

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EDDIE J. COTTON

APPELLANT

VS.

Case No. 2008-CA-00626

FANNIE M. COTTON


APPELLEE

APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY

ORAL ARGUMENT IS NOT REQUESTED

REPLY BRIEF OF THE APPELLANT EDDIE J. COTTON

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II. TABLE OF AUTHORITIES

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III. ARGUMENT

A. APPELLEE'S ISSUE I IS NOT BEFORE THIS COURT AND APPELLANT MOVES TO STRIKE.

Appellee argues that the lower court erred in granting summary judgment as to the annulment. This is an issue not raised by Appellant and one Appellee did not cross- appeal. Consequently, the issue is not before this Court. Accordingly, Appellant moves to strike the portions of the Appellee's brief related to that argument.

In the event the Court decides to entertain Appellee's untimely assignment of error, Appellant responds as follows:

Appellee argues that her second marriage raised a presumption that the prior marriage was dissolved by death or divorce and that appellant failed to overcome that burden. The undisputed testimony by Mrs. Cotton, however, was that she knew she "had a marriage license by" Tate and that she "didn't get a divorce" from him. T 43. She admitted she first learned that Tate had claimed to have divorced her only after her marriage to Mr. Cotton. T 43-44. There was no documentary evidence before the court of when the purported divorce (by Tate) occurred or if it in fact ever occurred. T 47. Neither was there any real evidence that Mrs. Cotton didn't know she needed a divorce to remarry. Mrs. Cotton herself could not even identify the date Tate supposedly told her he had obtained a divorce from her. T 47. Mrs. Cotton admitted bigamy before the court. Moreover, Appellee asserts in her argument (see Appellee's Issue III, p. 8) that the marriage was invalid. Clearly, there was enough evidence for the lower court to reach the conclusion it did as to summary judgment.

B. THE COURT WAS MANIFESTLY WRONG AND CLEARLY IN ERROR IN DIVIDING MR. COTTON'S PROPERTY IN VIOLATION OF THE PRECEDENTS OF THIS COURT WHICH REQUIRE GOOD FAITH ON BEHALF OF THE PARTY SEEKING EQUITABLE DISTRIBUTION IN A NON-MARRIAGE SITUATION.

The trial court clearly erred in dividing Mr. Cotton's property. Though the Appellee cites *Woolridge v. Woolridge*, 856 So. 2d 466 (Miss. 2003), *Chrismond v. Chrismond*, 52 So. 2d 624, 628 (Miss. 1951), *Taylor v. Taylor*, 317 So.2d 422 (Miss. 1975), all three are different from the case before this Court. In *Woolridge*, the couple had been married, divorced, then had begun cohabiting. No one was deceived there as Ms. Cotton deceived Mr. Cotton. *Chrismond* requires that the putative wife entered into the marriage in good faith. Clearly, a woman who knew she had been married and that the marriage had not been dissolved, as is the case before this Court, cannot be said to have acted in good faith. See, e. g., *Redmond v. Broadus*, 153 Miss. 889, 122 So. 194 (Miss. 1929) (necessary element of good faith absent where bigamist woman entered equity seeking alimony and attorney fees from her former purported husband). If Ms. Cotton lacked the mental capacity to contract a marriage, as she now seems to be arguing, and as the lower court seemed to be suggesting, there is no proof of such feeble-mindedness in the record.

Taylor v. Taylor, 317 So.2d 422 (Miss. 1975), also cited by Appellee Cotton was clearly against the precedents of this Court. There, a 5-4 Court plainly (5-4 decision) motivated more by sympathy than the doctrine of *stare decisis*, awarded alimony (justified as and styled "support," rather than alimony) to a putative wife who was not the innocent party. Even there, though, the Court did not go as far as the chancery court below. Rather, the Court approved only a relatively small sum to the bigamist (\$75.00 per month for thirty-six months) and, plainly, not because it was justified in law or equity, but because the woman was down and out and elicited the Court's sympathy. *Taylor v. Taylor*, 317 So.2d 422, (Miss. 1975). Objectivity requires an admission by

all that the minority opinion in that case was closer to the historic holdings of this Court than was the majority:

Chrismond adjudicated the rights of a woman who attempted to enter into a marriage in good faith, but Viola Taylor did not act in good faith because she knew she had a living husband when she attempted to marry Louis James Taylor. *She was guilty of bigamy and does not fall within the class entitled to equitable relief* (emphasis added).

Taylor v. Taylor, 317 So.2d 422, (Miss. 1975) (Dissent, 5-4 decision), alimony.

Lest there be any doubt that Taylor was an aberration, consider these precedents:

Redmond v. Broadus, 153 Miss. 889, 122 So. 194 (Miss. 1929) (necessary element of good faith absent where bigamist woman entered equity seeking alimony and attorney fees from her former purported husband); and *Woodson v. Colored Grand Lodge of Knights of Honor of America*, 97 Miss. 210, 52 So. 457 (Miss. 1910) (bigamist woman estopped from claiming insurance benefits against husband's widow).

In this case, though, the lower court went far beyond *Taylor*. Unlike the putative wife in that case, Ms. Cotton had her own means of support in the form of a monthly disability check in the amount of \$864. While Mr. Cotton had a monthly pension, there was no evidence of its value. Yet, the Court let Ms. Cotton have the entire value of her check and ordered Mr. Cotton to pay to Mrs. Cotton 40% of the value of his! Without a determination of the value of and/or the income from that fund, how could that possibly have been an equitable division?

