

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2007-TS-01965**

ROBERT EDGAR ATKINSON, JR.

APPELLANT

VERSUS

BETTY RICHARDSON ATKINSON

APPELLEE

Appeal from the Chancery Court of Hinds County, Mississippi
Cause No. G2005-61S/2

BRIEF OF THE APPELLANT

Oral Argument Requested

Carolyn B. Mills, Esq.
Jerry L. Mills, Esq.
Pyle, Mills, Dye & Pittman
800 Avery Boulevard North, Ste. 101
Ridgeland, Mississippi 39157
Telephone: 601-957-2600
Facsimile: 601-957-7440

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2007-TS-01965**

ROBERT EDGAR ATKINSON, JR.

APPELLANT

VERSUS

BETTY RICHARDSON ATKINSON

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

Appellant Parties

Robert Edgar Atkinson, Jr.
Appellant

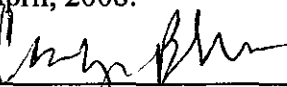
Carolyn B. Mills [REDACTED]
Jerry L. Mills [REDACTED]
PYLE, MILLS, DYE & PITTMAN
800 Avery Blvd. North, Ste. 101
Ridgeland, Mississippi 39157
Telephone: 601-957-2600
Facsimile: 601-957-7440

Appellee Parties:

Bettye Richardson Atkinson

M. Judith Barnett
Barnett Law Firm
501 South State Street
Jackson, Mississippi 39201-5306
Telephone: 601-948-6640
Facsimile: 601-948-6644

Respectfully submitted this the 21st day of April, 2008.



Carolyn B. Mills

TABLE OF CONTENTS

	Page(s)
CERTIFICATE OF INTERESTED PARTIES	i
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
I. STATEMENT OF THE ISSUES.....	1
II. STATEMENT OF THE CASE.....	1
III. SUMMARY OF THE ARGUMENT	1
IV. ARGUMENT	2
A. Statement of the Facts	2
i. Wife did not prove Uncondoned Adultery.....	3
ii. Wife did not prove adequate grounds for establishing Cruel and Inhuman Treatment	4
iii. The distribution of marital assets was inequitable and against the desires of both parties	5
VI. CONCLUSION.....	12
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

	Page(s)
<u>CASES</u>	
<i>Bias v. Bias</i> , 493 So.2d 342, (Miss.,1986).....	4
<i>Curtis v. Curtis</i> , 7962 So.2d 1044 (Miss. Ct. App. 2001)	4
<i>Owen v. Geriby</i> , 422 So.2d 284 (Miss. 1982).....	3
<i>Scott v. Scott</i> , 69 So.2d 489, (Miss. 1954).....	5
<u>STATUTES</u>	

I.

STATEMENT OF THE ISSUES

1. Appellant argues the record does not support a finding of uncondoned adultery or the grounds for cruel and inhuman treatment.
2. Appellant would also show that both parties had a strong attachment to the marital home and that the Court's division of the marital assets was not equitable.

II.

STATEMENT OF THE CASE

The case at bar is an appeal from the Chancellor's Opinion granting Appellee (Wife) a divorce from Appellant (Husband) based on uncondoned adultery and cruel and inhuman treatment.¹ The lower Court also divided the marital estate.

III.

SUMMARY OF THE ARGUMENT

The evidence at trial simply did not meet the burden of proof to establish adultery or cruel and inhuman treatment.

The evidence regarding adultery was that the husband lived with two women because wife had the Court remove him from their marital home. Husband is bipolar and the evidence showed only remote instances in a 32 year marriage of ups and downs. The parties separated in 2000; subsequently in 2004, the wife deeded property to husband and

¹ The Court's opinion includes adultery and cruel and inhuman grounds. The Judgment only goes to adultery.

they constructed a new home together. Evidence since the last reconciliation was only one alleged incident of bruising which the husband denied. The pictures wife offered in support of her allegation were dated a year after the final separation in 2004.

The distribution of marital properties was not equitable.

IV.

