

COPY

NO. 2006-CA-01987

**SUPREME COURT AND COURT OF APPEALS
STATE OF MISSISSIPPI**

JAMES STRONG

APPELLANT

versus

GRETCHEN STRONG

APPELLEE

FILED

MAY 01 2007

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

APPEAL FROM

THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI

HONORABLE MARGARET ALFONSO, PRESIDING TRIAL JUDGE

BRIEF OF THE APPELLANT

ORAL ARGUMENT IS NOT REQUESTED

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IN THE SUPREME COURT OF MISSISSIPPI

JAMES STRONG

APPELLANT-DEFENDANT

V

NO.: NO. 2006-CA-01987

GRETCHEN STRONG

APPELLEE-PLAINTIFF

APPEAL FROM

THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI

HONORABLE MARGARET ALFONSO, PRESIDING TRIAL JUDGE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed person 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 of recusal.

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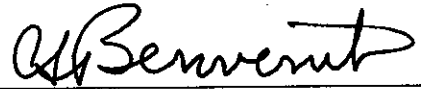
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A handwritten signature in cursive script, appearing to read "C. Benvenuti", written over a horizontal line.

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I. STATEMENT OF ISSUES

- i. The Chancellor erred in applying an improper legal standard by ordering that Mr. Strong pay Mrs. Strong temporary child support for twelve months prior to the date any order of support was entered by the court as no legal basis exists to support such a finding.
- ii. The Chancellor was manifestly wrong and clearly erroneous in finding that Mr. Strong provided only \$760.00 in support for his children during the period of time between May 15, 2005 and the date of the trial.
- iii. The Chancellor applied an improper legal standard and was manifestly wrong and clearly erroneous in finding that she could make no adjustment in the equitable division of the marital property because Mrs. Strong had given to her mother \$9,696.30 in marital property.

II. STATEMENT OF THE CASE

Gretchen Strong (hereinafter referred to as Gretchen) and James Strong (hereinafter referred to as Jimmy) were married in Hancock County, Mississippi on June 8, 1996. They continued to reside as husband and wife in Hancock County, Mississippi until their final separation on or about May 19, 2005. (Rec. Pg.11) Of their marital union, three children were born, namely Trevor Allen Strong, a son whose date of birth is February 16, 1995, Abrey Lee Strong, a daughter whose date of birth is August 2, 1998, and Tyler James Strong, a son whose date of birth is May 21, 2000. (Rec. Pg.9) During their marriage they obtained a marital domicile at 6095 Road 135, Bay St. Louis, Mississippi. The domicile was titled solely in Gretchen's name. (Rec. Pg.56, Exhibit 5) Two years after they married, Gretchen completed her

Bachelor of Science degree in Business Administration from the University of Southern Mississippi. (Rec. Pg.88, 89) She was a stay at home mother for approximately two years during the marriage. (Rec. Pg.91) When she returned to work she was employed in some low paying positions until after Hurricane Katrina when she resumed employment utilizing her training in accounting. (Rec. Pg.88, Exhibit 1) Jimmy is a high school graduate who has worked throughout the marriage. Jimmy acquired on the job training in plumbing, pipe fitting, and welding and during the marriage. He worked for approximately three years for the CSX Railroad for whom he working at the time of the final separation of the parties. (Rec. Pg.170) At the time of the divorce trial Jimmy was employed as a pipe fitter. (Rec. Pg.169, Exhibit 12)

On July 19, 2004, Gretchen filed a Complaint for Divorce and Temporary Relief alleging that she was entitled to a divorce on the grounds of Habitual Drunkenness, Habitual Cruel and Inhuman Treatment and in the alternative, Irreconcilable Differences. (Clerk's Papers, Pg. 1) Also on July 19, 2004, Gretchen filed a Petition for Protection from Abuse and Other Relief. No Order was entered on this petition. (Clerk's Papers, Pg . 7)

On August 10, 2004, Jimmy, through his first attorney, entered an Answer to the Petition for Domestic Abuse and to the Complaint for Divorce and Motion for Temporary Relief. He further filed a Counter Claim for Divorce and for Temporary Relief. Jimmy alleged that Gretchen was guilty of Adultery and Habitual Cruel and Inhuman Treatment. (Clerk's Papers, Pg. 16)

