

COPY

IN THE SUPREME COURT OF MISSISSIPPI

CA
NO. 2009-~~TS~~-01914

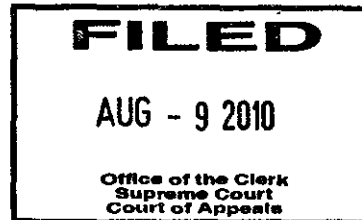
KATHRYN MARTELLO JENKINS

APPELLANT

v.

JOHNNY M. JENKINS

APPELLEE



On Appeal from the Chancery Court of Madison County, Mississippi
Civil Action No. 2006-0410

**REPLY BRIEF OF APPELLANT
KATHRYN MARTELLO JENKINS**

(Appellant does not request oral argument)

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IN THE SUPREME COURT OF MISSISSIPPI

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KATHRYN MARTELLO JENKINS

APPELLANT

v.


JOHNNY M. JENKINS

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following 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 disqualification or recusal:

1. Kathryn Martello Jenkins, Appellant
2. Johnny M. Jenkins, Appellee
3. Honorable Cynthia Lee Brewer, Madison County Chancellor
4. Mark W. Prewitt, Esquire
5. John W. Christopher, Esq.



Mark W. Prewitt
Attorney for Appellant, Kathryn Martello Jenkins

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STATEMENT OF THE ISSUE

- I. Whether the Chancellor committed error in ordering Kathryn to be solely responsible for credit card debt accumulated during the marriage?**
- II. Whether the Chancellor abused her discretion in deferring the payment of the \$115,000.00 judgment awarded Kathryn against Johnny by the payment of installments of \$500.00 per month.**

contrary to law. Kathryn is not asking the Court to disregard the total record in reviewing this issue, but like *Schoffner, id.*, marital debt may be considered separately. Kathryn is not asking the Court to relieve her of the entire debt only that it be equally divided between her and Johnny. This would be equitable.

On the issue of whether the Chancellor abused her discretion in deferring Kathryn's right to collect the \$115,000.00 judgment award her, Johnny argues that this is an equitable result. Kathryn recognizes that a Chancellor has broad discretion in the division of marital assets and in applying the *Ferguson* factors, *id.*, the Chancellor, in the exercise of discretion, is required to consider, among other things, "[T]he extent to which the property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties..." *Id.*, at 928 ¶10. The Chancellor exercised her discretion, divided the parties business asset, but set up periodic payments which is likely to lead to future friction between the parties, especially when the payout will extend beyond 20 years.

In referring to *Wells v. Wells*, 800 So.2d 1239, 1243 ¶7 (Miss. Ct. App. 2001), Johnny contends "that equitable distribution does not mean equal distribution," Kathryn would argue that this has no application to the case at bar. The Chancellor decided what Kathryn's equitable interest in KMJ, Inc., would be and awarded her a judgment for her interest. However, in making a division of this asset in the form of a money judgment, the Chancellor prevents collection by setting up monthly payments. Among the many dangers inherent with monthly payments is not only deterioration of the business itself, intentional or otherwise, as well as many other economic factors, but also requires Kathryn to keep a close eye on business operations which Johnny will attempt to prevent

ARGUMENT

Johnny inappropriately merges the issues presented for review by substantially arguing that the Chancellor took the Trustmark Visa credit card debt of \$7,312.10 into consideration in the division of marital assets in order to justify her being burdened by the entire debt. The two cannot be combined for a proper review.

While Kathryn admits that the analysis to be applied by a Chancellor as announced in *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994) is broad, it is submitted to this Court that the *Ferguson* factors, *id.*, are to be applied in the analysis of the division of assets. A credit card debt created primarily by personal family use is not an asset, and, as announced in *Schoffner v. Schoffner*, 909 So.2d 1245 (Miss. Ct. App. 2005), “[T]he courts in these state have consistently held that expenses incurred for the family, or due to the actions of a family member, are marital debt and should be treated as such upon dissolution of the marriage.”

In contending that equity was accomplished when Kathryn was saddled with the entire credit card debt, Johnny attempts, by interpolation, to form a basis for the Chancellor’s decision, where there is none, by asserting that the Chancellor possibly offset credit card debt by what Kathryn was to otherwise receive in distribution. Johnny’s contention in this regard is inviting the Court to enter into the field of speculation and disregard the record made in this case.

In asserting her position that the Chancellor committed error by making the credit card debt Kathryn’s sole responsibility, Kathryn relies on the former rulings of our Appellate Courts, in particular that as announced in *Schoffner, id.*, which constitute *stare decisis*. Johnny’s assertions that this issue has been raised in *isolation* is incorrect and

by any means necessary, including court intervention. Kathryn's judgment could become virtually worthless and uncollectible in the years to come. Equity equates with fairness and there is no equity or fairness in divesting Kathryn of her stock ownership in the business, awarding Johnny total control of the business and its income and Kathryn, age 49 at the time of hearing, being relegated to a paltry sum of \$500.00 per month.

Finally, the cases cited by Kathryn and criticized by Johnny regarding the right to garnish or levy execution on judgments do in fact concern themselves with alimony and child support, however, the cases of *Abshire v. Abshire*, 459 So.2d 802 (Miss. 1984), *Walters v. Walters*, 383 So.2d 827 (Miss. 1980), and *Peebles v. Yarbrough*, 475 So.2d 1154 (Miss. 1985) point out the inequities of deferred payments over an extended and unreasonable period of time, thus requiring reversal.

CONCLUSION

The Trustmark Visa credit card debt required by the Chancellor to be paid by Kathryn is contrary to the law and unsupported by the evidence. This debt is a family debt and should be treated as such by equally dividing the balance on the credit card between Johnny and Kathryn for payment. Therefore, the Chancellor's ruling regarding the credit card debt should be reversed as error.


Kathryn is entitled to collect on the \$115,000.00 judgment as awarded her by the Chancellor, and to prevent the collection solely on the basis that Johnny states the business is unable to pay the amount so awarded not only violates Kathryn's statutory rights of collection but the pronouncements of this Court as well. The Chancellor found in her Final Judgment that the corporation, its building and land were debt free, therefore any blanket unsupported assertion made by Johnny that the business is unable to pay the

judgment and nothing further is unfounded. The Chancellor made a finding of fact that KMJ, Inc., and its assets are debt free. If equity was done by awarding Johnny the entire business and its income by ordering Kathryn to divest her interest by signing "over any and all necessary documents to transfer her interest in KMJ, Inc. and its property to Johnny," then equity demands that Kathryn be likewise entitled to collection of her judgment. There is nothing in the record that would indicate that this would be injurious to the business.

As this Court has not hesitated in the past to reverse a Chancellor for preventing collection of a judgment and deferring payments for an unreasonable length of time, as is the case sub judice, Kathryn seeks reversal of this aspect of the Chancellor's Final Judgment as being contrary to law, abuse of discretion and manifest error.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, Mark W. Prewitt, attorney for Appellant, do hereby certify that I this day mailed, via U.S. mail, postage pre-paid, a true and correct copy of the above and foregoing Reply Brief of Appellant to the following: