

SUPREME COURT OF MISSISSIPPI  
Case # 2009-CA-01019

BOBBIE SUE KIMBROUGH

APPELLANT

VS.

ROBERT EARL KIMBROUGH

APPELLEE

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APPEAL FROM THE CHANCERY COURT OF LEE COUNTY, MISSISSIPPI

LEE COUNTY CHANCERY CAUSE NO. 07-1034-41-H

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REPLY BRIEF OF APPELLANT/CROSS-APPELLEE, BOBBIE SUE KIMBROUGH

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TABLE OF CASES AND AUTHORITIES

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I.

INTRODUCTION

In the Brief of Appellee, Robert Earl Kimbrough (Robert), the cross-appeals the decision of the Lower Court on one point set forth on page 2 of his brief designated as Paragraph E and discusses that issue under Paragraph F beginning on Page 25 of his brief. In essence, Robert complains that the Trial Court erred in categorizing the 2001 GMC Sierra Pickup, the 1992 Chevrolet Motorcoach and the 2000 Suzuki four wheeler as marital property. He then contends that the Trial Court erred in establishing the value of those pieces of property and in awarding one-half of those values to Appellant/Cross-Appellee, Bobbie Sue Kimbrough (Bobbie Sue). (Appellee's Brief Pg 26-27)

Bobbie Sue submits that the Trial Court did not err in the decision relative to these personal property assets either in designating same as marital assets, valuing them and in awarding her one-half that value.

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II.

ARGUMENT

When considering a Chancellor's equitable division of property, the same standard of review applies, to wit: A Chancellor's ruling should not be reversed by an Appellate Court unless it is manifestly wrong, clearly erroneous or an improper legal standard was employed. Pittman v. Pittman 791 So. 2<sup>nd</sup> 857 ¶7 (Miss. App. 2001) In this case, Judge Hatcher went to great detail in categorizing the parties personal property assets, employing a chart in his decision which clearly shows that he carefully considered the evidence in the case in both the classification, valuation and division of the personal property assets.

On the issue of classification, it is important to note that Robert listed the contested items in his 8.05 Financial Statement, not once but twice (Exhibit 1 and Exhibit 6). In addition, he testified about the assets and the value that he placed upon them.

(Tr. 379) However, nowhere in this record did Robert ever contend that any of the subject items were his separate property.

The mere fact that these items may have been acquired prior to the marriage is not in and of itself determinative as to the classification of the property. As noted in the Pittman decision at ¶9, title to property is not relevant in determining whether it is a marital or separate asset, citing Draper v. Draper 627 So. 2<sup>nd</sup> 302, 305 (Miss. 1993). It is further noted in the Pittman decision at ¶30 that even if property may have at one time been separate property, if the property has been utilized for family purposes, it may lose its separate identity, citing Johnson v. Johnson 657 So. 2<sup>nd</sup> 1281, 1286 (Miss. 1994). Further, in Pittman at ¶30 the Court went on to say that by this use, the separate property may be converted into a marital asset absent an agreement to the contrary, citing Heigle v. Heigle 654 So. 2<sup>nd</sup> 895, 897 (Miss. 1995).

As the Court will remember, from the initial brief of Bobbie Sue, she was the primary bread winner in this family (Tr. 391, 431-433) a fact clearly admitted to by Robert. (Tr. 325, 340) In fact, Robert had never declared income on his tax returns more than \$5,000.00 in any year of the marriage. (Tr. 325) Most of Robert's money earned went back into the business and was not used for family purposes. (Tr. 432)

Another factor which was clearly considered by Judge Hatcher was the fact that Robert went to great lengths to assign a value to

the three assets in controversy. Though alimony was sought in the pleadings filed by Bobbie-Sue, there was no effort to pursue that claim and therefore, there would be no reason to value "non-marital" assets. It is obvious that Robert considered the 2001 GMC Sierra automobile, the 1992 Chevrolet Motorcoach and the 2000 Suzuki to all be marital assets which made them subject to valuation and equitable distribution.