Some time after the filing of their respective pleadings, the parties reconciled and lived together until May 19, 2005, at which time the final separation of the parties occurred. (Rec. Pg.11) On June 29, 2005, a second Petition for Protection from Abuse and Other Relief was

filed by Gretchen (Clerk's Papers Pg. 27) and on June 28, 2005, without notice to Jimmy or his attorney, Gretchen obtained an Ex Parte Temporary Restraining Order which was entered by the Chancery Court of Hancock County, Mississippi, enjoining Jimmy from harassing, threatening, abusing, or stalking the Plaintiff, Gretchen, and the parties' minor children. The Ex Parte Order also awarded Gretchen the temporary exclusive use and possession of the parties' marital residence and her vehicle. The Order was silent as to child custody or support. The Order further set the matter for a hearing in July, 2005. (Clerk's Papers, Pg. 34)

On July 8, 2005, without notice to Jimmy or his attorney, the court entered a second order identical to the order entered on June 28, 2005. (Clerk's Papers, Pg. 36) Said order set a hearing for July 22, 2005. Neither of these orders was ever served on Jimmy nor does the file reflect that Jimmy's attorney was ever noticed of the hearing of June 28, 2005, or the hearing of July 8, 2005, or that copies of the Ex Parte Orders were ever served on Jimmy's attorney. The file reflects no record of a hearing in this matter on July 22, 2005. (Rec. Excerpts, Pg. 1)

On August 29, 2005, the marital domicile was substantially damaged by the forces of Hurricane Katrina. (Rec. Pg.63, Exhibits 14A-14H, inclusive, Rec. Pg.175) Gretchen testified that she received \$51,000.00 in flood insurance for destruction of the structure, \$21,400.00 for destruction of contents by flood water, and \$14,696.30 from the wind and hail policy for a total insurance recovery of \$87,096.00 (Rec. Pg.65, Exhibit 7). Three of the checks were made payable to Gretchen and her mother. (Exhibit 7) Gretchen had her mother endorse those checks and all of the proceeds were paid over to Gretchen. (Rec. Pg.80) Gretchen used the proceeds to pay numerous joint debts and all of the debts that were solely in her name other than her school loans. (Rec. Pg.104) The check payable in the amount of \$14,696.30 was placed in a certificate

of deposit solely in her mother's name. Thereafter she requested that her mother withdraw \$5,000.00 from the CD, which her mother delivered to Gretchen. (Rec. Pg.105). By her own accounting, Gretchen paid numerous expenses directly related for the children, including but not limited to, dance lessons, dance costumes, Christmas gifts, debts for child care, repayment to her father for money she borrowed, and wedding outfits. She spent this money during the time period between the final separation and the trial in this case. (Rec. Pg.103, Exhibit 11) At the time of the trial, all that remained of the insurance proceeds was \$9,696.30 together with accrued interest in a certificate of deposit solely in Gretchen's mother's name. (Rec. Pg.104) Jimmy did not receive directly a single penny of the insurance proceeds. (Rec. Pg.173)

On December 2, 2005, without Leave of Court, Gretchen, by and through a second attorney, Kelly C. (Walker) Ladner, filed an Amended Complaint for Divorce and Motion for Temporary Relief. (Clerk's Papers, Pg. 38)

Although not reflected in the file or the clerk's papers but as shown in the Chancery Clerk's docket, a hearing was set before Chancellor Margaret Alfonso on March 24, 2006, at 1:30 p.m. in Biloxi, Mississippi, by agreement of counsel, for a hearing on the temporary relief plead by the parties in their respective pleadings. (Rec. Excerpt, Pg. 1) The parties met with the judge in Biloxi on March 24, 2006, and the judge instructed attorney Kelly M. Rayburn, Gretchen's third attorney, to prepare a temporary relief order. Clement S. Benvenuti, Jimmy's second attorney, represented him at the temporary relief hearing. There was a dispute about the contents of the temporary order and it was not entered until May 2, 2006. (Rec. Pg.16)

On May 1, 2006, the parties came before Chancellor Alfonso in Gulfport for a trial on ~~their respective divorce pleadings and entered into a Consent to Divorce solely on the grounds of~~

Irreconcilable Differences, agreed to dismiss the fault grounds contained in their pleadings, and the parties further stipulated that the court was to decide all issues other than child custody. By agreement, primary physical custody of the children was to be awarded to Gretchen. (Clerk's Papers, Pg. 53)

