

IN THE SUPREME COURT OF MISSISSIPPI

MARTIN L. PIERCE .

APPELLANT

VS.

NO. 2009-TS-00161

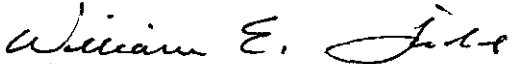

STAR PIERCE

APPELLEE

I. CERTIFICATE OF INTERESTED PERSONS

1. Martin L. Pierce ..... Appellant
2. Star Pierce ..... Appellee
3. Wendy Hollingsworth..... Attorney for Appellant  
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5. Honorable Carter O. Bise, Chancellor ..... Trial Judge  
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6. Tracey G. Bertrand ..... Court Reporter
7. Guy N. Rogers, Jr.....Trial Attorney for Appellant  
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Respectfully Submitted, this the 13<sup>th</sup> day of November, 2009.

  
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WILLIAM E. TISDALE -   
ATTORNEY FOR APPELLEE

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#### IV. STATEMENT OF THE ISSUES

A. The Court did not err in its division of marital assets and liabilities.

B. The Court did not err in awarding Star Pierce periodic alimony.

C. The Court did not err in awarding Star Pierce use and possession of the marital home and requiring Martin Pierce to pay the house note, taxes and insurance as periodic alimony until such time as Star should remarry or vacates the home or until Star's child should graduate from high school, whichever should occur first.

The Court did not err in the award of attorney fees to Star Pierce.

## V. STATEMENT OF THE CASE

Martin L. Pierce (hereinafter Martin) and Star Pierce (hereinafter Star) were married on October 8, 2000, and separated on May 10, 2006, in Biloxi, Second Judicial District of Harrison County, Mississippi. No child was born of this marriage. Star had a child by a prior relationship.

At the time of the marriage, Martin was on active duty in the U.S. navy. Martin was stationed at various naval bases for training and discouraged Star from residing with him while he was in training. Martin and Star lived together in Nevada for about two years. Star returned to Mississippi because of health problems.

Martin and Star purchased a home together in Biloxi on March 25, 2004. When Martin and Star were not living together Martin provided monthly money to Star.

After being stationed in Jacksonville, FL, Martin's next duty station was Whidbey Island, WA. While residing in Washington, Martin filed for divorce. Star was served with process in Mississippi but did not enter any appearance in Washington. Martin obtained a Washington divorce on July 24, 2007.

Martin subsequently remarried and on January 11, 2008, Martin's spouse, Michelle, with power of attorney, filed a Complaint in the Chancery Court of Harrison County, Second Judicial District, seeking to

adjudicate real and personal property rights and to evict Star from the jointly owned Mississippi marital residence.

On March 6, 2008, Star filed her Answer, Affirmative Defenses and Counter Complaint seeking the use, possession and title to the jointly owned marital home at 2188 Alice Drive, Biloxi, MS; that Martin be required to pay the house debt; that Star be awarded all of the household furniture; the 2004 Ford Focus; that Martin pay all marital debts; periodic and lump sum alimony; health insurance costs; a pro rata share of Martin's military retirement; that Star be designated as beneficiary on the survivor annuity benefit of the military retirement; restoration of her former surname; and attorney fees.

A trial on the merits was held on September 25, 2008, with the trial court's Judgment being filed on December 23, 2008. From this Judgment Martin has appealed.

## VI. STATEMENT OF THE FACTS

At the time of trial Martin was on active duty with the U.S. Navy , stationed at Whidbey Island, Washington, (T-9) residing in Oak Harbor, Washington. He had been in the Navy for eight (8) years. His job was a flight engineer on a P-3 aircraft. (T-3).

Martin went into the navy on March 6, 2000, and he and Star were married on October 8, 2000. (T-24, 58). When Martin went to basic training dependents were not allowed. (T-23). After basic training Martin was stationed for training in Pensacola and he and Star would visit each other on weekends (T-33). Martin was stationed in Maine for schooling no dependents were allowed. Martin went to California for training, no dependents were allowed. (T-33-34). Martin was stationed in Fallon, Nevada for three (3) years. They lived together in Fallon, Nevada, for about two (2) years. Star returned to Mississippi. (T-7,8). Star lived in Mississippi all during the marriage except for the time in Fallon, Nevada. (T-58). Star had Crohn's disease. (T-35). Star had medical treatment at Keesler Medical Center. (T-36). After living together in Nevada, Martin only visited Star on occasions, checking after Hurricane Katrina. (T-17). Martin was stationed at Jacksonville NAS for eleven (11) months for schooling. He to Star dependents were not allowed. Martin would visit Star on weekends. (T-36-37).