ARGUMENT

A. Statement of the Facts

The parties were married on May 24, 1975 (32 years), and made their marital domicile together most recently in Bolton, Second Judicial District of Hinds County, Mississippi, where they separated in 2000 and finally separated in September 2004 for good.

In 1988, the wife and her sisters inherited certain acreage. The wife and her sisters divided the property in-kind in 1993. The wife's parcel was approximately 32.5 acres. At the time of the partition of the property, wife intentionally had her parcel deeded only in her own name.

In 2003, wife went to the Courthouse in Lauderdale County, Mississippi, near where the parties then lived, and obtained a form deed to prepare retitling the property to herself and husband. The parties then put an \$80,000.00 doublewide mobile home on the property. Barely a year later, in 2004, they separated.

During the course of this marriage, husband also inherited property from his family. Husband and his brother together inherited a house and three acres on Zepher Road from husband's father at his death. Husband also inherited \$20,000.00 in liquid

assets from his father's estate, which the proof shows he used in part to purchase his brother's share of his father's real property that was subsequently sold.

During her lifetime, the wife's mother deeded her home at 112 Mary's Cove, Clinton, Mississippi, to wife and her two sisters, reserving a life estate unto herself. wife's mother has since moved from the property and abandoned her life estate, and the same is now effectively wife's and her sisters'.

The parties had two children who have been emancipated for several years. The parties' 32-year marriage was up and down. With husband's bipolar disease being blamed for the down times. Husband's bipolar disease was treated with medication and controlled during the last 18 years of the marriage. Wife was aware of husband's illness and the need for pharmaceutical intervention. Wife charges husband with an act of physical violence in 2004. Husband denied her allegation and wife's photographs of the alleged injuries were dated one year after their separation.

i. Wife did not prove Uncondoned Adultery

Adultery is defined as "Voluntary sexual intercourse of a married person with a person other than the offenders spouse." *Owen v. Geriby*, 422 S. 2d 284 (Miss. 1982).

The closest wife came to establishing adultery is the following exchange between wife's attorney and husband:

"Q. Okay. Where do you currently reside?

A. I reside at 108 Maudedith Lane in Clinton, Mississippi.

Q. Who lives there with you?

Mr. Mills: Objection. Relevancy.

The Court: overruled.

A. I live there with some friends.

By Ms. Barnett:

Q. Who are they?

A. Linda Roby and Nicole Roby.

Q. Okay. And Linda Roby is your current girlfriend. Is that correct?

- A. Linda Roby is a friend that I live with because my house was uprooted out from under me and I had no place to stay.
- Q. Have you ever had sex with her?
- Mr. Mills:** Objection. Relevance.
- Ms. Barnett:** Your Honor, he's circumventing my questions.
- The Court:** Have you---well, that's true.
- The Witness:** I tell you what, let me clear this up. Since November 1st, I've lived in Mobile, Alabama, where I've been working."

The only other inference is wife's testimony that husband did not return to the marital home because "he was living with his girlfriend." (R.170). Direct evidence of adultery was not established. A bare conclusion that a party had a "girlfriend" or committed adultery is insufficient. *Curtis v. Curtis*, 796 S. 2d 1044(Miss. Ct. App. 2001)

ii. **Wife did not prove adequate grounds for establishing cruel and inhuman treatment.**

Wife's allegations of cruel and inhuman treatment do not establish a connection between husband's conduct and any physical or emotional harm to the wife. *Bias v. Bias*, 493 S. 2d 342 (Miss. 1986).

The parties herein were married 32 years. The evidence presented at trial showed the husband suffered from bipolar disease during the last 18 years of the marriage. Wife offered no evidence of any direct impact on her emotional health. The only evidence of physical harm were photographs dated a year after the separation.

The overwhelming evidence presented by the wife, the daughter and the wife's sister related to allegations years and years ago. The wife testified about the treatment she received while pregnant 25 years ago. (R.114), outbursts in helping with a science fair project 17 years ago (R. 115), and backyard brush fires (R. 11).

