

COPY

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

JAMES PARKER

FILED

Appellant

Versus

JUN 04 2007

Civil Action No.: 2006-CA-01925

NANCY CAROLYN PARKER

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

Appellee

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

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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Appellee-plaintiff

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I. STATEMENT OF THE ISSUES

Issue One:

The Court erred in ordering a judicial sale of all property classified by the Court as marital assets.

Issue Two:

The Court erred in classifying 3 acres gifted to James Parker during the marriage as marital assets.

Issue Three:

The Court erred in classifying James' one-half ($\frac{1}{2}$) interest in approximately 85 acres contiguous to the homestead, and brought into the marriage by James Parker as marital property.

Issue Four:

The Court erred in failing to credit James Parker for equity in real estate brought into the marriage by James Parker but classified by the Court to be marital property.

Issue Five:

The Court erred in deducting one-half ($\frac{1}{2}$) of the appraised value of Quick Lube #3" and one-half ($\frac{1}{2}$) the appraised value of 3.01 acres sold by James in contravention of the temporary order in this cause, and in deducting one-half ($\frac{1}{2}$) of the difference between the appraised value of "Quick Lube #2 and its price brought at judicial sale, from James' share of the equitable division of proceeds from the sale of marital property.

Issue Six:

The Court erred in failing to credit James with payment of taxes and other debts owed against the marital property between the time of the court's temporary order and its final Judgement.

Issue Seven:

The Court erred in awarding attorney fees to Nancy's counsel and in deducting same out of the proceeds of James' share of the liquidated marital assets.

Issue Eight:

The Court erred in failing to properly list and make findings of fact as to each of the applicable Ferguson factors and in failing to illustrate, analyze or provide a conclusion of law to explain how each of the applicable Ferguson factors and findings of fact affected the court's consideration of an equitable division and distribution of the marital property.

II. STATEMENT OF THE CASE

This appeal is taken from decisions rendered by the Chancery Court of Itawamba County, Mississippi, pursuant to the entry of a consent for divorce on irreconcilable differences, wherein the Honorable Talmadge Littlejohn, presiding, was presented with the issues of equitable distribution of marital property and alimony. (Record p.45).

James and Nancy Parker were married September 2, 1992, it being the 5th or 6th marriage for James (Transcript p. 15) and the 3rd marriage for Nancy. (Transcript p.100). At the time of their marriage, James owned, "Parker's Quick Lube" (Transcript p. 15) (This business is referred to throughout the trial Court Record, Transcript and Exhibits, and herein, as "Lube Center #1.") The real estate upon which "Lube Center #1" was located, was still titled to James and his ex-wife, Donna (Transcript p. 113). As the note on this property was up for renewal and James could not secure the cooperation of his ex-wife, he allowed People's Bank and Trust to foreclose. The foreclosure took place November 26, 1992 and James repurchased the property the following day, November 27, 1992 for the amount of the debt of \$62,000.00. (Transcript p.15-16 and 113). A note

Issue Seven:

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was signed by James and the purchase price was financed by People's Bank and Trust and was secured by a Deed of Trust on the property. (Transcript p.16). (Exhibit 1).

Also, at the time of his marriage to Nancy, James owned one-half (½) interest in a house and what is referred to as approximately 96.1 acres located in Itawamba County, Mississippi, with James' ex-wife, Donna, and James' brother-in-law, Robert Hood owning the other one-half interest. (Transcript p.45). Although the transcript and at least one of the exhibits (Exhibit 9) refer to 96 or 98 acres, the deeds reflect the acreage to be approximately 85 acres, more or less. (Exhibit 10). This real estate was broken down into tracts consisting of 10.4 acres (upon which the house was located); a tract of 48 acres less one lot and 12 acres; a tract of 5.7 acres; and a tract consisting of 34 acres. (Exhibit 10).

Mr. Hood QuitClaimed his interest to the property to James (Transcript p. 45) on July 8, 2004, Donna transferred her interest in the above real estate to James for the sum of \$12,000.00. In order to pay Donna, James obtained a loan and executed a Deed of Trust securing said loan. (Transcript p. 45, 130-131 and 254-255) (Exhibit 10). James made the payments (Transcript p. 114).

