

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2007-CA-00171

APPEAL

FROM THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

JOHN O'NEAL LUSE

APPELLANT

VS.

LENDER LUSE

APPELLEE

BRIEF OF APPELLEE, LENDER LUSE

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN O'NEAL LUSE

APPELLANT

VERSUS

NO. 2007-CA-00171

LENDER LUSE

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel 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 this Court may evaluate possible disqualifications or refusal.

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John O'Neal Luse
Appellant

Lender Luse
Appellee

SO CERTIFIED on this the 12th day of July, 2007.



RICHARD R. GRINDSTAFF

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STATEMENT OF THE ISSUES

I. Whether the Chancery Court committed manifest error or abused its discretion when it did not make specific findings of fact and conclusions of law, to equitably distribute the marital assets and liabilities of the parties.

II. Whether the Chancery Court committed manifest error or abused its discretion/committed manifest error when granting a divorce on the ground of desertion when no record of a hearing was made and the divorce proceedings were not held in open court as required by the Mississippi Code as Amended Section 93-5-17(1)(1972).

III. Whether the Chancery Court committed manifest error or abused its discretion when it granted a divorce to appellee on the ground of desertion and awarded all marital property to the appellee when no uniform chancery court rule 8.05 financial statement was filed nor was an order excusing the same made apart of the record.

STATEMENT OF THE CASE

Lender Luse and John O'Neal Luse were married on November 28, 1981, in Marshall County, Mississippi, and had one child, Kelvin O'Neal Luse, born January 18, 1984. The parties hereto separated in September of 2002 when Mr. Luse deserted Lender Luse. Lender Luse filed a Bill for Divorce against John O'Neal Luse on November 6, 2006, alleging that she was entitled to a divorce on ground of desertion and alternatively upon the ground of irreconcilable differences and alleged that she was entitled to the use, possession and ownership of the real property of the parties. (R. at 1, 2, 3). The parties minor child that turned 21 years of age January 18, 2005. John O'Neal Luse was served with process on November 7, 2006, in Yazoo County, Mississippi, where he had moved when he deserted his wife in September of 2002, and John O'Neal Luse did not file an answer. (R. At 5, 6). A hearing was held on December 29, 2006, in open court as required by law, with witnesses testifying before the Chancellor, and a Final Judgment of Divorce was granted on the ground of desertion. The court awarded Lender Luse the real property owned by the parties in Hinds County, Mississippi, and Holmes County, Mississippi. (R. At 7). Lender Luse had been residing with her son who turned 21 nearly 3 years after the separation of the parties in the real property and Lender Luse was making the mortgage payments on the real property. Mr. Luse left Lender Luse to raise her son and provided no child support and did not assist with any of the mortgage payments to Citifinancial and Select Portfolio Services. Mr. Luse moved into the real property after being served with process in November, 2006, and evicted Lender Luse and their son and has made about ½ of one mortgage payment since that time, the only payment he has made since the parties separation in September of 2002, despite their being two mortgage payments. Lender Luse made all mortgage payments since the real property was refinanced in 1997 other than this one partial payment..

On January 26, 2007, John O'Neal Luse filed a Notice of Appeal. (R. at 11). On February 1, 2007, John O'Neal Luse field a Motion for Relief From Final Judgment of Divorce in the Chancery Court of the First Judicial District of Hinds County, Mississippi (R. at 12) and

sought to stay appeal pending the disposition of the Motion For Relief on April 2, 2007, which the Supreme Court of Mississippi denied on April 12, 2007.

SUMMARY OF THE ARGUMENT

In *Crowe v. Smith*, 603 So.2d 301, 305 (Miss. 1992) the court stated that a party is not allowed to raise an issue the first time on appeal. In *Ory v. Ory*, 906 So.2d 405 (Miss. Ct. App. 2006), cert. denied 936 So. 2d 367 (Miss. 2006) the Court of Appeals stated that the failure to raise an issue "either by objection or via post-trial motion" waives an issue. No motions were heard in the lower court and no evidence presented by Mr. Luse disputing the findings of the Chancellor. This court has stated in numerous cases that you cannot raise an issue for the first time on appeal. *Albert v. Allied Glove Corp.*, 944 So.2d 1, 7 (Miss. 2006); *Purvis v. Barnes*, 791 So.2d 199, 202 (Miss. 2001); *Chassaniol v. Bank of Kilmichael*, 626 So.2d 127, 133-34 (Miss.1993). Mr. Luse did not raise any issues in this appeal in the chancery court. Mr. Luse had the opportunity under Rule 56 and Rule 60 of the Mississippi Rules of Civil Procedure to filed proper motions before the lower court.