The court heard evidence on May 1, and May 2, 2006, and issued its Judgment of Divorce on June 12, 2006. (Rec. Excerpts, Pg. 4) In the Judgment of Divorce, the court found that although the marital domicile was titled solely in Gretchen's name, it was in fact marital property (Rec. Excerpts, Pg. 17) and that the gutted remains should be sold and the net proceeds equally divided between the parties after a deduction from Jimmy's share for a twelve month temporary child support arrearage. (Rec. Excerpts Pg. 19)

The court found that each of the parties was equally responsible for the remaining debt incurred by the parties during the marriage (Rec. Excerpts Pg.23) and that certain visitation rights should be granted to Jimmy. (Rec. Excerpts Pg. 20) The Judgment awarded future child support to Gretchen and made provision for medical care for the children. (Rec. Excerpts Pg. 22) The court further awarded to Jimmy the right to claim the minor child, Trevor, as a tax deduction in his income tax return. (Rec. Excerpts Pg. 22, 23) The court awarded Gretchen the use and possession of the van which was purchased during the marriage and required her to pay any remaining debt owed against the van. (Rec. Excerpts Pg. 23)

The court refused to make any adjustment in determining the equitable division of the marital property related to the approximately \$9,696.30 held in a Certificate of Deposit in Gretchen's mother's name. The Certificate of Deposit was the balance of the insurance proceeds which had not been spent by Gretchen. (Rec. Excerpts Pg. 19) The Chancellor stated she could

not make adjustment to the equitable division of the Certificate of Deposit "As the insurance proceeds are contained in a Certificate of Deposit in Mrs. Strong's mother's name, and she was not made a party to this action, the court is unable to order relief against a non-party" (Rec. Excerpts Pg. 19) The court further ordered that Jimmy pay Gretchen "the temporary child support arrearage of \$5,432.00" for twelve months of temporary child support at \$516.00 per month for the months of June, 2005 through May, 2006, inclusive. The court granted Jimmy credit against said amount for some \$760.00 in direct payments Jimmy made to Gretchen between the period of the final separation and the entry of the temporary relief order on May 2, 2006. (Rec. Excerpts Pg. 19)

Jimmy filed a Motion to Reconsider Judgment and for New Trial on June 20, 2006, wherein he requested the court reconsider and/or correct the Judgment of Divorce or in the alternative for a new trial on the grounds that:

- a. The portion of the Judgment of Divorce requiring a \$50,000.00 provision for life insurance was punitive;
- b. That the court was without authority or in the alternative, punitive, in requiring Jimmy to pay child support for twelve months when no temporary child support order had been entered;
- c. The court had ignored the fact that Gretchen had intentionally placed more than \$9,000.00 in insurance proceeds arising out of damage to the marital domicile in the hands of her mother for the specific purpose of defeating the court's ability to disburse the marital asset. (Clerk's Papers Pg. 79)

~~On October 17, 2006, the Chancery Court of Hancock County entered its Order~~

Overruling Motion for New Trial. The Order was entered with the Clerk's office on October 18, 2006. (Rec. Excerpts Pg. 25) On November 14, 2006, Jimmy filed his Notice of Appeal on the Order Overruling the Motion for New Trial. (Clerk's Papers, Pg. 90)

III. SUMMARY OF THE ARGUMENT

The Appellant contends that the chancellor was manifestly erroneous or did not apply proper legal standard in awarding a judgment for temporary child support arrearages which had never been ordered by the court. That the Chancellor's award of the said judgment is without support in the statutory or case law of the State of Mississippi nor was it properly based upon any right of the Chancellor to award equitable relief.

The court's finding that Jimmy failed to support his children in any way is clearly erroneous and contrary to the evidence at trial in this matter. The Chancellor found that the homestead was marital property, that therefore the insurance proceeds were marital property. Gretchen received these insurance proceeds totaling \$85,000.00 and freely expended those proceeds without consultation with Jimmy to make herself free of all debts incurred during the marriage for which she could be held personally accountable and to reimburse herself for money expended for and on behalf of the children and in fact used some of these funds directly in support of the children.