At the time of their marriage, James derived his livelihood through operating Parker's Quick Lube, (Lube Center #1) (Transcript p. 232). Nancy was employed by the Farmers Home Administration on November 4, 1994. Nancy retired, receiving a net "buy out" from Farmers Home Administration of \$16,000.00 and began receiving \$731.00 per month retirement. (Transcript p. 16-17) She began assisting James with the Quick Lube business and over the course of their marriage, James opened three more Quick Lube businesses, known herein as Lube Centers #2, #3 and #4, (Transcript p. 18) and acquired additional real estate. (Transcript p. 26-29, 35-49 and 54-58). (Exhibits 2-12, 14, 15). Items of personal property, mobile homes, equipment and the like were also acquired during the marriage. (Transcript p. 58-73) (Exhibits 16-22).

After two days of testimony and the court recessed, reconvening on May 12, 2005 issuing its opinion wherein it classified all real estate as marital property and ordered that it be liquidated at judicial public auctions by the appointed special commissioners. (Record p.46-78).

An auction of the real estate located in Itawamba County, Mississippi, was held and confirmed by Order of the court, grossing \$206,000.00. Auctions of the real estate located in Lee County, Mississippi and confirmed by Orders of the court grossed \$187,850.00 for a total sales of real estate of \$493,850.00 (Record p. 259-268, 274-275). The Court ordered that the outstanding county and city taxes and mortgages on the property be paid by the Special Commissioners and sales of the personal property was \$30,885.00. After deductions for those debts and the expenses of the auctions, a net of \$296,512.66 proceeds remained for division by the Court. (Transcript p.391-392).

On June 21, 2006, the Court issued its opinion finding that an equitable distribution of the net proceeds consisted of an equal or one-half division of net proceeds of \$148,256.33 to each party. (Transcript p. 397). Thereafter, due to the sale of Lube Center #3, the transfer of a house and 3.01 acre tract by James and the lease of Lube Center #2 by James after the Court's temporary order, the Court deducted monies from James' share of the proceeds, those deducted amounts purporting to represent what Nancy would have received, i.e., one-half ($\frac{1}{2}$), from the sale at Fair Market Value, or \$72,500.00 of Lube Center #3, an amount of \$22,075.00 for Quick Lube #2, (which was in fact sold at public auction) calculated as one-half of the difference between the Fair Market Value of Quick Lube #2 (\$100,000.00) and what it brought at public auction (\$55,580.00) and an amount equal to one-half ($\frac{1}{2}$) of the appraised value of the house and lot transferred to Mr. and Mrs. Jimmy Parker.

After these deductions, the Court found that Nancy was entitled to \$260,831.33 and James \$35,681.33. The Special Commissioner was then ordered to pay out of James' proceeds, the sum

of \$10,000.00 attorney fees to Nancy's counsel, and all remaining Court costs, leaving James less than \$25,681.00. (Transcript p. 397-399). (Record p. 280-281).

In arriving at these amounts, the Court did not credit James with payment of taxes, mortgages and other liabilities made solely by James by during the period between the Court's temporary order and the final hearing, nor did it consider the amount of debt relief from certain liabilities owed to People's Bank and Trust, occasioned by the sale of Lube Center #3, and lease and subsequent judicial sale of Lube Center #2, the extinguishing of the remainder of the debt owed to Trustmark Bank secured by the house and 3.1 acre that was transferred. (Transcript p. 177-183, 397-399).

III. SUMMARY OF THE ARGUMENT

James takes issue with the court's finding that his original one-half ($\frac{1}{2}$) interest in tracts of land constituting approximately 85 acres (contiguous to the 10.4 acre tract upon which his former home and subsequently the home of James and Nancy is located) constituted marital property. One-half ($\frac{1}{2}$) interest in such acreage was owned by James at the time of his marriage to Nancy and was not commingled to the extent it became marital property.

Likewise, James brought into the marriage a one-half ($\frac{1}{2}$) interest in property known as Lube Center # 1. Although the property was foreclosed just over two months following his marriage to Nancy, and "repurchased" by James from the foreclosing bank one day later, James brought equity in this property into the marriage as well as the ongoing and successful business operations located thereon. The court failed to make specific findings of fact and conclusions of law in either its opinion of May 12, 2005 or June 21, 2006 indicating either any credit or adjustment for the equity and ongoing business brought into the marriage by James, or, why James's former one-half ($\frac{1}{2}$)

interest and business operations brought into the marriage should be disregarded in his equitable distribution of the sale proceeds from "marital property."