Martin and Star bought a home located at 2188 Alice Drive, Biloxi, MS in 2004. (T-10). Star would pay the house note before the divorce from the money Martin sent her. (T-31,67). Martin has paid the house notes since the divorce. (T-11). The house note is about \$700.00 per month. (T-16). Star says the monthly note is \$656.00 per month. (T-66). Star used her tax refund of \$2,000.00 for the initial house payment.

Martin was granted a divorce in Washington on July 24, 2007. (T-10). Prior to the divorce Martin was sending Star \$1,400.00 per month by allotment to direct deposit. (T-13, 31). This was a joint bank account. (T-14). Martin is paying on a home in Washington and in Mississippi and they total about \$1,930.00 per month. (T-20).

The 2005 Ford Focus is a joint debt. (T-15). Martin cosigned the car note. (T-16). Star has been paying this debt.

Martin got remarried on November 15, 2007. (T-17). Martin first met Michelle in 2006 while he was deployed in Japan. (T-22). Martin admits having sexual relations with Michelle prior to July 24, 2007, while he was in Washington. (T-41).

Martin's gross monthly pay at trial was \$4,662.00 (T-27). Martin's current take home monthly pay is about \$3,663. (T-18).

Martin has serviceman's group life insurance of \$400,000.00. Star was the beneficiary while they were married. (T-29). Michelle is the current beneficiary of the SGLI. (T-30).

Star and her daughter were covered by dental insurance prior to the divorce. (T-31).

Star did the housekeeping (T-38), the cooking and laundry (T-44), she did not do anything to damage Martin's military career. (T-45). During the time of the marriage Star did not work outside the home. Martin provided for the family. (T-60).

Martin does not object to Star having her former surname of Wright restored to her. (T-42). Star wants her former surname restored. (T-68).

Martin has no objection to Star having the 2004 Ford Focus automobile. She has made the payments on it. He does not want it. (T-43, 78).

Martin knew Star had health and kidney problems when they got married. (T-44). Star has IGA nephropathy, glomerulonephritis and takes medication. It was diagnosed by military doctors. The military provided the medication before the divorce. It costs about \$40.00 per month. (T-62-64). Star got medical treatment from the military and got prescriptions for kidney problems and Crohn's disease. (T-44). Star takes prescription medicine for Crohn's disease at a monthly expense of

\$396.00 per month out of pocket expense since the divorce. (T-86). Star has not had any access to military medical facilities since Martin's divorce in July, 2007. (T-48). Star has no military health insurance since the divorce. (T-48).

Martin does not plan to get out of the navy on an early out after fifteen (15) years. That early out does not provide for medical coverage after retirement. (T-48).

Martin has not made an election for survivor annuity benefits on the military retirement. (T-49).

The Armstrong factors as to Star's alimony request were discussed in testimony (T-45-46 & 85-94).

Martin executed a power of attorney to his present wife, Michelle, and authorized her to file suit in Mississippi. (T-50). Martin is appearing in person even while on active duty with the military. (T-51).

Martin got some of his personalty from the house in Mississippi enroute from Jacksonville, FL, to Whidbey Island, WA. Other items were shipped to him by movers. (T-71). Martin never complained about any other personalty remaining in the Mississippi residence. (T-75). Martin got the items listed on page 6 (T-77, Exhibit 6). Star bought some furniture to replace some of what Martin had shipped to Washington. (T-79).

Star has no retirement. She has requested a portion of Martin's military retirement and to designated as beneficiary on survivor's annuity benefit to the retirement. (T-84).

There was about \$4,000.00 in direct deposits to the joint account as a result of Martin getting some travel money. Star used this money for family, home and prescription medications. (T-88).

Star divided the joint savings account in half when Martin got the divorce. They each got about \$10,000.00. Some of the savings account was from insurance money from hurricane damage. Star has about \$6,500.00 of her half remaining (T-91).

McKee factors were presented to the Court for Star's request for attorney fees. (T-94-95, 117-118).

## VII. SUMMARY OF THE ARGUMENT

The Chancellor did not abuse his discretion in determining the marital assets and providing for a division of same. The marital assets were determined to be the jointly owned residence where Star resided, the automobile that was in Star's possession, Martin's military retirement accrued during the marriage and the availability of survivor annuity benefits from the military retirement. Marital assets are not required to be divided equally.