- C. THE LOWER COURT'S FINDINGS WERE WITHOUT BASIS IN SUBSTANTIAL CREDIBLE EVIDENCE IN THAT THERE WAS NO EVIDENCE TO SUPPORT THE LOWER COURT'S PREMISE THAT APPELLEE DID NOT KNOW SHE NEEDED A DIVORCE FROM A LIVING SPOUSE TO LEGALLY REMARRY.

The Appellee did not appear to respond to Appellant's argument in support of this issue. Accordingly, it should be deemed as confessed and judgment entered for the Appellant on this issue.

- D. THE PROPERTY DIVISION FAILED TO APPLY THE APPROPRIATE LEGAL STANDARD TO THE FACTS AND WAS UNSUPPORTED BY THE WEIGHT OF THE EVIDENCE IN THAT IT DID NOT APPLY THE FERGUSON FACTORS OR WEIGH THE EVIDENCE IN THE LIGHT OF THE SAME.

Appellee Ms. Cotton disputes the lower court finding that she was a bigamist; she says there was no proof to overcome the presumption of the validity of her putative marriage to Mr. Cotton. Then, she argues that the *Ferguson* factors should not apply because there was no marriage! She can't have it both ways.

Whether or not there was a marriage, the lower court chose to divide the property as if a marriage had existed. Consequently, it was obligated to apply the *Ferguson* factors. The purpose of the *Ferguson* factors is to provide for an equitable division of property. *Ferguson v. Ferguson*, 639 so. 2d 921 (Miss. 1994). If a court is going to award a bigamist party a share of the innocent party's property following an annulment on the ground of bigamy, certainly that division of property should, at minimum, follow the *Ferguson* factors.

A chancellor's findings must be specific enough for the reviewing Court to find that the guidelines were applied. *Glass v. Glass*, 857 So. 2d 786, 790 (¶ 10) (Miss. Ct. App. 2003). Clearly, the lower court did not even attempt such an application. It is clear from the record that some factors were not considered at all. For instance, there was no evidence or consideration of

the degree to which [either] spouse had expended, withdrawn, or otherwise disposed of the marital assets (factor two). It would be extremely important to know what agreements the Cottons had, if any, with each other or others regarding the assets, especially the retirement fund. Yet, the chancellor made no findings regarding that issue, nor does there appear to have been any evidence adduced on that point. Neither was there evidence of the market value of Mr. Cotton's retirement fund, the vehicles, or two of the properties, before the Court. Further, there was no apparent consideration of "the needs of the parties for financial security. For instance, the court gave Mrs. Cotton a 40% interest in Mr. Cotton's retirement account but did not consider the value of Mrs. Cotton's pension in doing so. Without a determination of the value of and/or the income from that fund and without any evidence before the court of any agreements or legal obligations associated with that fund, the court could not possibly have applied factor seven.

Finally, the court did not consider other factors that equity should consider [factor eight] (e. g., Ms. Cotton came into court as a bigamist without clean hands).

VIII. CONCLUSION

The argument of the Appellee and the chancellor's opinion rest, not on what law and equity require or even permit, but upon what they, motivated by self-interest in the former case and apparent sympathy in the latter, believe ought to happen.

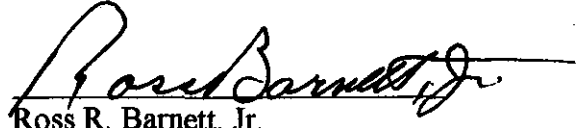
The Appellee argues the requirements of "decency." Decency would also seem to require that a woman be out of one marriage before contracting another and that a court, before awarding a man's property to his former bigamist putative wife, should at least consider the total financial picture of both parties. Decency also requires a court to consider this:

Marriage is the building block of society. The chaos that has resulted from the erosion of that societal foundation is all around us. Sympathy for Ms. Cotton or unhappiness with Mr. Cotton cannot change the fact that Ms. Cotton ignored our civil prescriptions regarding the inviolability of marriage, nor should subjective feelings be permitted to ameliorate the consequences thereof.

In any event, this is not a case (as in *Taylor*) of an entirely innocent woman being abandoned with nothing. The Appellee, Ms. Cotton, is a bigamist who already owns half interest in most of the couples' property and has a Social Security disability pension besides. Before 40% of Mr. Cotton's retirement fund was awarded to her, she already was in substantially the same financial condition as Mr. Cotton. Yet, the Court ordered Mr. Cotton to pay her 40% of his pension without even knowing its value!

Premises considered, the Appellant, Eddie J. Cotton, prays that this Court will (1) strike Issue I and all arguments related thereto in Appellee's brief; and (2) reverse the decision of the lower court and enter judgment awarding him full legal and equitable interest in all properties titled solely to him, including but not limited to his retirement fund. In the alternative, Appellant prays that this Court will remand this matter for a hearing for the purpose of taking additional evidence concerning the division of the property accumulated during the course of the parties' purported marriage, including Mrs. Cotton's disability pension, and that this Court will instruct the lower court to consider and apply the *Ferguson* factors in so doing.

Respectfully submitted,



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IX. PROOF OF SERVICE

I, the undersigned counsel of record for the Appellant, certify that I have this day caused to be served by United States Mail, postage prepaid, a copy of the foregoing to the following persons:

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This the 1st day of May, 2009.



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