The Appellant further contends that the Chancellor's refusal to make adjustment to the equitable division of the marital estate based on the fact that Gretchen intentionally placed \$9,696.30 of marital assets (insurance proceeds for the destruction of the marital domicile) solely in her mother's hands in an effort to keep them from the jurisdiction of the court was manifestly wrong, clearly erroneous, and in contravention to the legal standards previously enumerated by

the State Supreme Court and Appellate Court. The Chancellor ignored the Supreme Court's instructions from Ferguson v Ferguson 639 So. 2d 921, (Miss. 1994) to take into account the fact that a spouse has expended, withdrawn or otherwise disposed of marital assets in making equitable disposition of marital property.

The Appellant no longer wishes to pursue the issue regarding the \$50,000.00 provision for life insurance and will not address that issue. As to the other issues, the Appellant would show the following as his summary of facts pertinent to issues now before this court.

IV. ARGUMENT

It is clear that the standard of review for the case at bar is as stated in the case of McClee v Simmons, 834 So. 2d 61, (Miss. App. 2002) wherein the Court of Appeals states as follows:

Our scope of review in domestic matters is limited. This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. Denson v. George, 642 So.2d 909, 913 (Miss.1994). This is particularly true "in the areas of divorce and child support." Nichols v. Tedder, 547 So.2d 766, 781 (Miss.1989). This Court is not called upon or permitted to substitute its collective judgment for that of the chancellor. Richardson v. Riley, 355 So.2d 667, 668-69 (Miss.1978). A conclusion that we might have decided the case differently, standing alone, is not a basis to disturb the result. *Id.*



PREJUDGMENT TEMPORARY CHILD SUPPORT

The Chancellor ordered Jimmy to pay temporary child support for twelve months predating entry of the Temporary Relief Order which was signed by the Judge on May 2, 2006.

On December 2, 2005, without leave of court, Gretchen filed an Amended Complaint for Divorce and Motion for Temporary Relief. A Rule 81 Summons was issued on December 2, 2005, requiring Jimmy to appear in the Chancery Court of Hancock County, Mississippi, on

January 17, 2006 for hearing on the temporary relief requested in the Amended Complaint. Jimmy appeared with his attorney, Clement S. Benvenuti, and Gretchen appeared with her attorney, Kelly C. (Walker) Ladner. The parties argued the motion without a record and the court recessed the hearing and made no ruling as to an amount of child support nor was any order of temporary relief entered. (Rec. Excerpts Pg. 1) Thereafter, Gretchen retained Kelly Rayburn as her attorney. Mr. Rayburn on behalf of Gretchen and Mr. Benvenuti on behalf of Jimmy, agreed to set a Motion for Temporary Relief to be heard on March 24, 2006, at 1:30 p.m. in Biloxi, Mississippi (Rec. Excerpts, Pg. 1) The appellant did not and does not now contest the impropriety of the summons for the January 17, 2006, or the March 24, 2006, hearing. If any impropriety existed in the summons, Jimmy waived same at the time of the hearings. The Appellant does argue that as Gretchen was requesting temporary relief in her initial complaint filed on July 19, 2004, she did not properly serve Jimmy with a Rule 81 Summons for a hearing on the temporary relief request until December, 2005.

A second hearing was held on the temporary relief request on March 24, 2006. The order was not entered until May 2, 2006, during the trial. A review of the Clerk's Papers docket entry (Rec. Excerpts, Pg. 1) reveals that Jimmy, by and through his first attorney, voluntarily entered an appearance in this matter on August 10, 2004, by filing an Answer to Petition for Protection from Abuse Complaint, Complaint for Divorce, and Motion for Temporary Relief and Defendant's Counter Claim for Divorce and Motion for Temporary Relief (Clerk's Papers, Pg. 16). The parties thereafter reconciled for an extended period of time. Two Ex Parte Orders were entered on behalf of Gretchen, on June 29, 2005, and July 12, 2005, and a Rule 81 Summons was issued to Mrs. Strong's attorney on December 2, 2005. No returns on the summons or the Ex

Parte Orders were entered in the docket. The March 24, 2006, hearing on Temporary Relief was set by agreement of the respective counsel for the parties, Mr. Benvenuti for Jimmy and Mr. Rayburn for Gretchen.

To be sustained, the court's award for twelve months of "temporary child support" must be based on some statute, case law of common law concept. The statutory provision for temporary child support in a divorce case is found in Miss. Code Ann. §93-5-17 (2):

The Chancellor in vacation may, upon reasonable, notice hear complaints for temporary alimony, temporary custody of children, and temporary child support, and make all proper orders and judgments thereon.