Wife further testified on direct examination:

Q. How did Bob treat the children?

A. "Actually, when they were young - - when I say "young," let's say 10, 11 - - I thought - - I thought he was a pretty good father. As a matter of fact, I told people that he was a good father and - -because I just - -you know, I had the greatest father in the whole wide world, and I wanted them to. And I said, yeah, he's - he's a good father. I would tell my family that. I'm not sure they bought it, but I would tell them that. And then I think - -I'm thinking Kyle must be about 11 or 12, and Kyle was always big. He came into the world big, he was a big first grader. He's always been big, big, big for his age. So when he was about 11 or 12 then, where I was always Bob's go-fer, you know, his right-hand - you know, anything he needed, I would help him with. Then Kyle kind of picked up on some of those responsibilities."

The evidence presented by the wife is too remote in time to be of consequence to her allegations of cruel and inhuman treatment. *Scott v. Scott*, 69 S. 2d 489 (Miss. 1954)

iii. The distribution of marital assets was inequitable and against the desires of both parties

A. The Chancellor found as follows regarding distribution of marital assets:

3. *Equitable considerations in the division of the marital estate.* The Mississippi Supreme Court has delineated certain factors in *Ferguson v. Ferguson*, So.2d 921 (Miss. 1994), for consideration by the court in determining what is an equitable division of the parties' marital estate. A discussion of such factors and the proof as related to each follows:

a. *Substantial contribution to the accumulation of the property.*

(1) *Direct or indirect economic contribution to the acquisition of the property.* Exhibit 11 shows that Bettye was in the work force for all but seven of the thirty-two years of this marriage; six of those seven coincide with the period when the parties' children were small. Though Bob was the primary income earner during most of the marriage, the testimony shows that Bettye largely reared the children and made the parties' home. In fact, the evidence is very clear that she and the children did almost

all the work around the household. Bettye, then, has made a significant direct and indirect contribution to the acquisition of this marital estate.

(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.* Through the testimony of Bettye herself, the parties' eldest child, Melanie, and Bettye's sister, it is very apparent to the Court that there was very little stability or harmony in this marriage or in the relationships between Bob and other family members. Bettye's sister, Patricia Hughes, testified that Bob was constantly putting Bettye down and berating her in front of others; Melanie, the parties' daughter, testified that the family's life together with Bob was one of complete terror, physically, mentally and emotionally. Ms. Hughes, who obviously knew the parties during the entire course of their marriage and for the past several years were next-door neighbors, testified that Bettye was the primary caretaker of the parties' property and the children. Bettye and the children even had to come stay with Ms. Hughes and her family temporarily at one point in the marriage. Especially considering that the marriage has been a long one, it is apparent that Bettye has had to suffer through an unreasonable amount of abuse and degradation. This factor weighs heavily in Bettye's favor as the Court considers how to arrive at an equitable division of the estate Bob and Bettye accumulated during their marriage.

(3) *Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.* There was essentially no evidence offered to indicate that either party contributed to the other's education, training, or other accomplishment bearing on his or her earning capacity. This factor then has little bearing on Bob and Bette's circumstances in the division of their marital estate.

(b) *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.* The evidence does not show that either party unreasonably expended marital resources or wasted the marital estate. To the contrary, the one thing that Bob and Bettye seem to have done a good job of is in having lived within their means and in having

accumulated a reasonable estate on their income. Of course, a good portion of the marital estate exists as a result of Bettye's inheritance of land. Bettye converted the property to the marital estate when she titled it to herself and Bob, although it seems clear through the testimony that this prior distribution to him was not entirely voluntary. Both Melanie, the parties daughter, and Patricia Hughes testified that Bob browbeat Bettye for years until she finally relented and put his name on the title, as Patricia said, "to keep peace in the family."

(c) *The market value and the emotional value of the assets subject to distribution.* Bettye clearly has a far greater emotional attachment to the land, and thus the mobile home on the land, than does Bob. The Court will fashion a division of the marital estate, which accommodates Bettye's strong preference that she be awarded that property.

(d) *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.* For reasons previously discussed, the land inherited by Bettye does not, unfortunately, fall into the category of this type property any longer.

