

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SUPREME COURT DOCKET NO. 2007-CA-00045

COPY

JOE M. BOWEN

VERSUS

BETTY CAROL BOWEN

FILED

APPELLANT

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SUPREME COURT
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APPELLEE

APPEAL FROM

**THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI,
FIRST JUDICIAL DISTRICT**

HONORABLE SANFORD STECKLER, PRESIDING TRIAL JUDGE

REPLY BRIEF OF APPELLANT

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ARGUMENT I
THE COURT ERRED IN DETERMINING THAT THE PROMISSORY NOTE
FROM THE SALE OF THE MARINA WAS A MARITAL ASSET
and
ARGUMENT II
CHARACTERIZATION OF THE IRA AND STOCK BROKERAGE
ACCOUNTS AS MARITAL ASSETS

The law in Mississippi related to equitable division of property acquired during cohabitation of the parties without the benefit of marriage is quite clear, and the Chancellor properly found and clearly stated the law in Page 4 of the Order Granting Motion to Reconsider as follows, to-wit:

“4. The Length of the Marriage...

Betty and Joe married on November 22, 1995, separated on May 1, 2003, and were divorced in 2005. The marriage lasted a total of ten years, including two (2) years following the separation of the parties. The Court has carefully considered that period of time which the parties cohabitated without the benefit of marriage, but concludes that it cannot compensate Betty for that time due to prevailing law regarding cohabitation in this state. See Malone v Odom, 657 So. 2d 1112 (Miss 1995); Davis v Davis, 643 So. 2d 931 (Miss 1994); Nicholas v Funderberk, 881 So. 2d 266 (Miss. Ct. App. 2003) aff'd 833 So. 2d 554 (Miss 2004).” Clerk’s Papers P. 114

There was no allegation by Betty Bowen that a partnership existed nor did she request an accounting or equitable distribution of assets acquired during an alleged partnership during the period of cohabitation prior to the marriage of the parties. Betty did not allege that the increased value in the Bay View Marina occurred as a result of the joint efforts of the parties during cohabitation. In fact, Betty worked full time at jobs other than the marina during cohabitation. She received income from her own activities at the marina and from her outside jobs and kept her income for her own purposes. Betty’s sole claim to a portion of the marina or its resulting promissory note and Joe’s investment accounts which he acquired prior to the marriage is based

solely upon Mississippi Domestic Relations Equitable Distribution law.

The Chancellor stated as law that he could not consider the period of cohabitation in dividing the marital property. However a review of the Chancellor's equitable distribution suggests that he attempted to create marital property from separate property in order to make an award to Mrs. Bowen to compensate her for the cohabitation period of time prior to the marriage.

The testimony at trial is quite clear that Joe Bowen purchased the marina in 1971. (Rec. p 424 and Exhibit 24) He operated the Bay View Marina as a partnership with his brother beginning in the year 1986 when he bought out his wife's one-half interest in the Bay View Marina. Joe substantially improved the marina completing the improvements in 1994, the year before he married Betty. No capital improvements as per his income tax returns were noted during the years 1995 or 1996, the year in which the marina was sold. Betty and Joe were married in November, 1995. Therefore any finding by the Chancellor that Betty substantially contributed to the accumulating value in the Bay View Marina non-marital asset and Joe Bowen's stock accounts which were also acquired prior to the marriage are clearly erroneous, manifestly wrong, and not supported by substantial facts in the trial transcript. Malone v Odom, 675 So. 2d 1112 (Miss. 1995) The fact there was no increased value of the marina resulting from improvements made during the marriage is clearly found in the testimony of CPA Charles Benvenuti found at Pg. 417 of the trial transcript.

The Court also incorrectly found that Joe's Financial Statement did not disclose his investments or the value of the marina or his financial accounts. (CP Volume I, Pg. 113) A review of Exhibit 4 clearly shows a Financial Declaration which was filed with the Court on February 22, 2005, and found at Clerk's Papers P. 61, indicates that the assets Joe owned at the

time of the separation included investment accounts and gave the value of each investment account, identified the marina promissory note and gave its face value, and showed its monthly payments. Exhibit 5 entered into evidence is a Keesler Federal Credit Union amortization schedule from which the value of the note in any month can be determined.

