46-72, 279-281). Certainly, marital debt must be considered in equitable division as same is necessary in a determination of the net value of assets. Horn v. Horn, 905 So.2d 1151 (Miss. 2005)

In reversing the trial court in Horn, the court stated that without a value assigned by the lower court to the assets and debt (emphasis added) the court is unable to meaningfully review the argument that the property division was inequitable.

For the above reasons, and those cited in James' Brief, this case must be reversed.

ISSUE NO. 7

Nancy cites Poole v. Poole, 701 So.2d 813 (Miss. 1997), Varner v. Varner, 666 So.2d 493 (Miss. 1995), Geiger v. Geiger, 530 So.2d 185 (Miss. 1988), and Armstrong v. Armstrong, 618 So.2d 1278 (Miss. 1993) in support of the general principal that in domestic cases, awards of attorney fees are largely entrusted to the sound discretion of the trial court and will generally be upheld absent an abuse of discretion. James agrees that such is a broad statement of the applicable standard of review in determining the propriety of awards of attorney fees in domestic cases.

However, this standard of review does not vest the trial court with unlimited discretion in making such awards. The evidence which must be introduced in the trial court and the factors which must be considered by the chancellor are specifically set forth in McKee v. McKee, 418 So.2d 764 (Miss. 1982) and fully discussed in the Brief of Appellant.

Indeed, the cases above cited by Nancy support James' contention that the award of attorney fees in this case must be reversed.

In Poole, supra, this court sustained an award of attorney fees to Mrs. Poole after she largely prevailed against her ex-husband's Motion to Modify their former decree. Although there was no discussion of the nature of the evidence submitted by Mrs. Poole in support of her request for attorney fees, there in fact had to have been such evidence presented as this court upheld an award of \$1,800.00 in attorney fees out of the \$2,400.00 incurred by Mrs. Poole.

An award of attorney fees was upheld by this court in the Varner, supra, case cited by Nancy. James calls attention to the fact that Mrs. Varner introduced an itemized accounting of her attorney fees, thus providing the trial court with a factual basis for its award of \$2,000.00 out

of the submitted and requested \$2,270.79 attorney fees.

As the record in this case is devoid of evidence of the amount, reasonableness or necessity of any award of attorney fees to Appellee, Appellant submits the Varner case, citing McKee, supports James' contention that the award in this case was without any evidentiary basis, unsupported by the facts or requirements of McKee, and must be reversed as an abuse of discretion.

In Geiger, supra, the ex-husband's motion to reduce alimony payments to his ex-wife failed, and the trial court awarded Mrs. Geiger attorney fees in the amount of \$5,000.00. In reversing this award, the court found that Mrs. Geiger would suffer no financial hardship in having to bear the expense of her own attorney fees. James urges that there is no evidence of any financial hardship which would be born by Nancy in paying her own attorney fees. Moreover, as the trial court had awarded her \$260,831.33 cash, as her share of the proceeds of the sale of the parties' marital assets as a division of property.

In upholding the award of \$1,275.00 attorney fees in Armstrong, supra, this court described the detailed statement of Nina Armstrong's attorney as proof of fees incurred, it being offered and received into evidence, reflecting the hours expended and hourly rate charged. This court held that "the charges were reasonable, proven and undisputed." Armstrong, at p. 1282. No such evidence was submitted by Nancy.

Appellee cites Kelley v. Kelley, 2005-CA-01678-COA (Miss. 2007) for the proposition that there is no steadfast requirement that absolute inability to pay attorney fees must be shown before an award is granted. Kelley, wherein the parties were already divorced, there was ample evidence of Mrs. Kelley's (Commeaux's) financial straits and lack of resources with which to

pay her attorney fees even though there were no direct questions as to same. However, as noted by this court, testimony and exhibits were presented showing Mrs. Commeaux was unable to pay her attorney.

No such testimony or evidence was presented in this case and moreover, Nancy had not only resources of her own available to pay her attorney fees but could have well paid same out of the ample liquid assets awarded her as property settlement by the trial court.

Nancy cites Lauro v. Lauro, 924 So.2d 584 (Miss. 2006) in support of an award of attorney fees to the ex-wife in the amount of \$19,391.95 although the wife had been awarded proceeds from the sale of a marital home, alimony and child support. Affirming this award the court emphasized that a large sum of Helen's attorney fees resulted from Mr. Lauro's contemptuous conduct in failing to pay court-ordered support. Lauro, p. 591-592. The court found that "Based upon the trial record, Helen was not employed and she provided direct testimony that she would be unable to pay the fees." Lauro at 591. There is no discussion of the nature or extent of the evidence submitted to the trial court of the amount or reasonableness of Mrs. Lauro's attorney fees, however, James submits that some evidence of the amount was submitted to the trial court as the award was in a specific amount of \$19,391.95 and the court at p. 591 of its opinion indicated it was upholding the award "based on trial record."

Nancy argues that she is "deserving of her attorney fees due to the fact she was left homeless, unemployed, and penniless by her husband...". Other than Nancy's unemployment, such allegations are not supported by the record in this case. Moreover, the record in this case is devoid of the evidentiary factors and other considerations required by McKee in order to support

an award of attorney fees.

Nancy also cites Adams v. Adams, 591 So.2d 431 (Miss. 1991) in support of her award of attorney fees. James submits that the requisites for an award of attorney fees reiterated by this court in Adams in fact compels a reversal of the award in this case.

