

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ALFRED RANDOLPH SMITH, JR.

APPELLANT

v.

CASE # 2007-CA-01356


BRENNNA D. SMITH

APPELLEE

APPELLANT'S BRIEF

On Appeal from the Judgment of the Chancery Court of Hinds County, Mississippi

HONORABLE DENISE OWENS, JUDGE

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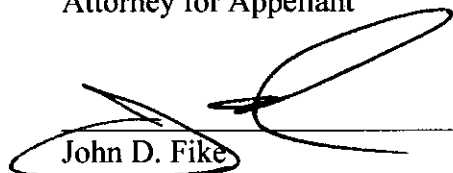
CERTIFICATE OF INTERESTED PERSONS

NO. 2007-CA-01356

ALFRED RANDOLPH SMITH, JR. v. BRENN A D. SMITH

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

Alfred Randolph Smith, Jr.	Appellant Herein
Brenna D. Smith	Appellee
Honorable Denise Owens	Presiding Judge at Trial Level
Honorable Harry J. Rosenthal	Attorney for Appellee
Honorable John D. Fike	Attorney for Appellant


John D. Fike

Attorney of Record for Alfred Randolph Smith, Jr.

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STATEMENT OF THE ISSUES

I. Whether the trial court erred as a matter of law by awarding an equitable distribution of non marital property to the appellee.

II. Whether the trial court erred in failing to make specific findings of fact and conclusions of law relating to the distribution of the assets of the parties.

III. Whether the trial court erred as a matter of law in awarding appellee an equal share in marital property after finding that appellant was entitled to a divorce on the ground of habitual cruel and inhuman treatment at the hands of appellee.

STATEMENT OF THE CASE

I: STANDARD OF REVIEW

The Court's scope of review in domestic relations cases is limited. The Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. **Ferguson v. Ferguson**, 639 So. 2d 921, 930 (Miss. 1994) (citing **Bell v. Parker**, 563 So. 2d 594, 596-97 (Miss. 1990)). Therefore, the Court "is required to respect the findings of fact made by a chancellor supported by credible evidence and not manifestly wrong." **Ferguson**, 639 So. 2d at 930 (citing **Newsom v. Newsom**, 557 So. 2d 511, 514 (Miss. 1990)).

II: COURSE OF PROCEEDINGS

Following a bifurcated trial, the Hinds County Chancery Court awarded Appellant a divorce on the ground of Habitual Cruel and Inhuman Treatment against the Appellee. A.R.E. 13. In the second phase of the trial, the Court then proceeded to divide the properties between Appellant and Appellee. It is Appellant's contention that the Chancery Court failed to follow the **Ferguson** factors in determining the division of the properties as it awarded Appellee one-half of the marital estate plus an additional portion of Appellant's separate properties without justification or reason. Feeling aggrieved, the Appellant files this his appeal.

III: STATEMENT OF THE FACTS

The Appellant and Appellee were married on February 14, 1999. At the time of their separation, they had been married less than six (6) years. On December 25, 2005, Appellee approached Appellant in the marital home and stabbed him twice resulting in

his hospitalization. T.R. 58. Appellant introduced photographs evidencing the physical trauma to his body at the hands of the Appellee. T. Ex. 1. Appellant filed for divorce and for Relief from Domestic Abuse on December 29, 2005. R.E. 1. A Temporary Order was issued on January 5, 2006 allowing Appellant to remain in the marital home and prohibiting Appellee from returning to the marital home, contacting Appellant or coming within 500 feet of Appellant. R.E. 13-14. Appellee filed a Complaint for Divorce on the grounds of Habitual Cruel and Inhuman Treatment and Habitual Drunkenness on January 6, 2006. R.E. 15-19. These two actions were then consolidated by Order. R.E. 1a.

During the course of the proceedings, Appellee plead guilty in Hinds County Circuit Court to willfully, feloniously, purposely and knowingly causing bodily injury to Appellant by stabbing him. T.Ex. 4. The Chancery Court considered Appellee's admission to this crime supported by her guilty plea entered into the trial record and awarded Appellant divorce finding Appellee guilty of Habitual Cruel and Inhuman Treatment of Appellant. A.R.E. 13.

