

IN THE SUPREME COURT OF MISSISSIPPI

CA
2007-00771

DONNA SULLIVAN

APPELLANT

VS.

STEPHEN D. SULLIVAN

APPELLEE

BRIEF OF APPELLANT

APPEAL FROM THE CHANCERY COURT OF RANKIN COUNTY, MISSISSIPPI

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These presentations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal:

1. Donna Sullivan, Appellant
2. Stephen D. Sullivan, Appellee
3. Honorable Dan H. Fairly, Chancellor
4. Anselm J. McLaurin, Attorney for Appellee
5. Melissa L. Gardner-Warren, Attorney for Appellant

MELISSA L. GARDNER-WARREN

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STATEMENT OF ISSUES

The lower court committed reversible error by its misapplication of the *Ferguson* factors in determining the distribution of marital assets.

STATEMENT OF CASE

A. Nature of Case

Donna M. Sullivan (hereinafter referred to as "Donna") and Stephen D. Sullivan (hereinafter referred to as "Stephen") were married on June 4, 1976, in Rankin County, Mississippi. During the course of their marriage three (3) children were born, namely, Brandi, who was emancipated at the time of the trial, and Brittany and Christian, who were 16 years of age and fifteen (15) years of age, respectively, at the time of the trial on the merits in this matter. Donna and Stephen resided in Rankin County, Mississippi, throughout the entirety of their marriage.

During September or October, 2004, the parties separated while still living in Rankin County, Mississippi. Donna left the marital home located at 701 East Dewey Camp Drive, Florence, Mississippi, while Stephen chose to remain there with the minor children of the parties. On September 27, 2005, Stephen filed for divorce from Donna alleging uncondoned adultery and desertion, as well as the no fault ground of irreconcilable differences. Stephen requests included legal and physical custody of the remaining minor children, support for those children, the ownership of the marital home, as well as other personal property, and payment of marital debts. (R.E. 3-7). Donna filed her responsive pleading setting out her answer and defenses, as well as her cross-claim for a divorce on the grounds of constructive desertion, habitual cruel and inhuman treatment, habitual drug and alcohol use, adultery, and irreconcilable differences. (R.E. 8-18). Thereafter, on February 27, 2006, an Order was entered allowing Donna to substitute counsel and amend her responsive pleading. (R.E. 39-41). Her Amended Answer and Counterclaim was filed on that date requesting sole custody of the minor children, support for the minor children, ownership of the former marital home, all household goods and furnishings

and other personal property, alimony, and attorney's fees. (R.E. 43-52). Stephen filed his Answer to Donna's amended counterclaim on March 28, 2006. (R.E. 54-57).

On April 18, 2006, the parties appeared before the Family Master for a hearing on the temporary issues in the matter. The parties reached an agreement as to those issues, and an Agreed Temporary Order was entered on June 1, 2006. (R.E. 59-63). The temporary agreement between the parties was that Stephen would have temporary custody of the minor children and Donna would exercise visitation. Moreover, Donna agreed to pay the sum of \$200.00 per month to Stephen as child support, as well as 25% of the medical expenses incurred by those children which were not covered by a policy of medical insurance Stephen was to maintain. Stephen agreed to pay the sum of \$600.00 per month to Donna as temporary alimony. Donna was awarded the use and possession of the former marital home and ordered to pay any future taxes, insurance, and utility bills on the residence, while Stephen agreed to pay any of those expenses which were past due and owing at that time.

The parties met in court once again on February 28, 2007, for a trial on the merits in this matter. However, prior to the commencement of trial, Donna and Stephen jointly executed a motion to withdraw the previously alleged fault grounds and a consent to the entry of the divorce on the ground of irreconcilable differences and to the lower court's deciding the disputed issues remaining between them. (R.E. 69-73). Thereafter, the lower court entered an Order Allowing Parties to Withdraw Fault Grounds and Proceed with Irreconcilable Differences Divorce (R.E. 74-75) and an Order Accepting Consent to Entry of Divorce on Ground of Irreconcilable Differences and Consent to Court Deciding Remaining Issues. (R.E. 76-77). The remaining issues to be decided were child custody and support, visitation, division of real and personal property, alimony, payment of marital debts, and attorney's fees.