There was very little, if any, equity in the jointly owned home. There was a negative equity in the automobile that was in Star's possession and she was paying the auto debt of \$317.00 per month.

Once a division of marital assets was made, Star was not able to provide for herself so that the trial court was able to consider an award of alimony. The Court carefully considered the Armstrong factors in making the determination of the type and amount of alimony awarded. Star was awarded periodic alimony in the form of Martin's payment of the house note, taxes and insurance, (\$656.00 to \$700.00 per month depending on which party's 8.05 financial declaration was being used) and an additional periodic alimony sum of Five Hundred Dollars (\$500.00) per month. Star is unable to meet her basic cost needs on a monthly basis for her housing, food, utilities, automobile payment, and prescription

medication necessary because of her kidney problems and Crohn's disease. Upon a designated event, Star's remarriage, her vacating the residence, or Star's daughter finishing high school, the jointly owned marital home is to be sold and the equity, if any, is to be divided. In the event of the death of either party prior to the sale, the joint tenancy with right of survivorship would apply.

As the parties had no children of their marriage there was no child custody issue and no child support was awarded.

Eighty two (82) months of Martin's military retirement was accrued during the marriage prior to Martin obtaining a divorce in Washington on July 24, 2007. Martin initiated the cause of action in Mississippi by the filing of his Complaint on January 11, 2008. Martin voluntarily submitted himself to the personal jurisdiction to the Chancery Court of Harrison County, Mississippi, Second Judicial District. As such, the trial court had jurisdiction to determine what division, if any, was to be made as to Martin's military retirement and jurisdiction to determine if Star was to be designated as beneficiary of the Survivor Annuity Benefit (or Survivor Benefit Plan) of such military retirement. The Court's award of 65% of the length of the marriage, (82 months), will result in Star having approximately 53.3 months as her share of the military retirement. If Martin remains in the military for a twenty year retirement Star's portion

would be approximately 22% of the total retirement. Because there was no overlap of ten (10) years of marriage while the retirement was being accrued, there will be no direct payment made from DFAS to Star upon Martin's retirement from active duty.

The military Survivor Benefit Plan makes provision for one (1) beneficiary to be designated. This may be done on a voluntary basis by the service member or the Court having personal jurisdiction may order a spouse, or former spouse, to be the designated beneficiary. 10 U.S.C. §1450(f). The Court did not err in designating Star as the beneficiary of the Survivor Benefit Plan of the military retirement.

Attorney fees were awarded to Star by the Court after consideration of the factors set forth in McKee. Such award is discretionary with the Court and no abuse of discretion was made.

The trial court's ruling, in all aspects of the Judgment filed December 12, 2008, should be affirmed.

## VIII. ARGUMENT

Standard of Review: As this Court stated in *Magee v. Magee*, 661 So.2d 1117 (Miss.1995): Our scope of review in domestic relations matters is limited by our familiar substantial evidence/manifest error rule. *Stevison v. Woods*, 560 So.2d 176, 180 (Miss.1990). "This Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Bell v. Parker*, 563 So.2d 594, 596-97 (Miss.1990). See also *Ferguson v. Ferguson*, 639 So.2d 921 (Miss.1994); *Faries v. Faries*, 607 So.2d 1204, 1208 (Miss.1992). In other words, "[o]n appeal [we are] required to respect the findings of fact made by a chancellor supported by credible evidence and not manifestly wrong." *Newsom v. Newsom*, 557 So.2d 511, 514 (Miss.1990). See also *Dillon v. Dillon*, 498 So.2d 328, 329 (Miss.1986). This is particularly true in the areas of divorce, alimony and child support. *Tilley v. Tilley*, 610 So.2d 348, 351 (Miss.1992); *Nichols v. Tedder*, 547 So.2d 766, 781 (Miss.1989). The word "manifest", as defined in this context, means "unmistakable, clear, plain, or indisputable." *Black's Law Dictionary* 963 (6th ed.1990). *Magee v. Magee*, 661 So.2d at 1122 (Miss.1995).

Periodic Alimony: The award of periodic alimony arises from the duty of the husband to support his wife. *McDonald v. McDonald*, 683 So.