Miss. R. Civ. P. Rule 81 requires that notice of no less than 7 days by summons be served on Jimmy prior to a hearing for temporary relief. The parties, by and through their counsel, agreed to set a temporary relief hearing. The hearing on March 24, 2006, was held off the record, after which the court gave instructions to Mr. Rayburn, Gretchen's attorney, to prepare a Temporary Relief Order and submit it to Jimmy's attorney. Mr. Rayburn did so; however, because of objections by Mr. Benvenuti, the Temporary Relief Order was not entered until May 2, 2006 (Rec. Pg. 45) The order required that beginning April 1, 2006, Jimmy was to pay to Gretchen \$516.00 per month as child support. The Appellant contends that there is no statute, case law or common law which supports the Chancellor's actions in requiring Jimmy to pay "temporary child support" prior to the March 24, 2006, hearing on temporary relief and in fact Jimmy did pay \$600.00 of the said support in April, 2006.

There are two statutory provisions which authorize the Chancery Court to grant pre-judgment support. Neither of these provisions is applicable to the case at bar. The first is Miss. Code Ann. §93-11-65 which provides additional remedies for establishing custody and support.

Miss. Code Ann. §93-11-65 (1)(d) states:

The non-custodial parent's liability for past education and necessary support and maintenance and other expenses are limited to a period of one (1) year preceding the commencement of an action

The other code section is found in the paternity statutes. Miss. Code Ann. §93-9-11 states:

The father's liabilities for past education and necessary support and maintenance and other expenses are limited to a period of one (1) year preceding the commencement of an action.

The Chancellor, in her Order Overruling Motion for New Trial, cited Lee v Lee, 135 Miss. 865, 101 So. 345, (Miss. 1924); Schneider v Schneider, 155 Miss. 621, 125 So. 91; and Bass v Erwin, 177 Miss. 46, 170 So. 673 (Miss. 1936) as authority in support of her decision granting an arrearage as to temporary child support in advance of a temporary relief hearing. The Appellant would show unto the court that these cases are not applicable to the facts of the case at bar.

The case of Lee v Lee, 135 Miss. 865, 101 So. 345, (Miss. 1924) is an appeal to the Mississippi Supreme Court on an issue of equity versus common-law jurisdiction in Chancery Court. Mrs. Lee obtained a divorce in the state of her residence, Tennessee. On August 11, 1919, a Tennessee court granted Mrs. Lee a divorce and required Mr. Lee to pay child support in the amount of \$25.00 per month. Mrs. Lee in 1923, filed an action in the Chancery Court of Washington County, Mississippi attempting to obtain a portion of the proceeds from a partition sale by writ of sequestration to pay the child support arrearage owed by Mr. Lee to Mrs. Lee in the amount of \$1,125.00 pursuant to the Tennessee judgment. Mr. Lee disputed the in personum jurisdiction of the Tennessee court as the judgment was granted solely on process by publication

and the subject matter jurisdiction of the Chancery Court. He objected that the Tennessee court did not have in personum jurisdiction over him in order to make a money award for child support. The Mississippi Supreme Court in its ruling in Lee v Lee, 135 Miss. 865, 101 So. 345, (Miss. 1924) at 346, 347, held that a common-law duty rests upon the father to support his children. That even though Mr. Lee may be correct in stating there was no jurisdiction over him, the Mississippi court would take the position where a decree of divorce awards the custody of a minor child and makes no provision for their support it is still the duty of the father to support the child and under such circumstances as the custodial parent furnishes support, the non-custodial parent becomes a debtor to the custodial parent for such support. Id at 346.

The Appellant submits that the Chancery Court of Hancock County, Mississippi, had jurisdiction in this matter both subject matter and in personum jurisdiction as early as October 10, 2004, when Jimmy entered his appearance by virtue of his Answer and Counter-Claim. Because Gretchen failed to bring the matter of temporary relief before the court until January 17, 2006, she is not entitled to this common law relief. She was entitled to relief pursuant to Miss. Code Ann. §93-5-17(2) but failed to request the relief from the court thereby waiving same. The parties remained married and the facts in the case at bar are very different from the Lee case.