Mr. Luse makes allegations that the divorce judgment was not conducted in open court which is not true. Lender Luse and Hattie Opara-Nade appeared and testified in open court on December 28, 2006 following which the Chancellor made her decision, all in accordance with law. Mr. Luse alleges that the *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994) were not followed the Chancellor. This issue was not brought in the lower court so it is not proper on appeal. Mr. Luse has had the opportunity to file a motion in the lower court so that this issue can be brought forward but the issue has not been heard in the lower court and is therefore improper on appeal.

BRIEF OF THE ARGUMENT

I: Whether the Chancery Court committed manifest error or abused its discretion by not equitably distributing the marital assets and liabilities of the parties when it failed to make specific findings of fact and conclusions of law.

A chancellor's decisions will not be disturbed unless manifestly wrong or clearly erroneous. *Consolidated Pipe & Supply Co. V. Colter*, 735 So. 2nd 958, 961 (Miss. 1999). In *Crowe v. Smith*, 603 So.2d 301, 305 (Miss. 1992) the court stated that a party is not allowed to raise an issue the first time on appeal. In *Ory v. Ory*, 936 So.2d 405 (Miss. Ct. App. 2006) cert. denied 936 So. 2d 367 (Miss. 2006) stated that the failure to raise an issue "either by objection or via post-trial motion" waives an issue. In the case sub judice there was no objection or post trial motion that has been filed prior to appeal that is before this court. This court has made it clear that you cannot raise an issue for the first time on appeal. *Albert v. Allied Glove Corp.*, 944 So.2d 1, 7 (Miss. 2006); *Purvis v. Barnes*, 791 So.2d 199, 202 (Miss. 2001); *Chassaniol v. Bank of Kilmichael*, 626 So.2d 127, 133-34 (Miss.1993).

Mr. Luse has not brought this issue before the trial court and this issue is without merit.

Nevertheless,

"The supreme court has set up a number of guidelines for chancellors to follow during equitable distribution. The chancellor must: (1) classify the parties' assets as martial or separate, (2) value those assets, and (3) divide the marital assets equitably. *Ferguson v. Ferguson*, 639 So.2d 921, 928 (Miss. 1993). Marital property consists of assets acquired or accumulated during the course of the marriage. *Hemsley v. Hemsley*, 639 So.2d 909, 915 (Miss. 1994). Separate property consists of property acquired before or outside of the marriage. *MacDonald v. MacDonald*, 698 So.2d 1079, 1083 (Miss. 1997)."

Marshall v. Marshall, No. 2005-CA-00436-COA (Miss. Ct. App.. 2007). This matter has not been brought before the court and is not properly before the court. The only property awarded to Lender Luse by the Chancellor was the real property for which she had solely been paying for since Mr. Luse abandoned her and their child in September of 2002. Mr. Luse moved into the real property after being served with process and evicted Lender Luse and their son and has made about ½ of one mortgage payment since that time, the only payment made since the parties separation in September of 2002, despite their being two mortgage payments. Lender Luse made

all mortgage payments since the real property was refinanced in 1997. Based on these factors and additional factors presented to the Chancellor, the Chancellor made the proper decision in this matter. In *Stinson v. Stinson*, 738 So. 2d 1259 (Miss. Appt. Ct. 1999) the defendant filed a motion after being aggrieved at a decision awarding the divorce to the plaintiff. In the case sub judice no such motion is before this court or a decision or evidence based on this allegation presented to the lower court. In *Lindsey v. Lindsey* 818 So. 2d 1191, 1193 (Miss. 2002) this court held that in that case the Defendant had a chance to contest the uncontested divorce by not answering and then give a second chance by filing a motion to set aside the divorce decree. In the case sub judice Mr. Luce did not answer the case and there is not motion to set aside heard at the lower court which could have provided sufficient evidence. In *Lindsey v. Lindsey, supra* at 1195, the court stated that although “there is no record of the original hearing before this Court....in a subsequent hearing” sufficient proof was established. In the case sub judice Mr. Luce could have filed a proper motion in a timely manner to hear additional evidence but Mr. Luce failed to do so.

II. Whether the Chancery Court committed manifest error or abused its discretion/committed manifest error when granting a divorce on the ground of desertion when no record of a hearing was made and the divorce proceedings were not held in open court as required by the Mississippi Code as Amended Section 93-5-17(1)(1972).

In *Crowe v. Smith*, 603 So.2d 301, 305 (Miss. 1992) the court stated that a party is not allowed to raise an issue the first time on appeal. In *Ory v. Ory*, 936 So.2d 405 (Miss. Ct. App. 2006) cert. denied 936 So. 2d 367 (Miss. 2006) stated that the failure to raise an issue “either by objection or via post-trial motion” waives an issue. In the case sub judice there was no objection or post trial motion that has been filed prior to appeal that is before this court. “Since the record does not reflect that the Albert presented this argument at the trial court level, Albert is barred from raising this issue on appeal.” *Albert v. Allied Glove Corp.*, 944 So.2d 1, 7 (Miss. 2006). This court has made it clear that you cannot raise an issue for the first time on appeal. *Albert v. Allied Glove Corp.*, 944 So.2d 1, 7 (Miss. 2006); *Purvis v. Barnes*, 791 So.2d 199, 202 (Miss.