2d 929, 931 (Miss.1996). “The husband is required to support his wife in the manner to which she has become accustomed, to the extent of his ability to pay.” *Brennan v. Brennan*, 638 So.2d 1320, 1324 (Miss.1994). In determining the proper amount of alimony, the chancellor should consider the Armstrong factors:

1. the income and expenses of the parties;
2. the health and earning capacities of the parties;
3. the needs of each party;
4. the obligations and assets of each party;
5. the length of the marriage;
6. the presence or absence of minor children in the home;
7. the age of the parties;
8. the standard of living of the parties, both during the marriage and at the time of the support determination;
9. the tax consequences of the spousal support order;
10. fault or misconduct;
11. wasteful dissipation of assets by either party; or
12. any other factor deemed by the court to be “just and equitable” in connection with the setting of spousal support. *Armstrong v. Armstrong*, 618 So.2d 1278, 1280 (Miss.1993) (citing *Hammonds v. Hammonds*, 597 So.2d 653, 655 (Miss.1992)).

Alimony awards are within the discretion of the chancellor; this Court will not reverse an award on appeal absent manifest error or abuse of discretion. *McEachern v. McEachern*, 605 So.2d 809, 815 (Miss.1992); *Cherry v. Cherry*, 593 So.2d 13, 19 (Miss.1991); *Powers v. Powers*, 568 So.2d 255, 257-58 (Miss.1990). "In the case of a claimed inadequacy or outright denial of alimony, we will interfere only where the decision is seen as so oppressive, unjust or grossly inadequate as to evidence an abuse of discretion." *Armstrong*, 618 So.2d at 1280; *Smith v. Smith*, 607 So.2d 122, 126 (Miss.1992).

In the case at bar the Chancellor made detailed findings as required by *Armstrong* beginning at page 9 and ending midway on page 13 of the December 23, 2008, Judgment. Each *Armstrong* factor was considered by the Court and a periodic alimony award of \$500.00 per month was made.

It is within the chancellor's authority to make an equitable division of all jointly acquired real and personal property. *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss.1994). In making an equitable division of marital property, however, the chancellor is not required to divide the property equally. *Love v. Love*, 687 So.2d 1229, 1232 (Miss.1997); *Trovato v. Trovato*, 649 So.2d 815, 817-18 (Miss.1995). Instead,

equitable distribution is governed by the guidelines set out by this Court in Ferguson. These guidelines include:

- (1) economic and domestic contributions by each party to the marriage,
- (2) expenditures and disposal of the marital assets by each party,
- (3) the market value and emotional value of the marital assets,
- (4) the value of the non marital property,
- (5) tax, economic, contractual, and legal consequences of the distribution,
- (6) elimination of alimony and other future frictional contact between the parties,
- (7) the income and earning capacity of each party, and
- (8) any other relevant factor that should be considered in making an equitable distribution.” Ferguson, 639 So.2d at 928.

In Watson, the wife (in an eight year marriage) was granted the use of the home to live for six (6) years with the mortgage paid each month by the husband and then half of the proceeds from the sale of the home.

In the case at bar the parties were married for eight (8) years and the trial court granted Star the use of the marital residence for a maximum of seven (7) years (at which time Star’s child should have completed high school) at which time the residence would be sold and the proceeds divided. Martin is to pay the house note, taxes and insurance

on the residence as periodic alimony. The payment of periodic alimony provides a tax benefit to Martin as the whole payment, note, taxes and insurance, becomes a deduction to him and taxable income to Star. Additionally, the \$500.00 per month designated by the Court as periodic alimony would also be taxable income to Star and deductible to Martin.

Military Retirement: Title 10, U.S.C.A., Section 1408(c)(1), vests state courts with the power to allocate military retirement pay pursuant to a divorce decree. It provides:(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.” Powers v. Powers, 465 So.2d 1036 (Miss.,1985).

Pierce v. Pierce, 648 So.2d 523( Miss.,1994) provided the following: “A military pension is considered personal property subject to the personal property laws of the forum state, and, in Mississippi, our laws grant chancellors the authority to effect an equitable division of property between spouses after making certain requisite factual findings. This Court has stated that, “[a] spouse’s military retirement pension is an asset....” Southern v. Glenn, 568 So.2d 281, 283, n. 1. (Miss.1990). We have also said that, “a former spouse’s rights vel non in his or her former

mate's military retirement pension ... is subject to the personal property laws of the states....” *Newman v. Newman*, 558 So.2d 821, 823 (Miss. 1990).

The Federal Uniformed Services Former Spouses' Protection Act does not “vest” any rights in a spouse, nor does Mississippi law. We have previously commented on this issue, stating that: As we perceive FUSFSPA, it did not vest any rights in anyone. It merely removed a federal bar and allowed the states to treat the military retirement pensions of their domiciliaries as personal property subject to state property laws. *Brown v. Brown*, 574 So.2d 688, 690-91 (Miss.1990).