Mr. Bowen clearly sets out authority for the proposition that the Supreme Court will not overturn a Chancellor's finding of fact unless they were manifestly wrong or the Court abused its discretion. Mr. Bowen asserts that the Court's findings related to the Bay View Marina promissory note as a marital asset is a clearly erroneous finding by the Chancellor and is not supported by the evidence presented at trial.

It is not enough for the Court to review all of the Armstrong factors, the Court's findings must be based on evidence in the record. Armstrong v Armstrong 618 So. 2d 1278 (Miss. 1993), Cheatham v Cheatham 537 So. 2d 435 (Miss 1988), the promissory note from the sale of the marina and Joe's investment accounts were not marital assets and the Chancellor's division of any interest in the said non-marital assets is clearly erroneous.

In the case of Ory v Ory, 936 So. 2d 405 (Miss. App. 2006) the Mississippi Court of Appeals stated, to-wit:

"For purposes of divorce proceedings, the marital estate consists of property acquired or accumulated by the parties during the course of the marriage." Hankins v. Hankins, 866 So.2d 508, 511 (Miss.Ct.App.2004) (citing Hemsley v. Hemsley, 639 So.2d 909, 915 (Miss.1994)). The marital estate is subject to equitable distribution upon the divorce of the parties. Id. However, not all property acquired during the course of a marriage is "marital"; those assets attributable to a party's separate estate prior to marriage are considered non-marital property not subject to equitable distribution. Id. While this is the general rule, non-marital assets may lose their status as such if the party commingles the asset with marital property or uses them for familial benefit. Johnson v. Johnson, 650 So.2d 1281, 1286 (Miss.1994).

Just as in the Ory case there is no serious dispute that Joe Bowen owned his interest in the marina property prior to the marriage. In fact, the testimony of Charles Benvenuti, CPA, clearly indicates that there were no improvements to the marina property during the one-year of the marriage that occurred prior to Joe selling the marina. In the Chancellor's 2006 Order Granting Motion to Reconsider, he awards Betty 10% of the \$600,000.00 as lump sum alimony; the Chancellor is clearly erroneous. He is giving Betty a non-marital asset and there is absolutely no basis for his finding to be found in the testimony presented at trial.

The Appellee again in her argument attempts to have the Chancellor and this Court award Betty interest in separate property owned by Joe prior to the marriage based upon cohabitation. Malone v Odom, 675 So. 2d 1112 (Miss. 1995). The Chancellor rejected the theory that Betty acquired an interest in Joe's assets by her contributions, if any, prior to the marriage; however, it appears from the Chancellor's findings of fact in his division of the marina property owned by Joe prior to the marriage that the Chancellor is in fact making an award to Betty of assets acquired by Joe prior to the marriage.

There was absolutely no testimony to support an allegation that the marina note and the Steifel Nicholas or Scotts Trade accounts and the other financial accounts were in any way commingled and therefore marital property. The Court did not find as fact that commingling occurred. The testimony at trial clearly indicated that all of said accounts were acquired prior to the marriage and no evidence was presented that any of the accounts were commingled in any way. Therefore the finding by the Chancellor that these accounts were somehow converted to marital property during the marriage and that Mrs. Bowen became entitled to 10% is clearly erroneous. The Chancellor cited no facts to support an allegation of commingling because no

such facts existed.

ARGUMENT III

IN THE EVENT THAT THE APPELLATE COURT UPHOLDS THE CHANCELLOR'S FINDING THAT THE PROMISSORY NOTE FROM THE SALE OF THE BAY VIEW MARINA WAS IN FACT A MARITAL ASSET, THE CHANCELLOR ERRED IN CALCULATING THE AMOUNT OR PERCENTAGE OF THE SAID ASSET WHICH COULD BE CONSIDERED MARITAL PROPERTY.