In the case of Schneider v Schneider, 155 Miss. 621, 125 So. 91, Mrs. Schneider, a resident of Harrison County, Mississippi, obtained a divorce against her husband who was a non-resident of the state of Mississippi based on process by publication. In her Bill of Complaint she did not demand alimony or support money for the child. In its divorce Judgment, the Chancery Court dissolved the marriage, awarded custody of the child to Mrs. Schneider and made no mention of alimony or child support. Several years later, Mrs. Schneider filed a suit against Mr.

Schneider in Hinds County, where Mr. Schneider was a resident, requesting education funds and support for the child. Mr. Schneider challenged the jurisdiction of the Hinds County Chancery Court stating that the Harrison County Chancery Court had exclusive jurisdiction. The Hinds County Chancery Court sustained Mr. Schneider's challenge to the Hinds County jurisdiction. The Mississippi Supreme Court was asked to decide the jurisdictional issue and found that Hinds County did in fact have jurisdiction as Mrs. Schneider was asking for a new decree of different subject matter as the original Harrison County judgment made no mention of support and the new action by Mrs. Schneider was not a request for modification of the divorce decree. *Id* at 93.

In the third case cited by the Chancellor, Bass v Erwin, 177 Miss. 46, 170 So. 673 (Miss. 1936), the Chancery Court annulled a marriage based on the grounds of coercion. The mother in the annulment case failed to petition for support of a minor child born during the alleged marriage. Subsequent to the annulment of the marriage by the Chancery Court, Betty Bass filed a new suit for child support. In her child support suit, Betty Bass alleged a bastardy proceeding had been held before a justice of the peace in 1933 and Mr. Erwin had been established as the father of the child. The justice of the peace rendered a judgment ordering Mr. Erwin to pay \$15.00 per month in support for the illegitimate child. The judgment of the justice of the peace was appealed to Circuit Court which agreed with the justice court. Mr. Erwin filed a plea of res judicata in response to Ms. Bass's request for child support. The Mississippi Supreme Court found that the child was not made illegitimate by the annulment and could not be made illegitimate under the facts. The court further found that provision for the support of the child should have been entered in the decree for annulment. Citing Lee v Lee 135 Miss. 865, 101 So.

345, (Miss. 1924) and Schneider v Schneider, 155 Miss. 621, 125 So. 91, the Mississippi

Supreme Court held:

...where a decree of divorce accorded the custody of the minor children to the wife, but made no provision for their support, it is still the duty of the father to support them unless under the law there is some reason why he should be relieved therefrom, and where the mother furnishes their support, and no such reason exists, the father becomes her debtor to that extent, for which debt she may recover against him. Bass at 674

The Appellant contends that the facts in Bass v Erwin, 177 Miss. 46, 170 So. 673 (Miss. 1936), do not support the Chancellor's finding of prejudgment temporary child support as in the Bass case there was a judgment entered. In the case at bar, there was no judgment entered.

In all three cases cited by the Chancellor, a judgment had been previously entered. These cases do not support her authority to grant an arrearage of temporary child support against Jimmy for any support monies due prior to January 17, 2006. All three cases predate the Miss. R. Civ. P., Rule 81, jurisdictional requirement of 7-day notice to Jimmy for a date, time and place, before an order of temporary relief may be granted. Bailey v Fischer, 946 So. 2d 404 (Miss. App. 2006)

Gretchen's failure to present the issue of temporary relief before the Chancellor by setting the matter by Rule 81 Summons and properly serving Jimmy, was in effect a failure to follow the requirement of reasonable notice of Miss. Code Ann. §93-5-17(2) before the Chancellor, may make provision for temporary child support. She had an affirmative duty through her attorneys to press for a temporary relief hearing before the Chancellor to secure temporary child support money. Jethrow v Jethrow, 571 So. 2d 270 (Miss. 1990) She failed to do so and the Chancellor had no authority to order the arrearage in temporary child support.