The court's action in ordering a judicial sale of all real estate classified as marital property was in error, unsupported by the facts in this case and contrary to well established principles of real property law. Dividing real property between divorcing spouses is the functional equivalent of the act of parting property between unmarried co-tenants in real property, "equitable" consideration being in play.

James argues that the equitable distribution of real estate should be first, made "in kind", with a sale of such property being made only when equitable division "in kind" is not possible. The Ferguson factors of equitable distribution are not inconsistent with and should be applied consistent with well established real property law of partition.

James argues that it was error for the court to make deductions from his determined one-half of the proceeds of the sale of marital property, for equity he did not receive from certain transfers of real estate made by him prior to the divorce. Also, it was error for the court to fail to consider or credit James with payment of taxes and other expenses he made on the real estate during the pendency of the divorce. The court failed to make specific findings of facts and conclusions of law with respects to each of these items and how if at all, same factored into the court's equitable division of the sale proceeds.

Finally, James submits that it was error for the court to award Nancy \$10,000.00 attorney fees, and that they be deducted from James' share of the sale proceeds. Such award, although generally left to the sound discretion fo the court, was, in this case, wholly unsupported by the evidence and contrary to law.

A final division of proceeds of sales of marital property netting \$260,831.33 (plus \$10,000.00 attorney fees) to Nancy and \$35,681.33 (minus \$10,000.00 attorney fees) resulted in an unconscionable and inequitable division of marital assets and should be reversed.

IV. ARGUMENT

ISSUE ONE: The Court erred in ordering a judicial sale of all property classified by the Court as marital assets.

On May 12, 2005, the court issued its opinion wherein it classified all real estate as marital property and thus, subject to equitable distribution. (Record p. 56-57). All real estate in these proceedings were in James' name (Record p. 50-52) as were the notes owed thereon. (Exhibits 1, 2, 4, 5, 6, 7, 10, 11, and 12).

The subject real estate consisted of the following parcel:

- 1) A lot upon which was located an ongoing business referred to herein as Quick Lube #1, located at 1957 Cliff Gookin, Tupelo, Mississippi. (Exhibit 1).
- 2) A lot upon which was located an ongoing business referred to herein as Quick Lube #2, located at 1749 N. Green Street, Tupelo, Mississippi. (Exhibit 2).
- 3) A lot upon which was located an ongoing business referred to herein as Quick Lube #4, located at 703 Pull tight Road, Saltillo, Mississippi. (Exhibit 4, 7).
- 4) James and Nancy's marital abode, located in Itawamba County, Mississippi on a tract of land approximately 10.4 acres; and contiguous, but separate tracts of roughly 36 acres, 5.7 acres and 34 acres, totaling approximately 86 acres (of which James brought his one-half interest into the marriage). (Exhibit 10).
- 5) A 3 acre tract in Itawamba County, Mississippi transferred to James by Charles and Eunell Digby (Exhibit 11) and which was gifted to him. (Transcript p. 132)

6) 21.5 acres adjoining the homestead in Itawamba County, Mississippi. (Exhibit 12).

7) 59.5 acres in Itawamba County, Mississippi (Exhibit 15).

Appraisals, although somewhat outdated, of the various Lube Centers were admitted into evidence (Exhibit 8) as were appraisals of the dwelling and 10.4 acres. (Exhibit 9). Values of the real estate were also reflected by a financial statement submitted by the parties to Peoples Bank and Trust in 2001 (Exhibit 23). James testified that he was trying to get \$225,000.00 for the Lube Center #1 (Transcript p. 250), that the appraised value of Lube Center #2 could be a little high (Transcript p. 252), that the value of the 21 acre tract was probably \$12,000.00 and that one of the dams had broken on the lake on the property (Transcript p. 257); and the value of the 60 acres (number 7 above) was \$20,000.00 and that the timber had been cut over. (Transcript p. 259).

