IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2009-CA-00379

LINDA CURRY **APPELLANT**

V.

CHARLES CURRY **APPELLEE**

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 representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

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   Appellant

2. Charles Curry
   Appellee

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THIS the 15 day of December, 2009.

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SUMMARY OF THE ARGUMENT

Linda Curry and Charles Curry entered into a *Consent to Divorce on Grounds of Irreconcilable Differences* authorizing the Chancery Court of Pontotoc County, Mississippi, to grant a divorce to the parties and enter a judgment determining the parties' respective rights and interests in all marital property. This consent was entered by the parties on October 9, 2008. The chancellor thereafter heard testimony and received proof over the course of three (3) days, following which a *Final Decree of Divorce* was entered *nunc pro tunc* to December 12, 2008. During the course of the trial, the chancellor was liberal in allowing each side to produce such testimony and evidence as each side saw fit. Linda does not complain in her brief that she was denied the right to introduce certain evidence, nor does she have a basis to do so. Rather, Linda simply disagrees with the chancellor's determination of an equitable division of the marital property. Linda seeks to have this Court on appeal substitute its own judgment for the judgment of the chancellor, which of course is not the proper standard for review. In essence, Linda complains of two matters alleged to have been errors by the chancellor:

(1) Linda complains there was a "mathematical miscalculation" by the chancellor regarding the award of Charles' interest in the former marital residence;

(2) and Linda complains that the chancellor erred in "setting an arbitrary amount of $75,000.00" regarding the value to be awarded to Charles as a result of a diminution in his retirement income based upon a one-time election made during the marriage (and made with encouragement from Linda.)

To the contrary, the proof presented at trial clearly supports the award of the chancellor, as will be set forth below. In fact, a strong argument can be made that Charles should have been awarded more property given the facts presented, although Charles was content with the chancellor's ruling and did not file a cross appeal.

ARGUMENT

The scope of review in an appeal involving a domestic relations matter is very limited.

> When this Court reviews domestic relations matters, our scope of review is limited by the substantial evidence/manifest error rule. *See R.K. v. J.K.*, 946 So.2d 764, 772 (Miss.2007) (citing *Mizell v. Mizell*, 708 So.2d 55, 59 (Miss.1998)). Therefore, we will "not disturb the findings of a chancellor unless the chancellor was manifestly wrong,clearly erroneous or an erroneous legal standard was applied." *Id.*

Giannaris v. Giannaris, 960 So.2d 462, 467 (Miss.2007).

Before addressing the specific two alleged "errors" raised by Linda, some space must be devoted to the applicable standard of review employed by this Court. A chancellor's division and distribution of marital assets "will be upheld if it is supported by substantial credible evidence." *Carrow v. Carrow*, 642 So.2d 901, 904 (Miss.1994). The decision will not be disturbed on appeal "unless the chancellor was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *Turpin v. Turpin*, 699 So.2d 560, 564 (Miss. 1997); see also *Denson v. George*, 642 So.2d 909 (Miss. 1994). "This court is not called upon or permitted to substitute its collective judgment for that of the chancellor." *Richardson v. Riley*, 355 So.2d 667, 668-669 (Miss.1978). A conclusion that we might have decided the case differently, standing alone, is not a basis to disturb the result. *Id."McCardle v. McCardle*, 862 So.2d 1290 (Miss.App.2004). "In reviewing the chancellor's judgment, this court does not conduct a *Ferguson* analysis anew, but reviews the judgment to ensure that the chancellor followed the appropriate standards and did not abuse his discretion." *Phillips v. Phillips*, 904 So.2d 1999 (Miss. 2004).

> 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). *Turpin v. Turpin*, 699 So.2d 560, 564 (Miss.1997) (quoting Magee v. Magee, 661 So.2d 1117, 1122 (Miss.1995)).

Clark v. Clark, 754 So.2d 450, 458 (Miss.1999) (citations original).