The trial commenced and at the conclusion thereof the Court rendered a bench opinion. That opinion was reduced to writing, and the Final Judgment of Divorce - Irreconcilable Differences was filed on March 12, 2007. (R.E. 78-83). On March 21, 2007, Donna filed her Motion for Reconsideration or, Alternatively, Motion for New Trial (R.E. 86-88), which was denied on April 17, 2007. (R.E. 89). Donna appeals from that Final Judgment.

B. Facts of Case

Stephen testified that Donna was guilty of uncondoned adultery and that prior to the separation of the parties, Donna had become involved with another man, namely, Brandon Roberts. According to Stephen, Donna's relationship with Mr. Roberts was the cause of the disruption of the family's harmony. (T.R. 55). However, Stephen went further to say that although he was fully aware of the nature of the relationship he simply told Donna "[i]f you're going to see him at least come home and stay here." (T.R. 56). Stephen stated that even after the separation of the parties he continued to attempt to reconcile their marriage (T.R. 56). Although Stephen placed the blame for the disintegration of the relationship on Donna, he later admitted that he had been involved in a sexual relationship with a woman other than Donna during their marriage (T.R. 112) and that there had been two other woman more recently. Stephen admitted that he had been involved sexually with Penny Hopkins and that the minor children had been exposed to Ms. Hopkins on numerous occasions. Stephen further stated that Ms. Hopkins had spent the night in the former marital home on at least two occasions during which the minor children were also present. (T.R. 115). On cross-examination, Stephen admitted that Ms. Brooks was a drug user and was emotionally unstable. (T.R. 117-118).

Stephen also testified that at the time of the hearing in this matter he was living with a woman named, Sharlette Wilson, and that Ms. Wilson and her three minor children were

presently living in his home with himself and the minor children of the parties. (T.R. 57-59). Stephen admitted that he had engaged in sexual relations with Ms. Wilson and that they were, in fact, planning to marry "as soon as we take care of our business." (T.R. 117). Stephen rationalized that his engagement to Ms. Wilson removed any taint attached thereto and, therefore, absolved himself of any guilt as to the adultery itself or the immoral environment in which his children were living. (T.R. 117).

Stephen also testified that he purchased a home during the separation of the parties, namely, the house and lot located at 108 Kimwood Place, Florence, Mississippi, and secured a mortgage from Trustmark Bank on that property in the amount of \$170,000.00. (T.R. 66). Additionally, Stephen testified that the value of the former marital home in which Donna resides is \$60,000.00 and that said home was unencumbered at the time that he vacated the premises. The parties also owned an improved lot at Eagle Lake with a value of \$10,000.00. (T.R. 68).

Insofar as investment accounts are concerned, Stephen testified that he had been employed at Entergy since 1982 and that during the course of his employment he had accumulated a 401(k) account which had an approximate value of \$206,000.00 at the time of the separation. By the time of the trial that account had increased in value to approximately \$320-330,000.00, less a \$19,000.00 loan which he had taken against those funds during the separation of the parties. (T.R. 74). Additionally, the parties had accumulated numerous savings bonds, the cost of which were payroll deducted from Stephen's wages.

Stephen testified that his funds were commingled with those of his live-in paramour, Sharlette Wilson, and that he had been paying the household expenses from that account, including, but not limited to, Ms. Wilson's son's car note. (T.R. 59, 83).

Finally, on direct examination Stephen gave only cursory information regarding the minor

children of the parties. He stated that he thinks the children are flourishing, that they could do better in school, they smile, and that Brittany goes to church; however, he could not inform the court as to which church she attends. (T.R.98-100). Having said that, he offered no corroborative evidence to substantiate any of these claims. During his cross-examination, Stephen testified that Donna stayed home the vast majority of the marriage and cooked, cleaned, and “definitely took care of the children.” (T.R. 104-107). At the present time, Brittany and Christian are sharing a bedroom in the home of Stephen and Sharlette. (T.R. 108).