Mississippi law has “long recognized that, incident to a divorce, the Chancery Court has authority, where the equities so suggest, to order a fair division of property accumulated through the joint contributions and efforts of the parties.” *Brown v. Brown*, 574 So.2d 688, 690 (Miss. 1990). See *Brendel v. Brendel*, 566 So.2d 1269, 1273 (Miss.1990); *Jones v. Jones*, 532 So.2d 574, 580-81 (Miss.1988); *Regan v. Regan*, 507 So.2d 54, 56 (Miss.1987); *Watts v. Watts*, 466 So.2d 889, 891 (Miss.1985); *Clark v. Clark*, 293 So.2d 447, 450 (Miss.1974).

There is a distinction between alimony and retirement benefits. In *Brown v. Brown*, 574 So.2d 688 (Miss.1990), this Court noted that the Federal Uniformed Services Former Spouses Protection Act, 10 U.S.C. §

1408 (hereinafter FUSFSPA), “allowed the states to treat the military retirement pensions of their domiciliaries as personal property subject to state property laws.” Brown, 574 So.2d at 690. In reference to a spouse's equitable right to a share of the other spouse's military retirement pay, this Court reiterated that a chancery court has authority, where equity so demands, to order a fair division of property accumulated through the joint contributions and efforts of the parties. Brown, 574 So. 2d at 690. See also Brendel v. Brendel, 566 So.2d 1269, 1273 (Miss. 1990); Jones v. Jones, 532 So.2d 574, 580-81 (Miss.1988); Regan v. Regan, 507 So.2d 54, 56 (Miss.1987); Watts v. Watts, 466 So.2d 889, 891 (Miss.1985); Clark v. Clark, 293 So.2d 447, 459 (1974).

Survivor Benefit Plan: Federal law allows state courts to order military service members to participate in the Survivor Benefit Plan and to designate a former spouse as beneficiary as part of a dissolution agreement. 10 U.S.C. §1450(f)(4).

Appellant's assertion that it was error for Star to be designated as the beneficiary of the military retirement is misreading Williams v. Williams, No. 2007-CA-01376-COA (Miss. Ct. App. 2009). In Williams the survivor annuity specifically mentioned the husband civil service retirement and did not specifically mention the survivor annuity as concerning the husband's military retirement.

It is discretionary with the Court. The trial court did not abuse its discretion requiring Martin to designate Star as the beneficiary of the military retirement survivor annuity plan.

**Attorney's Fees:** In *Ferguson*, this Court provided guidance in this matter: The question of attorney's fees in a divorce action is a matter largely entrusted to the sound discretion of the trial court. *Smith v. Smith*, 614 So.2d 394, 398 (Miss.1993). "If a party is financially able to pay her attorney, an award of attorney's fees is not appropriate." *Martin v. Martin*, 566 So.2d 704, 707 (Miss.1990). See also *Jones v. Starr*, 586 So.2d 788, 792 (Miss.1991) ("Generally, it is true that, unless the party can establish inability to pay, attorney's fees should not be awarded by the court."). The criteria to be utilized in determining attorney's fees are found in *McKee v. McKee*, 418 So.2d 764, 767 (Miss.1982). *Ferguson*, 639 So.2d at 937.

This Court is "reluctant to disturb a chancellor's discretionary determination whether or not to award attorney fees and of the amount of [any] award." *Geiger v. Geiger*, 530 So.2d 185, 187 (Miss.1988).

## IX. CONCLUSION

A. The Court did not err in its division of marital assets and liabilities.

B. The Court did not err in awarding Star Pierce periodic alimony.

C. The Court did not err in awarding Star Pierce use and possession of the marital home and requiring Martin Pierce to pay the house note, taxes and insurance as periodic alimony until such time as Star should remarry or vacates the home or until Star's child should graduate from high school, whichever should occur first.

D. The Court did not err in the award of attorney fees to Star Pierce.

E. The ruling of the trial court should be affirmed and additional attorney fees awarded to Star L. Pierce, Appellee, in this cause for costs incurred by her on appeal.

X. CERTIFICATE OF FILING AND SERVICE

I, WILLIAM E. TISDALE, do hereby certify that I have mailed by first-class postage prepaid, or hand delivered, a true and correct copy of the Brief for Appellee and Record Excerpts for Appellee to the following at their usual mailing address:

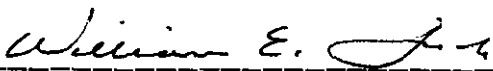

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