Thus, it is clear that despite Linda's disagreement with the ultimate ruling of the chancellor, the *Final Decree* should not be disturbed unless she meets the high burden placed upon her. It is apparent from a simple review of the record that she is unable to meet this high burden, as there was ample evidence presented during the trial to support the division of property ordered by the chancellor.

Linda states in her brief that "The Trial Court Erred in Performing the Mathematical Calculation of Twenty Percent of the Equity in the Marital Residence"

Linda's argument is misplaced in that she takes out of context the chancellor's use of the term "equity", without giving it the full meaning when read within its context. Linda focuses her attention on two sentences contained within the bench opinion: "Charles Curry is entitled to 20 percent of the equity in the house. This is $50,000." (TR.227) However, the context within which these two sentences were placed is as follows:

"Therefore, the marital residence and the property on which it is located is a marital asset.[1] It will be divided as follows; according to both parties, the property is worth $250,000.00. The property was paid for at the time of the marriage. However, Linda has used the property to obtain a $100,000 loan in order to satisfy tax liens of hers. Because this loan was used for her benefit only, Linda will be responsible for the repayment of that loan. Charles Curry is entitled to 20 percent of the equity in the house. This is $50,000. Linda Curry will receive 80 percent of the equity in the house, $200,000, minus the debt owed of $100,000, for a total of $100,000."

(TR.226-227)

Later in the bench opinion, the chancellor again addressed this property, and again made it clear that he was well aware of the indebtedness owed against the property and that no "miscalculation" occurred.

"As to the real property, the marital residence, as the Court has already noted, Charles gets $50,000 of that, or 20 percent. Linda gets a net of $100,000. Really it was $200,000 but she owed $100,000 of her own debt on it so she gets the equivalent of $200,000 on that, it being valued at $250,000."

(TR. 233) With all due respect to Linda, it is somewhat specious to suggest that the chancellor miscalculated the amount he felt was properly due to Charles. The chancellor went to great lengths to perform the calculation, and specifically noted that Linda was to receive "200,000, minus the debt owed of $100,000, for a total of $100,000."

The detailed calculation and analysis of the chancellor makes it abundantly clear that there was no miscalculation involved in assigning Charles $50,000 interest in the marital residence. The chancellor took great pains to avoid a division wherein Linda would benefit from taking out a loan against the marital property which was used solely for her own benefit. In

1 It should be noted that Linda does not complain that the chancellor erred in finding that the marital residence, although owned by her at the time of marriage, was properly classified as "marital property." Certainly the chancellor was correct in finding that this property had been converted to marital property by commingling and being used for familial purposes.

other words, it would have been a great injustice if Linda was allowed to encumber the marital residence, which initially was debt-free, with a $100,000 loan from which she alone benefitted, and thereby reduce the amount of money to be awarded to Charles. Surely, Linda is not suggesting that married parties can, shortly prior to a divorce, encumber marital assets with loans used solely by one party (for gifts, to conceal money, or as here, to pay individual indebtedness like tax liens) and thereby impede the chancellor's ability to do equity with that particular asset.

When one analyzes the total award given to Linda and Charles by the chancellor, in the context of the very large separate estate of Linda, one cannot genuinely suggest that error was committed by the chancellor in awarding Charles a $50,000 interest in the marital residence which was worth $250,000 before Linda elected to unilaterally encumber it. Linda's argument is clearly without merit.

Linda argues in her brief that "The Trial Court Erred in Finding that $75,000.00 was the Sum of the Reduction in Retirement Payments Made to Charles Curry Added to the Value of the Retirement Account to be Paid to Linda Curry"

As with the alleged "miscalculation," Linda once again appears to take statements made by the chancellor during the bench opinion out of context. Quoting from the Appellant's brief:

> Appellant Linda Curry asserts that the chancellor's determination of the amount was clearly erroneous and based upon proof insufficient to establish the amount. Appellant further asserts that the chancellor arbitrarily assigned $75,000.00 as the amount necessary to offset Charles' monthly reduction to his pension payments and Linda's potential income in the event she survives Charles." (underline in original)

(Appellant's Brief, p.9)