At the close of the record, the trial court rendered a bench opinion which made an uneven division of the marital estate. Although the evidence was clear that Donna and Stephen had each committed adultery, Stephen even more so, the trial court placed all fault on Donna and severely restricted her financial award.

SUMMARY OF ARGUMENT

The lower court erred in its application of the *Ferguson* factors in the case at bar. Although a specific finding was made that the parties had equally contributed to the accumulation of the marital assets and that Appellant was in need of financial security due to the disparity of assets and income, she was awarded only a paltry share. Appellant's marital misconduct was used to reduce her share of the marital estate, while Appellee's admitted misconduct was ignored. As both parties are guilty of the same wrongdoing, at the same time, and to the same degree, the division of the marital assets should have been equal.

ARGUMENT

The Chancellor committed reversible error by his misapplication of the *Ferguson* factors in determining the distribution of marital assets.

In *Brown v. Miss. Dep't of Human Servs.*, 806 So. 2d 1004, 1005 (Miss. 2000), the Mississippi Supreme Court held that issues of law on appeal, are reviewed de novo. The issues in the case *sub judice*, as raised on appeal, are issues of law.

While the parties, in the case *sub judice*, stipulated to a divorce based upon the Grounds of irreconcilable differences, the Mississippi Court of Appeals held that marital misconduct could still be considered in the chancellor's determination of the distribution of marital property. *Driste v. Driste*, 738 So. 2d 763, 766 (Miss. Ct. App. 1998). The factors to be weighed in making an equitable division of the marital estate are found in *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994). Those factors are:

1. Direct or indirect economic contributions to the acquisition of the property;
2. 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;
3. Contribution to the education, training or other accomplishments bearing on the earning power of the spouse accumulating the assets;
4. The degree of which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.
5. The market value and the emotional value of the assets subject to distribution;
6. The value of assets not ordinarily, absent equitable factors to the contrary, subject

- to such distribution;
7. Tax and other economic consequences, and contractual or legal consequences to third parties of the proposed distribution;
 8. The extent of 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;
 9. The needs of the parties for financial security with due regard to the combination of assets, income, and earning capacity; and
 10. Any other factor which in equity should be considered.

The evidence introduced at trial made it clear that both of these parties had engaged in extramarital relationships. At the time of the trial both parties were openly and continually living with a member of the opposite sex. Both of the parties were sharing expenses with those individuals. However, Stephen's conduct was more severe because his was not his first extramarital relationship. During his testimony, he admitted to an affair during the marriage and an additional relationship immediately prior to his present one, totaling three (3) in all. Moreover, the argument can be made that Stephen's conduct was more appalling because his activities are presently, and were at the time, being conducted in full view of the minor children of the parties and were, in fact, forcing those children to participate in his adulterous relationship because they resided with his paramour. Stephen even went so far as to refer to Ms. Wilson's children as siblings to the Sullivan children. (T.R. 100).

In its ruling from the bench, the lower court laid blame for the disruption of the marriage solely at Donna's feet. "This Court finds that Mrs. Sullivan's open, shameless, continued relationship with Mr. Roberts had a tremendous impact on the harmony and stability of the

marriage.” (T.R. 325). The trial court went further by stating that “this is not something that’s hidden from the children...her conduct, particularly her relationship with Mr. Roberts, has impacted substantially the harmony and stability of the marriage.” (T.R. 326). Interestingly, no mention was made of Stephen’s misconduct.

A review of its *Ferguson* analysis plainly shows that the lower court found:

1. Although Stephen was the primary monetary contributor to the accumulation of marital assets, Donna’s efforts as mother and homemaker were in-kind contributions equal to those of Stephen; therefore, the parties are equal in the accumulation of the marital assets. (T.R. 321).
2. Neither party had squandered or dissipated marital assets. (T.R. 322)
3. Donna had an emotional tie to the marital home while Stephen did not. (T.R. 322)
4. A sufficient division of the marital estate is necessary to eliminate periodic alimony. (T.R. 323)
5. While Stephen enjoys a handsome salary each month, Donna, on the other hand, is in need of financial security because her income is “nominal.” (T.R. 323)

The trial court further denied alimony to Donna because of her living arrangements and “the support” she received from Mr. Roberts in the form of shared expenses. Along the same line, Stephen substantially supports his paramour and her three minor children, even going so far as financing a vehicle for one of the Wilson children. While the trial court may be correct in its analysis of the *Armstrong* factors in rendering this denial, the facts of this case then make it more imperative for the court to make an equal distribution of the marital assets.