During the second phase of the hearing, Appellee testified that she and the Appellant entered into a prenuptial agreement. T.R. 117. She also testified that she was not an owner of any of Appellant's property until June of 2005, some five (5) years following the marriage. T.R. 117. Appellee testified that she assisted in making improvements to the marital home; however, the only receipt she could produce was for \$3000.00 and she further testified that she only paid half of that bill. T.R. 88, 89. Appellee further testified that she was listed as a joint tenant on the marital home in June, 2005. T.R. 90.

Appellee testified that Appellant owned a rental property located on Prassel Street, Raymond, Mississippi prior to the marriage and that she had knowledge that the tenants requested that repairs be completed to this property. T.R. 144. Appellant testified that he allowed an acquaintance of Appellee's to make the repairs and that he raised the rent on that property by \$100.00 per month. T.R. 142. There was evidence introduced indicating that repairs were made to this property. T.R. 143. Appellee testified that she was not an owner of the rental property on Prassel Street and that her only involvement with this property was that she sat with the repairmen while they made the repairs to the house. T.R. 99. Appellee produced no evidence that she paid for or made any financial or "sweat equity" contribution to this property, although there were charges on her credit card related to these repairs; however, all of the charges were paid for with funds from a joint marital bank account solely funded by the Appellant. T.R. 100.

Appellee testified that she had separate property i.e. a farm in Arkansas from which she derived income. T.R. 105. Appellee testified that her earnings for fiscal 2004 were \$5,600.00 and \$1,500.00 for fiscal 2005. T.R. 105.

Additionally Appellee testified that Appellant purchased a life insurance policy through John Hancock in 1983, and though Appellee testified that she paid the premiums on this policy during the marriage, the payments actually were applied toward the payment of a loan against the policy. T.R. 109. Appellee testified that she paid \$6,000.00 toward a loan balance of \$9,429.00. T.R. 112.

Appellee testified that she became the owner of a Farm Bureau life insurance policy on the life of the Appellant in June, 2005, which previously had been the sole

property of the Appellant. T.R. 113. Appellee further testified that following the separation of the parties she stopped paying the premiums on the policy insuring her life but continued to pay the premiums on the policy insuring the life of the Appellant. T.R. 115.

Appellee testified that there were four (4) savings accounts consisting of money markets and certificates of deposit. T.R. 118. Appellee testified that the basis for these funds resulted from funds held in the joint bank account; however, there is no evidence to support this testimony and there was contradictory testimony from the Appellant that he created these accounts prior to the marriage and continued to maintain all of them as complete and separate property to the exclusion of the Appellee. T.R. 118. Further, Appellant testified that he had not contributed to these accounts since their inception. T.R. 158.

Regardless of this testimony, the Chancery Court proceeded to equally divide all marital assets as well as award to the Appellee a monetary value in Appellant's separate property.

SUMMARY OF THE ARGUMENT

The Chancellor's failure to follow the guideline mandated by this Court in *Ferguson* and *Hemsley* in the division of property in a divorce proceeding constitutes manifest error, an abuse of discretion and warrants a reversal. There is no mention of the *Ferguson* factors or how they contribute to the division of the property in the court's ruling. The court stated that *Ferguson* controls but did not support its findings with conclusions of law and findings of fact as mandated in *Singley*. Further Appellant was granted a divorce on the grounds of Habitual Cruel and Inhuman Treatment. There is no consideration of the fault grounds or their contribution to the decline of the marriage. The Chancellor clearly abused her discretion and is manifestly wrong in her equal distribution of the marital assets, instead of finding an equitable distribution as this court has repeatedly stated is the goal in a divorce proceeding.

Several of Appellant's assets are divided without any evidence to support them being marital property as directed in *Hemsley*. The court stated that assets existed and then divided them as the court saw fit without following this Court's mandates and many times with no evidence to support the division. The Chancellor abused her discretion and is manifestly wrong in awarding Appellee an interest in Appellant's property with no evidence to show that it was a marital asset.

The ruling of the Chancellor should be reversed, and remanded for further determination in the light of *Hemsley*, *Ferguson*, and giving due weight to the fault grounds and the role they played in the dissolution of the marriage.

ARGUMENT

1. WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW BY AWARDING AN EQUITABLE DISTRIBUTION OF NON MARITAL PROPERTY TO THE APPELLEE.