What the chancellor actually said concerning this $75,000 tract of marital property was:

> "As to the Highway 9 property with rentals, the Highway 9 property was purchased after the marriage and placed in both parties (sic) names. Therefore, the parties agree that this is a marital asset. The parties would also agree that the property is worth $75,000. According to the parties' testimony, there are two buildings available for rent on this property. Charles testified that these buildings generate approximately $550 a month in rental income, $350 on the front building and $200 on the back building. This property will be awarded to Charles Curry. The rental property should compensate for the reduction in retirement benefits received by Mr. Curry and based on the irrevocable payment option selected during ~~the marriage.~~ There was no evidence presented to the Court as to what the actual difference in amounts is between the two options. However, Mr. Curry estimates it to be around $700 a month."

(TR.229) The chancellor went on to provide in great detail the itemization of marital assets awarded to each party, which resulted in Charles receiving $189,200 and Linda receiving $183,950. The ultimate result of the chancellor's bench opinion allowed for an almost equal split of marital assets. It is very difficult to see how Linda can complain about that, given her substantial separate estate. According, to Linda's *Rule 8.05 Financial Disclosure Statement,* (TE 1-11) her separate estate was approximately $500,000. By comparison, Charles' separate estate was approximately $18,500. (RE.109, TE2) Linda's separate estate is approximately twenty-seven (27) times that of Charles.

The simple fact is that the chancellor intentionally provided for an almost equal division of marital property. While it is true that the chancellor made reference to the reduction in Charles' pension benefits, nowhere in the opinion did the chancellor state that his sole reasoning for awarding the $75,000 tract of property to Charles was based upon this reduction. The chancellor even noted: "there was no evidence presented to the Court as to what the actual difference in amounts is between the two options. However, Mr. Curry estimates it to be around

$700 a month." (TR.229) The chancellor obviously took this reduction into consideration, as equity certainly required. The chancellor did not, however, as is implied in Linda's Appellant's Brief, suggest that any precise mathematical computation of the reduction in benefits equaled $75,000.

Throughout Linda's brief, she refers to the chancellor's award of the $75,000 tract of land, and the references to the reduction in pension benefits, as being "arbitrary."[2]

The Mississippi Supreme Court adopted the following definitions of arbitrary and capricious:

> The terms "arbitrary" and "capricious" are open-textured and not susceptible of precise definition or mechanical application. We find helpful meanings North Carolina has assigned in a not-dissimilar context:
>
> "Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone,-absolute in power, tyrannical, despotic, non-rational,-implying either a lack of understanding of or a disregard for the fundamental nature of things.
>
> "Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles....

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2 "Appellant further asserts that the chancellor arbitrarily assigned $75,000 as the amount necessary to offset Charles' monthly reduction to his pension payments . . ." (Appellant's Brief, p.9) "The chancellor's attempt to assign an arbitrary number was clearly erroneous . . ." (Appellant's Brief, p.12) "However, instead of using the information from the Pension Fund, it appears that the chancellor arbitrarily awarded a 3-acre parcel of property . . ." (Appellant's Brief, p.12) "However, the chancellor did attempt to assign an arbitrary amount, $75,000. . ." (Appellant's Brief, p.14) "Appellant Linda Curry submits that the $75,000 amount was arbitrary and therefore erroneous . . ." (Appellant's Brief, p.14) "Moreover, the unfairness is compounded by the completely arbitrary and unsubstantiated value that the chancellor assigned to the reduction in Charles Curry's pension benefits." (Appellant's Brief, p.15)

Mississippi Com'n on Environmental Quality v. Desai, 868 So.2d 381, 388 (Miss.App.2004) (citing *McGowan v. Mississippi State Oil & Gas Bd.*, 604 So.2d 312, 322 (Miss.1992); *Mississippi State Dept. of Health v. Southwest Mississippi Regional Medical Center*, 580 So.2d 1238, 1240 (Miss.1991)).