When making his final calculations, the trial court found that the accumulation of marital

assets ceased at the entry of the Temporary Order and placed a value of \$300,326.14 on the marital estate, the vast majority of which was Stephen's 401(k), valued at \$206,647.14. The total value of that account at the time of trial was determined to be \$320-330,000.00. (T.R. 74). At the end of the day, Donna was awarded a mere \$20,000.00 from that account. The remainder of her award is comprised of the marital home, a vacant lot on Eagle Lake, cemetery plots, a small personal injury settlement, and a vehicle, the bulk of which were not in the form of liquid assets. In order for her to realize the value of the property awarded to her to gain any semblance of financial security would be to sell her home and liquidate the 401(k) rollover, both of which would trigger a taxable event, thereby creating even more debt.

The trial court relies on *Singley v. Singley*, 846 So. 2d 1004 (Miss. 2002) in making its award. In *Singley*, the Mississippi Supreme Court reversed an equal division of assets to a wife who had eight affairs in fifteen years. However, in the case at bar, **both** parties are guilty of the same misconduct, making the case inapplicable hereto. Furthermore, in *Henderson v. Henderson*, 757 So. 2d 285 (Miss. 2000), the Supreme Court held that an equal distribution was appropriate even though one spouse was at fault.

Although the court had previously made a specific finding that the parties were equal contributors to the accumulation of all marital assets, the reason given for this paltry award was that Stephen had made the contributions and "that her behavior is the one that has affected the stability and harmony of the marital relationship." (T.R. 327). It is clear that Donna's equitable share of the marital estate was dramatically reduced because of her marital misconduct. While the lower court punished and penalized Donna for her misconduct, Stephen's misconduct was virtually ignored. Even with the changing attitudes prevalent today, what is good for the goose is still definitely good for the gander. Fault for the disintegration of this marriage should be

shared equally in this case along with the assets accumulated therein.

The lower court does make an attempt at justification of this awarded by referencing Stephen's testimony regarding his efforts to reconcile the marriage after the separation, placing more credibility on his testimony than on Donna's. (T.R. 325-326). Consequently, while doing this, the lower court completely ignores one admitted and undisputed fact: Stephen was engaging in sexual relations with Ms. Hopkins and Ms. Wilson during the period of time that he **claims** to be working on a reconciliation with Donna; therefore, his attempts could not have been in good faith and genuine. The trial court is required to make a complete and impartial analysis of *all* facts, not just those which do not offend its sensibilities.

Upon a review of the facts in this case what becomes crystal clear is that **both** of these parties were guilty of the same misconduct, both of the parties were equal contributors to the marital estate, and both should share equally in the final dissolution.

CONCLUSION

Donna and Stephen endured a long marriage together, resulting in the birth of three children and various assets. At the conclusion of that marriage, both of the parties engaged in marital misconduct, i.e., adultery. To argue that the wife's participation in her adulterous relationship was more egregious than the husband's participation in his numerous relationships is at best an oversight and at worst a misapplication of the law to the facts. Because their mutual errors contributed to the decay of their relationship and because their mutual contributions made the resulting accumulation of the assets possible, the division of those assets should be equal.

CERTIFICATE OF SERVICE

I, MELISSA L. GARDNER-WARREN, attorney for Donna Sullivan, Appellant herein,
do hereby certify that I have this day hand delivered a true and correct copy of the above and
foregoing Brief of Appellant to:

HONORABLE DAN H. FAIRLY, CHANCELLOR
Twentieth Chancery Court District
Government Street
Brandon, Mississippi

ANSELM J. McLAURIN
McLAURIN & McLAURIN
200 Felicity Street
Brandon, Mississippi

THIS, the 24th day of January, 2008.



MELISSA L. GARDNER-WARREN