(e) *Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distributions.* Of necessity the Court will include in the award to Bettye some portion of funds set aside by Bob for retirement, with the potential of a tax or other penalty in said distribution, it will be the Court's intention in making such award that Bettye not bear the expense or penalty associated with any transfer of such funds or accounts.

(f) *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.* The intent of *Ferguson* is to divide the marital assets in an equitable fashion and, if possible, in such manner as to avoid future payments, necessity of future contact, and thereby friction, between the parties. This is a marriage of long duration, but there is also a very

volatile relationship between Bob and Bettye. The award made herein below is designed to eliminate any need for future contact between the parties.

(g) *The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity.* Both Bob and Bettye have done well in providing for their future support and their retirement years and still have some years to further prepare. With the division of their marital estate made herein below, the Court believes that they will each respectively have sufficient means to support themselves.

As to a. (1), direct or indirect economic contribution to the acquisition of the property, husband concedes both parties contributed to the accumulation of marital assets.

As to a. (2), contribution to the stability and harmony of the marital and family relationship as measured by quality, quantity of time spent on family duties and duration of the marriage, husband would show that a long-term marriage of 32 years took both parties investments and that husband did as well as he could while trying to control and alleviate his bipolar disease.

As to a. (3), contribution to the education, training or other accomplishments bearing on the spouse accumulating the assets, the record reflects no additional training or education on the part of either party since the date of the marriage.

B. 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.

Both parties agree that all assets were marital except for wife's interest in the Mary's Cove property. Wife testified as follows:

Regarding the Richardson Road property:

Q. I just want to make certain that when y'all built this house, you said you intended it to be permanent. You actually occupied this home on this land as your marital home, did you not?

A. For a year and one month.

Q. And you made the improvements, spent around \$100,000 on improving this house - - or this land with marital funds, did you not?

A. Yes.

The Court: Wait a minute, now. Listen to the question carefully.

The Witness: Okay.

The Court: Repeat that question.

By Mr. Mills:

Q. Ma'am, the \$100,000 that y'all spent to get this house up and running -

A. I'm not sure if it was 100,000, but I would say it's possible. I would say it's possible. I don't know for sure.

Mrs. Mills: From 80 to 100.

By Mr. Mills:

Q. Let's say 80 to 100.

A. Okay. Yes. Most definitely.

Q. You know it was at least 80, don't you?

A. Uh-huh. (Affirmative)

Q. And those were marital funds, were they not?

A. Yes.

Q. And at the time, there was a deed giving you half of the land that those marital funds were spent on and giving Mr. Atkinson half of the land that those marital funds were spent on, was there not?

A. The deed had both of our names on it that the house was placed on, if that's what you're asking.

Q. Title was in your name, title was in Mr. Atkinson's name?

A. That's correct.

C. The market value and the emotional value of the assets subject to distribution.

Although the Richardson Road property came from Wife's family - the facts show that husband had an equally strong attachment to the property. Husband did no improvements on the property until his name was added to the deed. As a birthday gift, wife included husband's name on the deed. (R-183) After that husband testified:

Q. And when you got that deed, did it change your attitude with regards to your willingness to go out there and do work?

- A. Uh-huh. I felt much better about it.
- Q. Did you go out and do work after that?
- A. Yes, sir.
- Q. Tell us what types of work you did on the property after the deed - -
- A. There is a lake on the property that her dad had built, and he had had the dam made so small you couldn't fish off the dam, and it was so narrow that you couldn't hardly drive down the dam. I carried my little small bulldozer down there and spent a week out there and lived in the cabin, and I bulldozed about three foot of the top of that dam and shoved all the dirt off and made it wide enough that you can comfortably drive on it and you can also fish off the dam.
- Q. Did you do other work out there?
- A. Yes, sir, just, you know . . .
- Q. Now, when - - would you have been willing to have spent marital assets to put this house on that property without your name on the deed?
- A. No, sir, I don't - - no, sir.

It is clear from the reading of the entire record that both parties had a strong attachment to the Richardson Road property.

D. 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* gifts by or to an individual spouse.

Both parties acknowledge all assets should be split 50-50.