~~The parties' final separation occurred in May, 2005. Gretchen was living in the marital~~

domicile until August 29, 2005, when Hurricane Katrina struck the Mississippi Gulf Coast. The Warranty Deed from Gretchen's mother and grandmother, dated March 4, 1998 conveyed the property solely to Gretchen (Exhibit 5). As consideration to Gretchen's mother and grandmother, Gretchen and Jimmy borrowed \$15,236.00 which paid off two existing loans, some past due taxes, and paid a net amount of \$4,130.29 to Gretchen's mother. (Rec. Pg. 58 – 62, Exhibit 6) The Chancellor properly found that the marital domicile, although titled solely in Gretchen's name, was a marital asset subject to equitable division. (Rec. Excerpts Pg. 17)

As a result of the hurricane damage to the house, Gretchen applied to Southern Farm Bureau Casualty Insurance Company, and received a total of \$87,096.00 in insurance proceeds. Three insurance checks were made payable to Patricia Fielder, Gretchen's mother, and the fourth check was made payable to Gretchen and Patricia Fielder. (Exhibit 7)

The testimony was not contradicted that Jimmy for many years paid the insurance premiums as the insurance and taxes were included in the monthly mortgage payment paid to the existing lender at the time of Hurricane Katrina. (Rec. Pg. 96, 170 – 172) Upon receipt of the insurance proceeds, Gretchen paid off the balance on the existing mortgage, paid off an equity line with the Hancock Bank which was secured by the home, and utilized all but \$9,696.30 to pay various debts for which she was personally liable, utilizing a portion of the funds for living expenses for herself and the children. (Exhibit 11) The only debt for which she was personally liable, which was not paid off, was her student loan, most of which was incurred prior to the marriage. (Rec. Pg. 110) She did not pay off any of the marital debt which was solely in Jimmy's name. (Rec. Pg. 110 – 112) The balance of \$9,696.30 was redelivered to Patricia Fielder and placed in a Certificate of Deposit solely in Mrs. Fielder's name. (Rec. Pg. 105) Gretchen

utilized at least \$8,702.22 in insurance proceeds directly for her needs and those of the children.

The court rightfully found that the marital domicile was in fact a marital asset and ordered it sold with the net proceeds divided after a reduction was made from Jimmy's share to pay Gretchen an amount equal to pay child support for twelve months less actual child support paid by Jimmy, a total amount of \$5,432.00.

ii. INSURANCE PROCEEDS AS CHILD SUPPORT

In the event that the appellate court were to find that the Chancellor did have legal basis for ordering twelve months of prejudgment child support, the appellant would show unto the court that the Chancellor was clearly erroneous and manifestly wrong in determining that Jimmy provided only \$715.00 in support for his children during the time period between May 15, 2005 and May 2, 2006. The record is replete with testimony by Gretchen that she received \$87,096.30 in insurance proceeds for damage to the marital domicile which the court found was a marital asset. The Chancellor made no finding of fact as to the actual percentage division of ownership of each of the parties; however, she ordered the sale of the marital domicile and that the proceeds be equally divided. This equal division supports a presumption that the Chancellor found that the marital domicile was equally owned by the parties and a further presumption that the insurance proceeds were also a marital asset equally owned by the parties. Therefore, one-half of every dollar spent by Gretchen of the insurance proceeds for herself and the children belonged to Jimmy. Therefore, Jimmy's share of the marital assets to the amount of \$38,700.00, were utilized by Gretchen for herself and her children and to pay off joint marital debt.

iii. GRETCHEN DISPOSED OF MARITAL ASSETS

~~The Chancellor ruled that she could do nothing about the fact that Gretchen had taken~~

\$9,696.00 in marital assets (which were the remaining insurance proceeds) and delivered them to her mother as the Chancellor found that her mother was not made party to the proceeding. The Chancellor in finding that the marital domicile was a marital asset, necessarily found that the proceeds from the insurance payments were also marital assets. Just as the Chancellor offset Jimmy's one-half net proceeds of the sale of the marital domicile by the alleged arrearage in temporary child support, Gretchen's one-half share of the proceeds from the sale of the marital domicile should have been offset by Jimmy's one-half share of the \$9,696.00 plus interest which was being held by Gretchen's mother. Therefore, the Chancellor was clearly erroneous in finding she could do nothing about Gretchen's attempt to place marital assets out of the jurisdiction of the court. To sustain the Chancellor in this position would invite future litigants to place marital assets in the hands of their friends, parents, and children solely for the purpose of defeating the court's ability to make equitable division of marital property.