In addressing the third factor under Ferguson, the Fair Market Value and Promotional Value of the assets subject to distribution, the court stressed that other than Exhibits 8 and 9 (appraisals of the Lube Centers and marital abode and the 10.4 acre tract upon which it is situated, Nancy and James had failed to provide guidance as to how the marital assets should be divided, that the appraisals submitted were out of date and inadequate and that the financial information required by Rule 8.05 furnished "minimal" but insufficient information for the court to make a division of marital assets (Record p. 61).

In its opinion, the court acknowledged the necessity of making valuation of assets prior to distributing those assets, citing and analyzing several cases dealing with valuation, or lack thereof, in effectuating a division of property. (Record p. 61-68). James acknowledges that the real estate valuations were thorough, up to date and reliable.

At this point in the proceedings, considering the critical nature of valuations, the court could simply have instructed counsel for the parties to obtain up to date and reliable appraisals or other

evidence of the value of the assets, or exercised its power under Rule 53, Mississippi Rules and master, referee or commissioner to obtain and report such valuations to the court.

Rather, due to the inadequate evidence of value of the marital property, the court ordered all such assets be sold at public auction, with the proceeds to be distributed at a later date. (Record p. 24 and 81-92).

James urges that it was error for the court to order such sale, albeit a moot point for Nancy and James, as the properties have been sold. Counsel for James submits that this is an issue of significant impact in the area of equitable division in domestic law, potentially impacts well established principles of real property law and that a decision of this issue is necessary in order to give guidance to courts faced with similar problems in the future and to stem future litigation.

James urges that the proper, least costly, most judicially expedient, and equitable procedure would be for the court to simply instruct the parties to submit their respective appraisals or valuations to the court as it deemed necessary, from those appraisals, issue its finding of fact as to the valuation of the marital assets, equitably distribute all assets capable of division in kind and then, and only then, order a partition by sale of any remaining assets which were found incapable of being distributed in kind.

This Court has long held that a partition in kind is preferred over partition by sale, the party seeking a sale must strictly comply with the requirements of Mississippi Code Ann. §11-21-11 as amended, (See Fuller, supra) quoting Shorter v. Lesser, 98 Miss. 706, 54 So. 155, 156, (Miss. 1911), Heigle v. Heigle, 771 So.2d 341 (Miss. 2000).

Principals of “equitable distribution” allow the court to distribute or divide marital real estate between divorcing spouses, when necessary, allowing divestiture of title in one spouse in favor of

the other when required by principles of equity. Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994); Hemsley v. Hemsley, 639 So.2d 909 (Miss. 1994).

Counsel for James submits that the principals of equitable distribution between divorcing spouses in domestic law are the functional equivalent of partition between non-divorcing joint owners of real estate in the law of real estate. Thus, the distribution of real estate between divorcing spouses should be interpreted consistent with well established principals of the real estate law of partition.

Historically, due to the special nature of real property a division of real estate "in kind" is preferred over a division by judicial sales. Blair v. Blair, 601 So.2d 848 (Miss. 1992) Also, Shorter v. Lesser, 98 Miss. 706, 54 So. 155, 156, (Miss. 1911).

Partition "in kind", or by assigning each owner parcels of real estate, is so preferred over partition by sale that in real estate law, the party seeking a sale must strictly comply with the requirements of §11-21-11, Mississippi Codes 1972, annotated and amended.

In the case at bar, the listed tracts of real estate were certainly such as were capable of division without resort to sale. The court made no factual determination that a sale of the marital real estate would better promote the parties' interest or that the properties were not partited or distributed "in kind". (Record p. 19-24).

Other than the case of Owen v. Owen, 798 So.2d 397 (Miss. 2001), James counsel is unaware of other cases wherein marital property was ordered sold. Counsel notes, however, that this issue was neither raised nor considered by this Court in its decision.

Real estate has traditionally been placed in a special category by the laws of this State and treated differently than personal property. James submits that the authority presented herein supports his argument that it should be treated no differently in the domestic law arena.

ISSUE TWO: The Court erred in classifying 3 acres gifted to James Parker during the marriage as marital assets.

On August 3, 1993, James acquired title to 3 acres of property adjoining acreage surrounding the parties' marital abode. (Exhibit 11). Mr. Parker had assisted his neighbors Charles and Eunell Digby in clearing some land owned by them. (Transcript p. 48). As a show of their appreciation, the Digby's deeded James three (3) acres of land. Corroborated by Nancy, there was no price involved, "they gave it to him." (Transcript p. 132-133).