To suggest that the chancellor's actions concerning the award of the $75,000 parcel of property to Charles was "arbitrary" is simply misplaced and unjustified. First, it must be restated that nowhere in the opinion did the chancellor suggest he had used some mathematical computation to derive at a fixed figure of $75,000 as the value of the reduction in Charles' pension benefits. Again, the chancellor specifically noted that there was no evidence which would allow for a precise calculation as to what this reduction in pension benefits would be worth. "There was no evidence presented to the Court as to what the actual difference in amounts is between the two options. However, Mr. Curry estimates it to be around $700 a month." (TR. 229) The chancellor went on to explain that he "tried to compensate" Charles to some degree for his reduction in pension benefits, although not precisely determined, by the award of the $75,000 parcel of property.

Second, Linda suggests that the Calculation Worksheet which was introduced as Trial Exhibit 4 (RE 119-135, TE 29-45) allowed for a precise mathematical calculation of the reduction in benefits, and that the chancellor "should have reviewed the information." Linda fails to understand that there would inevitably be some speculation in determining the value of this reduction, regardless of whether the Calculation Worksheet was used or not. It goes without saying that no one can predict when Charles or Linda will die, nor whom will survive the other. Furthermore, any calculation of this reduction in benefits for purposes of trial would necessary require a determination of the "present value" of the reduction in these monthly payments.

Determining the present value requires certain assumptions of interest rates, etc. The point is that present value of the reduction in pension benefits cannot be ascertained with absolute precision, nor did the chancellor indicate any attempt to do so in his opinion. However, simply because that figure cannot with absolute certainty be determined does not by any means suggest it should be ignored. Indeed, for the chancellor to have ignored the reduction in pension benefits to be received by Charles would have resulted in a gross injustice.

Finally, and perhaps most importantly, nowhere in the opinion did the chancellor suggest the only reason the $75,000 parcel of property was awarded to Charles was because of the reduction in pension benefits. While reference was made to that reduction, the opinion does not suggest that was the only basis. Had the chancellor not awarded Charles the $75,000 parcel of property, the result would have been for Linda to receive $258,950 in marital assets while Charles would have been left with $114,200. Here Linda would have received 70% of the marital assets, together with her separate estate of approximately $500,000. Charles, on the other hand, would have received 30% of the marital assets, together with his separate estate of approximately $18,500. Surely Linda cannot genuinely suggest this would have been an equitable result, nor consistent with the principals set forth in *Ferguson v. Ferguson.*

Giving the foregoing, this court cannot disturb the opinion and judgment of the chancellor unless it can be said that there was no substantial, credible evidence to support the ultimate decision, or that the chancellor applied the inappropriate standard or abused his discretion. A review of the record clearly demonstrates that none of these are true, and therefore the decision of the chancellor should be upheld. The appellate process is invaluable to our legal system, and is one of the most important functions that make our system the best in the world.

On the other hand, it is important that the duties and responsibilities of the trial judge never be trivialized. Only the trial judge is able to smell the "smoke of the battlefield."

> "The trial judge saw these witnesses testify. Not only did he have the benefit of their words, he alone among the judiciary observed their manner and demeanor. He was there on the scene. He smelled the smoke of battle. He sensed the interpersonal dynamics between the lawyers and the witnesses and himself. These are indispensable. *Madden v. Rhodes*, 626 So.2d 608 (Miss.1993) (quoting *Culbreath v. Johnson*, 427 So.2d 705, 708 (Miss.1983)).

Clark v. Clark, 754 So.2d at 461-62.

CONCLUSION

The chancellor was correct in his equitable division of marital assets, in awarding Charles a $50,000 interest in the marital residence and the parcel of property valued at approximately $75,000. This was proper based upon all applicable statutory and case law, and was in the sound discretion of the chancellor. Therefore, the decision of the chancellor should be affirmed.

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V.

CHARLES CURRY **APPELLEE**

CERTIFICATE OF SERVICE

I, J. Mark Shelton, do hereby certify that I have this day forwarded by United States Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellee, Charles Curry* to the following:

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THIS the 15 day of December, 2009.

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