Robert is correct that the case of Owen v. Owen 798 So. 2<sup>nd</sup> 394 (Miss. 2001) is relevant to this case. However, its relevancy is not as stated by Robert. The relevant holding of that Court is that a Chancellor's findings of fact will not be disturbed on appeal unless the Chancellor is manifestly wrong, clearly erroneous or applies an erroneous legal standard and that the appellate Court should not substitute its Judgment for that of the Chancellor even if the Court disagrees with the Lower Court's findings of fact. The Court also went on to note that when no specific findings appear in the record, the Appellate Court generally presumes that the Chancellor resolved fact issues in favor of the Appellee, (here Cross-Appellee Bobbie Sue). Owen ¶10

As to the value placed upon the items, it is incumbent upon the parties in any case where equitable division of assets is an issue to value those assets. Watson v. Watson 882 So. 2<sup>nd</sup> 95, ¶53 (Miss. 2004) It is clear that Robert on at least three occasions, reaffirmed the value of these pieces of property as he set forth the "value" specifically on his two 8.05's that were filed in this

case as Exhibits 1 and 6. Further, he affirmed the value of these properties and in particular the Motorcoach when he stated in his testimony that the value of \$32,000.00 as that's what he put on it. (Tr. 379) Now, simply because he does not like the Chancellor's ruling, he is asking this Court to give him "another bite at the apple" on value. If his testimony and documents establishing the value of these items was incorrect, he should have taken care of that issue at the time of the trial. This case went on for months and months and if Robert was unhappy with the values he placed upon any of the marital assets, he certainly had more than ample time to amend his 8.05's and alter his testimony to so reflect. Having failed to do so, he is bound by the values that he placed on these items as these were not contested by Bobbie Sue anywhere in this record. Watson at ¶53

Robert moans that he has been unfairly treated by the Court's awarding Bobbie Sue one-half interest in certain personal property which he says should have been classified as non-marital and for not deducting from that amount the value of what Bobbie Sue received. As noted in the Owens case at ¶14, equitable distribution in the state of Mississippi has never been interpreted to me an equal distribution. Therefore, the fact that the Chancellor made an uneven distribution of values of the personal property is of no consequence and certainly does not indicate that the Chancellor was manifestly wrong, clearly erroneous or that he



applied an erroneous legal standard as to the classification, valuation and division of the personal property assets.

It is further important to remember that which is pointed out in Bobbie Sue's original brief. When the Court divided the real property, he only awarded Bobbie Sue 2.6 percent of the net equity of the marital home and awarded Robert all of the business. (R.E. 22, C.P. 226, R.E. 29, C.P. 233) The inequity in the division of marital assets is in the division of the real property, not in the division of the personal property.

CONCLUSION

In conclusion, the Chancellor did not commit any error in his classification, valuation and division of the personal property assets of these parties. There was no claim same were separate property by either party, but all of the evidence pointed clearly that these were marital assets. The values came directly from Robert and were not disputed by Bobbie Sue. Finally, there is nothing to show that the Chancellor below was manifestly wrong or clearly erroneous in the division of these personal property assets that he made. Therefore, Bobbie Sue Kimbrough respectfully submits that the Cross-Appeal of Robert Earl Kimbrough on this point should be denied and the Chancellor's decision thereon affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that I, John A. Ferrell, attorney for Appellee, have this day mailed by United States mail, postage prepaid, the original and three (3) copies of the Reply Brief of Appellant/Cross-Appellee to Kathy Gillis, Clerk, Supreme Court of Mississippi at the address of said Court, P. O. Box 249, Jackson, Mississippi, 39205-0249.

This the 26<sup>th</sup> day of July, 2010.

  
JOHN A. FERRELL

CERTIFICATE OF SERVICE

I, John A. Ferrell, 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 Reply Brief of Appellant/Cross-Appellee to the following:

Honorable Jak M. Smith  
P.O. Box 7213  
Tupelo, MS 38802-7213

Honorable John A. Hatcher  
Chancellor  
P. O. Box 118  
Booneville, MS 38829

Honorable Talmadge D. Littlejohn  
Chancellor  
P. O. Box 869  
New Albany, MS 38652

THIS the 26<sup>th</sup> of July, 2010.

  
JOHN A. FERRELL