James submits that the above property was a gift to him during the marriage, and as such was not subject to equitable distribution, getting rightfully his separate estate. Hemsley v. Hemsley, 639 So.2d 909.

As these three acres were sold along with the other property classified as marital, James urges that this court should remand with instruction that the lower court determine the value the property brought at the public sale, awarding solely to James that value.

ISSUE THREE: The Court erred in classifying James' one-half (½) interest in approximately 85 acres contiguous to the homestead, and brought into the marriage by James Parker as marital property.

At the time of his marriage to Nancy, James owned an undivided one-half (½) interest in approximately 85 acres, more or less, with his ex-wife, Donna and James' brother-in-law, Mr. Hood, owning the remainder. After their marriage, Mr. Hood executed a Quit Claim Deed in favor of James', and James' purchased Donna's interest for the sum of \$12,000.00 on July 8, 1994. (Transcript p. 45 (Exhibit 10)).

This real estate consisted of the following:

- a) A house (occupied by James prior to his marriage to Nancy and subsequently by James and Nancy) situated upon a tract of land consisting of 10.4 acres;

- 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)

James concedes that his one-half ($\frac{1}{2}$) interest in the home and 10.4 acre tract upon which it is situated and brought into the marriage by him was commingled and used for familial purposes to the extent that it became marital property subject to equitable distribution. Heigle v. Heigle, 654 SO.2d 895 (Miss. 1985). However as this court ruled in Singley v. Singley, 846 SO.2d 1004 (Miss. 2002) citing Bullock v. Bullock, 699 So.2d 1205 (Miss. 1997) the property does not have to be divided equally.

James primary argument hereunder is that the court erred in classifying James one-half ($\frac{1}{2}$) interest in the remaining tracts (b), c) and d) above) consisting of approximately 75.7 acres and which was brought into the marriage by him, as martial property.

There is ample evidence in the record that James commingled his one-half ($\frac{1}{2}$) interest in the marital abode as such it was transformed into marital property.

The record is devoid of any evidence whatsoever, that any such commingling took place with respect to James' one-half ($\frac{1}{2}$) interest in the remaining 75.7 acres.

Nancy testified that after their marriage, she and James made improvements to the home and built a storage shed behind their home (Transcript p. 50-53) Indeed, the appraisal submitted by Nancy on the real estate consisted of their home and the 10.4 acres upon which it was situated. (Exhibit 9).

Absent evidence of use of James' one-half ($\frac{1}{2}$) interest brought into the marriage for family purposes or commingling same should have remained his separate estate. Hemsley v. Hemsley, 639 So.2d 909 (miss. 1994); Johnson v. Johnson, 650 So.2d 1281 (Miss. 1994)

James also argues that as the court failed to make specific findings of fact and conclusions of law as it respects James' one-half ($\frac{1}{2}$) interest discussed herein, as required by Ferguson and its progeny (Record p.46-72) (Transcript p. 388-402), there is no evidence that the court even took into account the one-half ($\frac{1}{2}$) interest of James which was brought into the marriage.

Accordingly, this issue requires reversal.

ISSUE FOUR: The Court erred in failing to credit James Parker for equity in real estate brought into the marriage by James Parker but classified by the Court to be marital property.

At the time of his marriage to Nancy, James owned one-half ($\frac{1}{2}$) interest in and to the real estate and business known herein as Parker's Quick Lube #1, or Lube Center #1, with his ex-wife, Donna owning the remainder. When the note on this property became due, James could not obtain the signature of his ex-wife on the renewal. On November 26, 1992, and not three months after his marriage to Nancy, Peoples Bank and Trust foreclosed on the property. On November 27, 1992, James repurchased the property, including Donna's former one-half ($\frac{1}{2}$) interest therein. (Transcript p. 113-114 (Exhibit 1). This was the same ongoing business that James operated at the time of his marriage to Nancy (Transcript p. 15) and that continued in operations after the marriage (Transcript p. 114).

In making its determination of equitable distribution of the sale of proceeds of martial property, James should have been given credit for his interest owned prior to the marriage, and for the ongoing business and experience brought with him into the marriage.