The trial court erred as a matter of law when it awarded Appellee an equitable distribution of the distinct separate property of the Appellant, i.e. the “Prassel Street Rental Property”. The law of this state requires an *equitable distribution* of the marital estate *not an equal one*. **Tate v. Tate**, 875 So. 2d 257, 260 (Miss. 2004) quoting **Peterson v. Peterson**, 797 So.2d 876, 880 (Miss. 2001)(emphasis added). According to the ruling held in **Oswalt v. Oswalt**, 2007 WL 2840359 (Miss. App. 2007) the first step in dividing property in a divorce proceeding is to classify the property as marital or non marital property. Even though the trial court found that the “Prassel House” was and is owned solely by the Appellant with his previous wife, and though there was repair work completed on this property during the course of the marriage, there was no transfer of ownership interest in said property by Appellant to Appellee. The Court, never the less, awarded Appellee \$5,000.00 as “her equitable portion”. A.R.E. 21, 22. The Court held in **Hemsley v. Hemsley**, 639 So.2d 909, 914 (Miss. 1994) that assets acquired or accumulated during the course of a marriage are subject to equitable distribution by a chancellor. Thus this award is in direct contradiction to the law and the holdings of the Court.

The Chancellor also “equally” divided vehicles owned by the Appellant with Appellee i.e. by awarding to Appellee a monetary value of a Chrysler van and a 1984

Chevrolet pickup truck, both titles unproven and unknown to the court. A.R.E. 24. There was no testimony regarding these vehicles and the trial court did not make a finding on the record as to these assets being or at any time becoming marital assets. The Court simply makes reference to these vehicles and then divides the values of same equally between the parties without justification or reasoning. A.R.E. 24.

**2. WHETHER THE TRIAL COURT ERRED IN FAILING TO MAKE
SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW
RELATING TO THE DISTRIBUTION OF THE ASSETS OF THE
PARTIES.**

The holding in **Ferguson v. Ferguson**, 639 So.2d 921, 928 (Miss. 1994) mandates and “directs chancery courts to evaluate the division of marital assets by ..following guidelines ..to support their decision with findings of fact and conclusions of law for purposes of appellate review.” The finding in ***Ferguson*** sets forth the following guidelines that must be adhered to when making a division of the marital estate:

- “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, or 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 and due regard to the combination of assets, income and earning capacity; and**
8. **Any other factor which in equity should be considered.**

Ferguson, at 928.

There was no finding of fact or conclusion of law issued by the chancery court. There was no specific determination regarding the source or basis for any property of Appellant or Appellee, whether joint, separate or commingled by this Court. Thus there was no basis nor reasoning to support the division of the separate property of Appellant to Appellee. The Court found in ***Johnson v. Johnson***, 823 So.2d 1156, (Miss. 2002) that because the chancellor failed to make specific findings of fact and conclusions of law on the record as required by *Ferguson* and *Sandlin* to guide this Court in appellate review, the trial court's division of property must be reversed and this cause remanded for the chancellor to divide the property after making specific findings of fact and conclusions of law. *Johnson*, at 1161. In the *Johnson* case, the court failed to clearly state the *Ferguson* factors upon which it relied in the division of property between the parties. As

in the case at bar, this chancellor also failed to set forth the necessary application of the *Ferguson* factors in support of the division of marital and non marital assets. Though the Chancellor made a cursory mention of *Ferguson*, she did not specifically set forth which factors it considered, the categorization of the property or the reasoning for the division before dividing the property. The law as set forth in *Ferguson* mandates specific findings and requirements of the chancellor before she can divide any property, marital or otherwise, and without the necessary factors, reasoning, and classification, the ruling of the court should be remanded until it has sufficiently applied the law and justified the property division. For that reason, the finding of the chancery court should be rectified and the property division should conform with the mandates of the law.

3. **WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN AWARDING APPELLEE AN EQUAL SHARE IN MARITAL PROPERTY AFTER FINDING THAT APPELLANT WAS ENTITLED TO A DIVORCE ON THE GROUND OF HABITUAL CRUEL AND INHUMAN TREATMENT AT THE HANDS OF APPELLEE.**

Your Appellant would show that the chancellor erred as a matter of law by failing to consider the award of divorce to Appellant on the fault ground of Habitual Cruel and Inhuman Treatment for the stabbing of Appellant by Appellee in the division of property between the parties.