The Mississippi Supreme Court has given our Chancellors guidance in making equitable division of marital property in the case of Ferguson v Ferguson, 639 So. 2d 921, (Miss. 1994) as follows, to-wit:

This Court has previously promulgated guidelines in the awarding of periodic alimony. Armstrong v. Armstrong, 618 So.2d 1278, 1280 (Miss.1993); Hammonds v. Hammonds, 597 So.2d 653, 655 (Miss.1992). Guidelines for lump sum alimony were specifically addressed in Tilley v. Tilley, 610 So.2d 348, 351-52 (Miss.1992) and in Cheatham v. Cheatham, 537 So.2d 435, 438 (Miss.1988). Given the development of domestic relations law, this Court recognizes the need for guidelines to aid chancellors in their adjudication of marital property division. Therefore, this Court directs the chancery courts to evaluate the division of marital assets by the following guidelines and to support their decisions with findings of fact and conclusions of law for purposes of appellate review. Although this listing is not exclusive, this Court suggests the chancery courts consider the following guidelines, where applicable, when attempting to effect an equitable division of marital property:

1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:

- a. Direct or indirect economic contribution to the acquisition of the property;
 - b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage; and
 - c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.
2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.
 3. The market value and the emotional value of the assets subject to distribution.
 4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;
 5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution;
 6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;
 7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and,
 8. Any other factor which in equity should be considered.

The Chancellor was manifestly wrong, clearly erroneous and applied an incorrect legal standard in applying the Ferguson factors (Rec. Excerpt Pg. 18 and Clerk's Papers, Pg. 72, Paragraph 21, subparagraph 2). The Chancellor in reviewing the second Ferguson issue found that both parties contributed to the marital debt which led to their considering bankruptcy prior to the separation and Hurricane Katrina. The court further found the remaining insurance proceeds were being held by Gretchen's mother where Gretchen placed them. The Appellant contends that to the extent that Mrs. Strong's mother had funds belonging to the marital estate, Gretchen diminished the marital estate. Therefore the Chancellor ignored the aforementioned Ferguson factor in reaching her decision or in the alternative, improperly applied same.

V. CONCLUSION

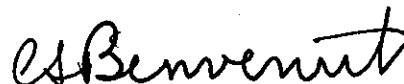
The Chancellor in the case at bar erred in ordering that Jimmy was liable for an arrearage of temporary support which predated any temporary relief hearing. No basis exists in the Mississippi Code, case law of this state, or common law previously accepted by the Mississippi Supreme Court to allow such an award. To sustain this finding of the Chancellor flies in the face of the jurisdictional requirements of Rule 81 of the Mississippi Rules of Civil Procedure. The Chancellor clearly applied an improper legal standard in ordering this prejudgment "temporary child support arrearage." Should the court find that Jimmy was responsible for child support from and after the date of the first temporary relief hearing on January 17, 2006, then the Chancellor applied an improper legal standard in ordering that Jimmy was in arrears in temporary child support prior to the date of the first temporary relief hearing. To sustain the Chancellor in this matter would create great uncertainty in the area of temporary support of children in this state without clear guidelines which must be supplied by this court or by statute.

Should this court sustain the Chancellor's finding of an "arrearage in temporary child support" it is clear that the Chancellor was manifestly wrong and clearly erroneous in finding that Jimmy provided only \$760.00 in support for his children during the period of time between May 15, 2005, and May 2, 2006. Jimmy in fact supplied one-half of all insurance proceeds spent by Gretchen in the amount of \$38,700.00.

The Chancellor clearly applied an improper legal standard, was manifestly wrong, and clearly erroneous in finding that she could make no adjustment as to the equitable division of the marital property resulting from Gretchen's attempt to remove \$9,696.30 in marital assets from the jurisdiction of the court. The court clearly found that the marital domicile was marital property, subject to equitable division. That it was to be sold and the net proceeds divided

equally. Therefore it stands to reason that one-half of the \$9,696.30 which Gretchen gave to her mother, belonged to Jimmy. The court was manifestly wrong, clearly erroneous and applied an improper legal standard in failing to deduct one-half of the \$9,696.30 from Gretchen's net proceeds of the sale of the marital domicile and credit the said one-half to Jimmy's share.

Respectfully submitted this the 15th day of May, 2007.



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CERTIFICATE OF SERVICE

I, the undersigned attorney for the Appellant, James Strong, hereby certify that I have on this date mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of the Appellant to the following parties of interest:

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SO CERTIFIED this the 1st day of May, 2007.


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