The court's opinions in this case do not reveal any consideration of these facts in determining the distribution of marital assets (Transcript p. 388-402) (Record p. 46-72).

For the same reasons set forth in James' third assignment, the court's failure to make specific finds of fact and conclusions of law factoring them into the considerations dictated by Ferguson require reversal. Owen v. Owen, 928 So.2d 156 (Miss. 2006)

ISSUE FIVE: The Court erred in deducting one-half (½) of the appraised value of Quick Lube #3" and one-half (½) the appraised value of 3.01 acres sold by James in contravention of the temporary order in this cause, and in deducting one-half (½) of the difference between the appraised value of "Quick Lube #2 and its price brought at judicial sale, from James' share of the equitable division of proceeds from the sale of marital property.

In contravention of the court's temporary Order dated December 11, 2002, (Record p. 9-10) James sold the business known as Quick Lube #3 to Susie A. Grissom and Ralph David Owen on March 25, 2004. (Exhibit 6).

The testimony of Susie Grissom revealed that James was about to lose this business and that she took it over first by lease, then the purchase. Ms. Grissom testified that during the lease/option, she made all payments directly to Peoples Bank and Trust and after the purchase, likewise made all payment to the bank. During the first year of the lease, payments were made in the amount of \$1,250.00 per month. (Transcript p. 177-180).

Also, on January 3, 2003, James reconveyed a house to Jimmy Ray Parker and wife, Barbara Lynn Parker, purchased by James February 1997 for the sum of \$26,000.00 (Exhibit 14). There was a note and deed of trust on this property (Exhibit 14). There is no evidence that James received any benefit from this transfer, other than debt relief.

James leased Lube Center #2 to Jerry Enis (Transcript p. 32, 253). This property was sold at the public auction to Jerry Enis for \$55,850.00 (Record p. 265).

While James certainly should have sought relief from the court orders prior to transferring or leasing these properties, James' testimony, under examination by the court, revealed no intent to cheat or defraud Nancy (Transcript p. 269-273).

Although James' actions were wrong, there is no testimony in consideration for these transfers that did not go toward debt reduction. After the court determined that an equitable division of the proceeds of the sale of marital assets would be effectuated by a 50/50 split or \$148,256.33 each, the court made deductions out of James' share of the proceeds purporting to credit Nancy with equity she would have received from the proceeds of a sale of this property. (Transcript p. 397-399).

Although the court had previously indicated in its May 12, 2005 opinion that the valuation provided were insufficient, the court deducted the following:

a) Lube Center #3, transferred to Susie A. Grissom - deducted \$72,500.00 (based on the parties stipulated appraisal value of \$145,000.00).

The uncontroverted testimony of Susie Grissom indicated all payments were made to Peoples Bank and Trust.

b) The house and 3.10 acres transferred back to Jimmy Ray Parker and wife, Barbara Lynn Parker - deducted \$18,000.00 based a value now set by the court.

c) Lube Center #2 - Leased to Jerry Enis until its sale at public auction (Exhibit 45) - deducted \$22,075.00 based on a calculation of the now determined appraised value of \$100,000.00 and the price this property brought at the judicially mandated sale, \$55,850.00 (Transcript p. 397-399).

These deductions, made without consideration of the mortgage debts owed thereon or the debt relief also provided equally to Nancy were arbitrary and capricious and must not stand. Carrow v. Carrow, 642 So.2d 901 (Miss. 1994); Owen v. Owen, 798 So.2d 394 (Miss. 2001); Owen v.

Owen, 928 So.2d 156; Lindley v. Lindley, 749 So.2d 77 (Miss. 1999); Heigle v. Heigle, 771 So.2d 341 (Miss. 2000).

ISSUE SIX: The Court erred in failing to credit James with payment of taxes and other debts owed against the marital property between the time of the court's temporary order and its final Judgement.