2001); *Chassaniol v. Bank of Kilmichael*, 626 So.2d 127, 133-34 (Miss.1993). This issue was never raised in the lower court and is therefore not properly before this court.

Nonetheless the assertion that the divorce proceedings were not held in open court as required by Section 93-59-17(1) of the Mississippi Code of 1972, as amended, is absolutely untrue and false. A hearing was heard in the open court room with witnesses testifying. It is true that the court reporter did not record the proceedings but that is common practice in nearly every court in Mississippi when an uncontested divorce is heard. In *Ory v. Ory, supra*, it was held that evidence had not been presented with no witnesses. This evidence was made available in that case because of motions made with the court. There were no such motions made and evidence presented by Mr. Luse. There is not a single case cited by Mr. Luse in which an uncontested divorce was granted without a motion and evidence presented. The Mississippi Rules of Civil Procedure, Rule 56 allow an aggrieved party 10 days to file a motion for new trial. No such motion was filed. Rule 60 of the Mississippi Rules of Civil Procedure allow relief from a party for various reasons. There is no such motion or ruling pending before this court. A motion for relief from final judgment of divorce was filed after an appeal was had to this court and more than 30 days after the final judgment was rendered. (R. At 12). The only two grounds alleged to set aside the final judgment were that it was to be held in open court which it was and that financial statement and disclosures as required by Uniform Chancery Court Rule 8.05(A),(B), and © were not filed. This rule does not require that financial statements be filed with the clerk of the court, only that a copy be provided to the court, witnesses and opposing counsel.

Mr. Luse would have this court rule that because a record was not had that this divorce is null and void. No motion or allegation by Mr. Luse alleging this was brought in the lower court was brought. Further, if Mr. Luse were to prevail thousands of uncontested divorces could be put in jeopardy because nearly every Chancellor in Mississippi has uncontested divorces without a record.

III. Whether the Chancery Court committed manifest error or abused its discretion when it granted a divorce to appellee on the ground of desertion and awarded all marital property to the appellee when no uniform chancery court rule 8.05 financial statement was filed nor was an order excusing the same made apart of the record.

In *Crowe v. Smith*, 603 So.2d 301, 305 (Miss. 1992) the court stated that a party is not allowed to raise an issue the first time on appeal. In *Ory v. Ory*, 936 So.2d 405 (Miss. Ct. App. 2006) cert. denied 936 So. 2d 367 (Miss. 2006) stated that the failure to raise an issue “either by objection or via post-trial motion” waives an issue. In the case sub judice there was no objection or post trial motion that has been filed prior to appeal that is before this court. Mr. Luse did not bring this allegation before the lower court and therefore this allegation is without merit.

Rule 8.05 of the Uniform Chancery Court Rules states that a financial statement in court is to be provided “the Court, the witness and opposing counsel....The failure to observe this rule, without just cause, shall constitute contempt of Court for which the Court shall impose appropriate sanctions and penalties.” The policy of many chancellors in uncontested and irreconcilable differences divorces is for attorneys to keep the disclosures because the forms contain private and confidential information that would be public record such as social security number and date of birth. Nonetheless nowhere is it required to be filed with the clerk and even were one not provided the penalty is contempt. However because this issue has not been brought before the lower court the issue is without merit.

CONCLUSION


The Chancellor was correct in granting the Final Judgment of Divorce. No answer has been filed and there was no contest of the issues by Mr. Luse in the lower court. No issues have been presented by Mr. Luse in the lower court and therefore the Final Judgment of Divorce should stand. There are no Rule 56 of Mississippi Rules of Civil Procedure, or Rule 60 of the Mississippi Rules of Civil Procedure motions that were heard in the lower court and no issues brought by Mr. Luse were brought in the Chancery Court. The law is well settled that no new issues are to be brought in the appeals courts and all issues presented by Mr. Luse are new and

have not been brought in the Chancery Court.

Respectfully submitted,

LENDER LUSE

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CERTIFICATE OF SERVICE

This is to certify that I, the undersigned attorney of record for the Plaintiffs, Appellants, have this date mailed, postage prepaid, by United States Mail, a true and correct copy of the above and foregoing Brief to the following at their usual mailing addresses:

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SO CERTIFIED on this the 12th day of July, 2007.


RICHARD R. GRINDSTAFF