Husband testified:

- A. For probably the first 25, 26 years, it went into a joint account; but it was always spent down to the last penny at the end of every month to the point where I got tired of it. So then I figured what the bills were, and I doubled that amount, gave her that much money every month, put the money into an account with my name only on it, purchased a house and paid cash for it. If it hadn't been done that way, I would have never had the money.
- Q. Them, how did you manage to accumulate those funds in that account up to 23 and \$24,000 while you were married to Bettye Atkinson?
- A. I worked.
- Q. And she did, too, did she not?
- A. She sure did.
- Q. But you kept your money in a separate account that she couldn't get her hands on. Isn't that true?

A. I had asked her several times not to spend everything we made, and I got tired of it.

Q. So you decided just to keep it all for yourself?

A. I guess buying a house and putting your family in it and paying cash for it is not exactly what I'd call for myself.

And further:

Q. So to what extent do you think that you're entitled to those accounts?

A. I guess half of them, but it's more that just those accounts involved too.

Q. I beg your pardon?

A. There's more than just those accounts involved.

Q. Well, those are the only accounts that I have record of and that you put on your statement. What other accounts are there?

A. Oh, well, you need to look at her retirement and her IRA account.

Q. I'm going to get to her. I'm asking you about yours. Do you have any others that you did not list or that I have not already mentioned?

A. No.

Q. So you believe that you're entitled to half of that?

A. I would think so.

Q. And of the property on Zepher Road, how much do you think she's entitled to?

A. I would say half of that.

Q. And the property on Richardson Road, how much do you think you're entitled to?

A. Half of that.

Q. Okay. What about the house that's sitting there on Zepher Road? Are you going to cut it in half, or do you think you should be entitled to it?

A. That house has been sold. The money is sitting in an account right now waiting for this divorce to go through.

Q. What about the one on Richardson Road?

A. What about it? It's still there.

Q. Who should be entitled to it?

A. It's going to have to be divided.

Q. Well, how do you propose this Court divide it?

A. It's just like I explained to her when she asked me the same question over two years ago. You're talking about 31.8 acres of land out there. Part of it is income-producing land, and then you've got the house that sits in one corner off to itself. And I told her then that I will take the house and that little piece of property that that house is sitting on and she could have the rest of the land or she could have the house and that piece of property that it's sitting on and I would take the rest of the land. And as close as I can figure, they would be equally valued. But the aggravation effect comes in and I was told at the time, "No, I don't want you out here." "Period."

Wife acknowledges as follows:

A. A fair division to me would be what I inherited is mine and what he inherited is his and 50/50 right down the middle on the debt and assets.

(e) Tax and other economic consequences, and contractual or legal consequences to third parties of the proposed distributions.

The lower court's opinion gives husband no credit for the increase in the value of Richardson Road property. Husband spent more than the value of the real property on \$100,000 home.

(f) "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."

The parties were married 32 years. They raised two children and managed husband's mental disease. The parties agree that marital property should be divided 50-50. Husband paid \$100,000 plus cash for the home- he should be allowed to live there and enjoy his life.

(g) The needs for financial security with due regard to the combination of assets and earning capacity.

With a 50-50 split of all marital assets this will be accomplished.

V.

CONCLUSION

Wife did not establish viable grounds for divorce. The distribution of marital assets was not equitable.

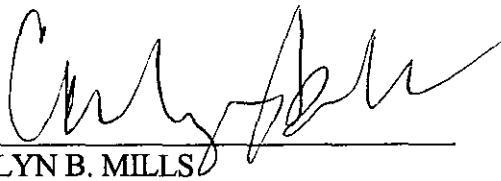
CERTIFICATE OF SERVICE

I, Carolyn B. Mills, attorney for the Appellant herein, do hereby certify that I have this day served a copy of this Brief of Appellant by United States mail, postage prepaid to the following:

Honorable William H. Singletary
Chancery Judge, Hinds County
Post Office Box 686
Jackson, MS 39205-0686

M. Judith Barnett, Esq.
Barnett Law Firm
501 South State Street
Jackson, MS 39201-5306

This the 21st day of April, 2008.



CAROLYN B. MILLS