The Appellant would again assert that the Chancellor was manifestly wrong and abused his discretion in finding that the marina promissory note was marital property. A finding that the Appellant again would assert is manifestly wrong and not supported by substantial evidence and was arbitrary and capricious. Ory v Ory 936 So. 2d 405 (Miss. App. 2006). However, should the Supreme Court find that Joe commingled the proceeds from the promissory note, and that Betty is to receive a portion of the marina note then the Appellant asserts that the Chancellor was manifestly wrong in the award of 10% of the \$600,000.00 face value of the note. On the one hand the Chancellor found that somehow Joe commingled the proceeds of the note by expending the proceeds during the marriage and therefore the note becomes marital property; however, the diminution in the value of the note for each of the monthly payments is totally ignored by the Chancellor. The note did not have a value of \$600,000.00 at the time of the December 7, 2006 Order Granting Motion to Reconsider. The note had been paid down for nine years and its value could be ascertained from the amortization schedule entered into evidence as Exhibit 5. The Chancellor, in granting to Betty 10% of \$600,000.00 when the asset at the time of the divorce was less than one-half this value is unreasonable, arbitrary and capricious, and contrary to Mississippi Domestic Relations Law.

ARGUMENT IV

THE CHANCELLOR ERRED IN FAILING TO GIVE JOE BOWEN CREDIT FOR LUMP SUM ALIMONY PAYMENTS MADE DECEMBER 6, 2005 TO DECEMBER, 2006 AND ERRED IN FAILING TO GIVE JOE BOWEN CREDIT FOR TEMPORARY REHABILITATIVE ALIMONY PAID BETWEEN DECEMBER, 2003 AND DECEMBER, 2005

The Appellee frames the issue as a legal one whereas the Appellant has asserted the issue as an abuse of discretion on the part of the Chancellor and the finding is not supported by substantial evidence and is arbitrary and capricious. Ory v Ory 936 So. 2d 405 (Miss. App. 2006). The underlying basis of most of Joe Bowen's wealth at the time of the divorce was his entitlement from payment from the marina note. Each month during the pendency of the divorce, Joe Bowen was required to take the monthly proceeds of the note and pay the mortgage on the marital domicile, medical insurance and expenses on behalf of Betty, and pay to her \$1,836.00 in alimony, effectively requiring Mr. Bowen to expend the entire payment of the note each month together with his income from his social security to support himself and Betty, (See Exhibit 4, Financial Declaration of Joe M. Bowen), thus diminishing the asset and by judicial decree, and granting Betty a substantial portion of the asset each month. The Chancellor ignored this diminution of the value of the asset and benefit thereof to, in granting Betty an interest as marital property in the promissory note and not relying on the value of the note on the date of the award.

The Appellant would again assert that the Chancellor totally ignored the Ferguson factor related to diminution of the marital asset and that she committed waste pursuant to Craft v Craft, 825 So. 2d, 605 (Miss 2002) and that the Court was clearly erroneous in ignoring the factor.

CONCLUSION

The Appellant again asserts that the Chancery Court's findings that Joe M. Bowen's proceeds from the marina promissory note and his investments obtained prior to the marriage were marital property and that such a finding was manifestly wrong, an abuse of the Court's discretion and arbitrary and capricious and thus should be set aside by the Supreme Court. However, if this Court is not going to set aside such findings than it is arbitrary and capricious for the Court to make awards based on the value of an asset so outdated when the Court has more than ample proof of the current value of each asset and the diminution of the assets as a result of award of temporary relief. For all these reasons the judgment entered by the Chancellor should be overturned and be remanded with instructions to properly apply the law and find that the marina note and investment accounts are not marital property and to reverse the Chancellor's award to Mrs. Bowen of any interest therein.

Respectfully submitted this the 26th day of November, 2007.



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CERTIFICATE OF SERVICE

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

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SO CERTIFIED this the 26th day of November, 2007.


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