Between the time of separation of Nancy and James on December 11, 2002 and the Judgment of divorce herein dated June 26, 2006 (Record p. 279-281) James, paid taxes and other debts on the marital property which relieved the martial property of substantial liabilities, thus benefitting Nancy as well as himself. These debts were paid by a loan obtained by James on May 9, 2003 (Transcript p. 220-230) and totaled roughly \$47, 509.65 (Exhibit 28). Although this debt was secured by a deed of trust on "martial property" James continued to discharge the debts on all property until it was sold. James continued to keep the businesses afloat, even putting his retirement of \$1,500.00 into the businesses on numerous occasions during this time. (Transcript p. 220-230). The opinion and record and limited analysis of the Ferguson facts cited therein do not reflect that the discharge of liabilities owed on the marital properties between the December 11, 2002 separation and the Judgment of Divorce, solely by James, was at all taken into consideration by the by the court in determining the "equitable" distribution made herein (Transcript p. 388-402) (Record p. 46-72, 279-281).

The failure of the court to make finding of fact and conclusions of law and analyze these under the Ferguson factors requires reversal.

In the case of Watson v. Watson, 882 so.2d 95 (Miss. 2004), the appellant assigned as error, the court's failure to credit him with payments he made on the martial domicile during the time

between the filing of the divorce and the judgment of divorce. In Watson, however, the chancellor did address the mortgage on the home finding it to be \$114,624.00. This court stated that in the amended finding of fact and conclusions of law did not address this issue, that the parties would have an opportunity to provide accurate and current data upon remand, and that the issue may be revisited at that time. Watson at p. 107.

The court's failure to properly consider and analyze James' discharge of debts on the marital property during the pendency of the divorce constitutes reversible error. Further, James submits that under Watson, such payments should be taken into consideration in determining an equitable division of the sale proceeds upon any rehearing of this cause.

ISSUE SEVEN: The Court erred in awarding attorney fees to Nancy's counsel and in deducting same out of the proceeds of James' share of the liquidated marital assets.

The court awarded Nancy attorney fees in the amount of \$10,000.00. The award was paid by the Clerk of the Itawamba Chancery Court from James' \$35,681.33 share of the proceeds derived from the sale of property classified by the court as marital. (Transcript p. 399) (Record p. 280-281).

Although an award of attorney fees is within the court's broad discretion, it nevertheless must be supported by the evidence. McKee v. McKee, 418 So.2d 764 (Miss. 1982), Walters v. Walters, 383 So.2d 827 (Miss. 1981).

In McKee, an award of attorney fees was reversed as being excessive even though three attorneys testified concerning the service rendered to Mrs. McKee, their hours spent on her behalf and the reasonable charge per hour in the area where the divorce was tried. In reversing the award, the court indicated there was insufficient evidence to accurately assess attorney fees.

In the case at bar, the record is devoid of any evidence as to attorney fees. There is no evidence of Nancy's employment of counsel, no testimony or documentation whatsoever concerning

counsel's hourly fees, the hours spent on Nancy's behalf or his final bill. There was simply no evidence presented at the trial of this cause upon which an award of attorney fees can be based.

In its opinion of June 21, 2006, the court cited and discussed a number of cases in support of the proposition that attorney fees are matters within the discretion of the court: Haney v. Haney, 907 So.2d 948 (Miss. 2005); Smith v. Smith, 614 So.2d 394 (Miss. 1993); Martin v. Martin, 566 So.2d 704 (Miss. 1990); Devereaux v. Devereaux, 493 So.2d 1310 (Miss. 1986) and Kergosien v. Kergosien, 471 SO. 2d 1206 (Miss. 1985). (Transcript p. 401-402).

None of the cases cited in the court's opinion dispose with the requirements of McKee and Walters, supra, that an award of attorney fees be supported by the evidence.

In Kergosien, supra, an award of \$1,000.00 attorney fees was made to Mrs. Kergosien. In her appeal, Mrs. Kergosien alleged that the chancellor should have awarded a greater sum. Mr. Kergosien did not contest the award of attorney fees. Therefore, although this court upheld the award, it reiterated the criteria set forth in McKee, supra, for gauging the appropriateness of attorney fees and emphasized that the attorney for Mrs. Kergosien presented no evidence of such criteria to assist the court in properly assessing an award of attorney fees.

In Martin, supra, at page 707, the court, citing Cheatham v. Cheatham, 537 So.2d 435 (Miss. 1998) stated that an award of attorney fees is not appropriate if a party is financially able to pay her attorney. The appellant in that case presented no evidence of inability to pay her attorney fees and thus upheld the Chancellor's decision not to make such award.