The Court held in Singley v. Singley, 846 So.2d 1004 (Miss. 2002) that “marital misconduct is a viable factor entitled to be given weight by the chancellor when

misconduct places a burden on the stability and harmony of the marital and family relationship” *Singley*, at 1007.

In that case, Mr. Singley was granted a divorce because his wife had numerous affairs during the marriage. *Singley*, at 1008. The Court held that while fault is only one of the factors to be considered, it, none the less is a factor that should be given its “due weight”. *Id.* The Court went on to find that because of the numerous affairs and the overall effect that they had on the marriage, the trial court’s division of the marital estate was manifestly wrong. The Court found specifically that the chancellor abused its discretion, failed to do equity and the ruling was reversed and remanded for reconsideration.

In the present case, Appellant was granted a divorce from Appellee on the ground of Habitual Cruel and Inhuman Treatment due to the stabbing of Appellant by Appellee, ending a marriage of approximately 5 ½ years. The chancellor in the case at bar even states that the most relevant evidence against Appellant supporting an awarding of a divorce to Appellant is the guilty plea entered by Appellee wherein she admits she purposely stabbed the Appellant. T.R. 58. The testimony indicates that this act caused the divorce between the parties and as such should be given its “due weight” in considering the property division. Also this act by the Appellee should be considered in light of the *Ferguson* factor which addresses contribution by each party to the stability and harmony of the marriage. Obviously, Appellee’s actions of physical violence toward Appellant eroded the stability and harmony of the marriage and thus Appellee should not

be "rewarded" in property division, but rather, should be held "accountable" accordingly for her actions when considering the property division.

However, the chancellor in considering a division of the marital home found that Appellant did place Appellee on the deed. A.R.E. 20. The chancellor went on to mention that improvements were made to the home, yet it failed to state which party was responsible for this work and/or which party paid for the cost of said improvements. A.R.E. 20. The record is completely void of any mention of fault grounds, length of marriage or factors contributing to or causing the erosion of the stability of the marriage and yet, Appellee was awarded a one-half interest in the marital domicile valued at \$67,000.00. A.R.E. 179.

The chancellor found that the life insurance policy on the life of the Appellant was purchased and maintained during the marriage and that Appellant made economic contribution toward the acquisition and maintenance of said policy; however, there was no evidence as to the exact time when the policy was obtained, pre or post marriage. A.R.E. 27. Yet, the chancellor granted one-half of the value of said policy to Appellee, even though she would not have collected any benefits if she had succeeded in mortally wounding the Appellant. Again, the chancellor found, without basis, that the value of said policy should be divided equally between Appellant and Appellee, without considering fault grounds, economic contribution or stability of the marriage.

The chancellor also divided certain accounts held separately or jointly by the parties. The Final Decree of Divorce lists four (4) savings accounts. A.R.E. 12. The chancellor found that these accounts were commingled sufficiently during the marriage to

warrant an equitable distribution; however, these accounts were then divided equally.

A.R.E. 12. There is no justification pursuant to the *Ferguson* factors in the division of these accounts and “equitable” does not mean “equal”. *Tate*, at 260. Not only did the trial court err by failing to consider fault grounds, it failed to apply the necessary factors to support the property division. Thus the ruling of the chancellor should be reversed and remanded for strict application of the *Ferguson* and other factors necessary to warrant an equitable division of marital property in this case.

CONCLUSION

Based on the foregoing, the Chancellor manifestly erred and abused her discretion in dividing assets without deeming them marital property. The Chancellor also abused her discretion and is in manifest error by not considering the fault grounds in the equitable division of marital assets. Your Appellant is requesting this Court to order and mandate that Appellee has no interest in Appellant's separate property and that an equitable, not an equal, division of the marital assets be ordered.

CERTIFICATE OF SERVICE

The undersigned attorney of record certifies that true and correct copies of Appellant's Opening Brief have been delivered to the following parties which have an interest in this case:

Judge Denise Owens
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SO CERTIFIED, this the 19TH day of February, 2008.


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