The record in this case reflects no statement for legal fees, no testimony as to the amount, if any, of such fees, the actual services rendered by Appellee's attorney, the fairness of same nor any other evidence which could support any award of fees nor evidence upon which any determination of the necessity or reasonableness of such a fee as was arbitrarily established and awarded by the trial court.

While the court in Dunn v. Dunn, 609 So.2d 1277, 1287 (Miss. 1992) did uphold an award of attorney fees where the wife worked, had a \$2,900.00 IRA and \$1,600.00 in savings, among other assets awarded her in the devorce, the lower court once again had evidence before it upon which to support such award. Citing Adams, the Dunn court affirmed the chancellor's discretion "Assuming he follows the appropriate standards" Dunn at p. 1286 (emphasis added). James submits that the appropriate standards were not followed by the trial court and thus, the award of attorney fees in this case was an abuse of discretion.

The courts opinion in Dunn, clearly reflects that at least evidence of Mrs. Dunn's attorney fees were submitted for consideration by the trial court. In the case at bar there was no evidence presented as to the amount if any, of Appellee's attorney fees.

While Appellee speculates as to the trial court's considerations as to the McKee factors, and concedes that the trial court did not "specifically" apply the McKee factors in this case, there is no evidence in the record supporting such speculation.

Although the Varner court affirmed an award wherein the record date did not reflect a specific application of the McKee factors, nevertheless, as addressed above, the record therein did contain an itemized account of the attorney fees requested and evidence upon which the McKee factors could be considered.

Appellant cites O'Neill v. O'Neill, 501 So.2d 1117 (Miss. 1987) wherein an award of \$500.00 attorney fees to the ex-wife was upheld with a like amount awarded to the ex-wife as attorney fees in the appeal. In making this award, the trial court heard evidence of litigation and other actions initiated by the ex-husband bordering on harassment. Such is clearly not present in the case at bar.

Finally, Appellee cites Trunzler v. Trunzler, 431 So.2d 1115 (Miss. 1983) as the standard of manifest error for reversal of an award of attorney fees. Appellant concedes such is the standard. The court in Trunzler properly denied attorney fees as the respondent failed to show a need for attorney's fee or a reasonable amount needed for same and such request was denied as there was insufficient evidence upon which to base an award. As in Trunzler, there is insufficient evidence upon which the trial court could properly award attorney fees. Therefore the award in this case should be reversed.

James submits that the cases and arguments presented in his Brief and this rebuttal amply show an abuse of discretion in the award of attorney fees to Appellee and should be reversed.

ISSUE NO. 8

Although the trial court did recite two bench opinions (Transcript pp. 289-313, 389-402), it is clear from a review of those opinions, that they did not comport with the requirements of Ferguson, supra, and its progeny.

First, although the court found in its opinion that the parties had failed to provide adequate valuations of the marital property to the extent that the court ordered a sale of all real and personal property. In its division of the proceeds of the sales, the judge used the stipulated fair market value of Lube Center #2, \$100,000.00 rather than the actual value received at the judicial sale, \$55,000.00 in “adjusting” the equities and deducting from James one-half of the proceeds in favor of Nancy. (Transcript pp. 388-402) (Record pp. 46-72).

James submits that the use of the fair market value, without consideration for the debt owed thereon, was without basis and was an abuse of discretion. Though no request, argument or fault of James, Lube Center #2 was sold at judicial sale and actually brought only \$55,000.00. For the trial court to then make “adjustments” based on an unrealized fair market value was without evidentiary basis, contrary to law and an abuse of discretion.

The above argument likewise applies to the “adjustments” made by the court in favor of Nancy as relates to the Lube Center #3 conveyed to Susie Grissom and the 3 acres reconveyed to the Parkers by James. The trial court credited Nancy with ½ the fair market value of the property rather than the actual value of the property considering the debt thereon.

Further, even though the marital assets were sold, the trial court simply determined without analysis under Ferguson, that an equitable division of the proceeds would initially be accomplished by evenly dividing same. This decision was made without specific findings of fact

as to the source of the proceeds (i.e., each particular price of property), the debt on each source, the contribution of any of each party to the acquisition of the property and other considerations required by Ferguson, supra, Pucylowski v. Pucylowski, 741 So.2d 998 (Miss. 1999), Hemsley, supra, Lauro, supra.

Further, the court failed to make a detailed finding of fact as to how he arrived at the determination that an equitable distribution would be effectuated by a 50/50 split of the sales proceeds. This omission alone requires reversal as it is impossible for this court to review the facts, assignments of value of each asset and contributions of each party toward each asset which factored into the court's determination that than initial 50/50 division of the proceeds of the sale constituted an equitable division. Horn v. Horn, 905 So.2d 1151 (Miss. 2005).

CONCLUSION

For the above reasons and set forth in James' Brief, this case must be reversed and remanded.

CERTIFICATE OF SERVICE

We, Franklin B. Liebling and Tammy L. Woolbright, Attorneys for Defendant-Appellant, hereby certify that we have this deposited in the United States mail, postage prepaid, a true and correct copy of the Rebuttal Brief of Appellant to the following:

Honorable Talmadge Littlejohn
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SO CERTIFIED on this the 14th day of December, 2007.


TAMMY L. WOOLBRIGHT


FRANKLIN B. LIEBLING