In this case, Nancy made no attempt to show financial inability to pay her attorney fees. To the contrary, Nancy had just been awarded in excess of \$260,000.00 (Transcript p. 399) cash, ample evidence of her ability to pay her own attorney fees.

Likewise, in Devereaux, supra, this court upheld the Chancellor's failure to award attorney fees to John Devereaux due to his having a sufficient estate, after the division of property between the parties, to pay his attorney fees. In up holding the lower court, the cases of McKee and Walters, supra, were again cited.

Finally, the Haney case, supra, held that awarding attorney fees is a form of equitable distribution and should be awarded only when considerations of equity dictate that one party should assist the other. Inability to pay continued to be a primary consideration.

In upholding the Court of Appeals in reversing and rendering the award of attorney fees by the trial court, such award was determined an abuse of discretion and clearly erroneous.

James submits that in light of the absence of any evidence supporting an award of attorney fees herein, and Nancy's ability to pay her own attorney fees, the award was unsupported by the evidence, clearly erroneous and was an abuse of discretion requiring reversal.

ISSUE EIGHT: The Court erred in failing to properly list and make findings of fact as to each of the applicable Ferguson factors and in failing to illustrate, analyze or provide a conclusion of law to explain how each of the applicable Ferguson factors and findings of fact affected the court's consideration of an equitable division and distribution of the marital property.

A review of the court's opinions in this case reveal clear lack of specific findings of fact and conclusions of law with an analysis of how each of the Ferguson factors impacted in its equitable distribution of the assets in this case. (Transcript p. 388-402) (Record p. 46-72). Although the opinions do contain various findings of fact, list the Ferguson factors and discuss a number of post-Ferguson cases, no specific findings, conclusions and analysis were made which would assist this court in reviewing how, and whether or not, the Chancellor made a proper distribution of the sale proceeds of the marital assets.

As the Chancellor noted, the record was inadequate as to the appraisals for him to divide the different assets that he had classified as marital. (Record p. 66-69). This finding was made by the court even though appraisals of the three Lube Centers and the marital abode were introduced (Exhibits 9 and 10) and James testified as to his opinion of the value of numerous assets. (Transcript p. 250-269).

In light of the court's findings of the inadequacy of values presented that the trial of this divorce, the court nevertheless proceeded to determine the division of the sales proceeds without any evidence of what property generated what sales proceeds. Such division can be based on nothing more than the utter discretion of the court, is arbitrary and capricious, in disregard of Ferguson and its progeny and must be reversed. Carrow v. Carrow, 642 So.2d 901 (Miss. 1994); Owen v. Owen, 798 So.2d 394 (Miss. 2001); Owen v. Owen, 928 So.2d 156; Lindley v. Lindley, 749 So.2d 77 (Miss. 1999); Heigle v. Heigle, 771 So.2d 341 (Miss. 2000).

V. CONCLUSION



It is the court's responsibility to effectuate an equitable distribution of all assets classified by it as constituting marital property. The lower court is not at liberty to arbitrarily determine what it believes to be equitable but must do so within the guidelines of Ferguson and its progeny. Specific finds of fact and conclusion of law must be made and analyzed as to each of the Ferguson factors. The trial court failed to do so in either its opinion of May 12, 2005 or June 21, 2006.

Further, as enumerated herein, the court made finding which were wholly unsupported by the evidence in this case and made erroneous applications of law herein.

The result of such cumulative errors effected a division of proceeds of sales of marital assets, net \$270,000.00, Nancy, versus \$25,000.00, James as to not be an inequitable distribution of marital assets, but such as is unconscionable and requires reversal.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

We, Franklin B. Liebling and Tammy L. Woolbright, Attorneys for Defendant, hereby certify that we have this deposited in the United States mail, postage prepaid, a true and correct copy of the Brief for Appellant to Honorable Talmadge Littlejohn, Chancery Court Judge, P.O. Box 869, New Albany, Mississippi 38652 and Honorable Michael Malski, Attorney At Law, P.O. Box 543, Amory, MS 38821.

SO CERTIFIED on this the 4th day of June, 2007.


FRANKLIN B. LIEBLING


TAMMY L. WOOLBRIGHT