

**COPY**

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-TS-01914

KATHRYN MARTELLO JENKINS

APPELLANT

v.

JOHNNY M. JENKINS

APPELLEE

**FILED**

**MAY 24 2010**  
**OFFICE OF THE CLERK**  
**SUPREME COURT**  
**COURT OF APPEALS**

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

**BRIEF OF APPELLANT**  
**KATHRYN MARTELLO JENKINS**

(Appellant does not request oral argument)

MARK W. PREWITT  
Attorney at Law  
MB # [REDACTED]  
914 Grove Street  
Vicksburg, MS 39183  
(601) 636-5921 (Telephone)  
(601) 631-8076 (Facsimile)

Attorney for Appellant

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-TS-01914

KATHRYN MARTELLO JENKINS

APPELLANT

v.

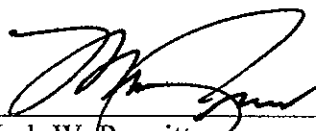
JOHNNY M. JENKINS

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

## **TABLE OF CONTENTS**

Certificate of Interested Persons.....	ii
Table of Authorities.....	iv
Statement of the Issue.....	1
Statement of the Case.....	2
Statement of Facts.....	3
Summary of the Argument.....	5
Standard of Review.....	8
Argument.....	8
Conclusion.....	14
Certificate of Service.....	15

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<i>Abshire v. Abshire</i> , 459 So.2d 802 (Miss. 1984).....	7,12
<i>Bullock v. Bullock</i> , 699 So.2d 1205, 1212 (Miss. 1997).....	9
<i>Ferguson v. Ferguson</i> , 639 So.2d 921 (Miss. 1994).....	6,11,12
<i>In re Estate of Taylor v. Thompson</i> , 609 So.2d 390, 393 (Miss. 1992).....	8
<i>Mabus v. Mabus</i> , 890 So.2d 806 (Miss. 2003).....	8
<i>Norton v. Norton</i> , 742 So.2d 126 (Miss. 1999).....	8
<i>Peebles v. Yarbrough</i> , 475 So.2d 1154 (Miss. 1985).....	7,13,14
<i>Schoffner v. Schoffner</i> , 909 So.2d 1245 (Miss. Ct. App. 2005).....	5,9,10
<i>Walters v. Walters</i> , 383 So.2d 827 (Miss. 1980).....	7, 8,13,14

### **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.**

## **STATEMENT OF THE CASE**

Johnny M. Jenkins (hereafter Johnny) and Kathryn Martello Jenkins (hereafter Kathryn) agreed to a divorce of the ground of irreconcilable differences with certain contested issues to be presented to the Chancellor for resolution. The matter was heard by the Chancellor on November 24, 2008, with the sworn testimony limited to Johnny and Kathryn together with documentary evidence submitted by them in support of their respective positions.

After having received and considered the evidence submitted by the parties, the Chancellor entered a Final Judgment and Opinion dated January 12, 2009, and entered on January 13, 2009, granting the divorce on the ground of irreconcilable differences, awarding the sole physical and legal custody of the minor children, Jennie Claire Jenkins and John Michael Jenkins, to Johnny, subject to reasonable visitation as awarded to Kathryn. The Chancellor went on to directed Kathryn to pay Johnny \$326.00 per month in child support, ordered Johnny to maintain health insurance for the children and to pay all uncovered medical costs until Kathryn obtains employment whereon she would be required to pay 40% of the children's uninsured medical bills, and ordered that Kathryn shall be solely responsible for the \$7,312.10 Trustmark Visa credit card debt.

That prior to trial the parties had agreed on the division of all marital assets except the jointly held corporation, KMJ, Inc., which was submitted to the Chancellor for disposition. The debt free corporation and its real estate appraised for a value of \$251,000.00 with Kathryn desiring Johnny to purchase her one-half interest in the corporation and Johnny agreeing to buy her interest after deducting Kathryn's dissipation of marital assets in connection with her gaming activities. After considering the

testimony and documentary evidence concerning corporate value and dissipation, the Chancellor concluded that Kathryn had dissipated marital assets and reduced her equitable interest in KMJ, Inc., awarding her a judgment against Johnny for \$115,000.00 at 6% interest. Instead of allowing Kathryn to recover or otherwise levy execution on the judgment given her, the Chancellor directed that Johnny pay Kathryn \$500.00 per month, until fully paid.

Soon after entry of the Final Judgment and Opinion, Kathryn sought the Chancellor's reconsideration of the award of child custody, sole responsibility for the Trustmark Visa credit card debt and deferment of the \$115,000.00 judgment awarded her resulting in an Order granting Kathryn a vendor's lien against the parties heretofore jointly owned corporation, KMJ, Inc., with all other matters being left as ordered.

While aggrieved by the Chancellor's award of the children's custody to Johnny, this issue is not made a part of the appeal for review by this Court. However, that part of the Chancellor's decision that Kathryn be solely responsible for the Trustmark Visa credit card debt, being a joint debt incurred during the marriage, should be reversed. Additionally, the deferment and prolonging Kathryn's recovery of her judgment for a period in excess of 20 years constitutes error and an abuse of discretion on part of the Chancellor. Accordingly, Kathryn prosecutes this appeal on these limited issues.

#### **STATEMENT OF FACTS**

Johnny and Kathryn were married on January 4, 1991 and from this marriage two children were born, namely, Jennie Claire and John Michael. At the time of trial Jennie Claire was age 17 and John Michael was age 13.

An action for divorce was filed by Johnny on the ground of habitual cruel and inhuman treatment, or, in the alternative, irreconcilable differences. The Complaint was followed by an Answer and Counterclaim for Divorce filed by Kathryn on the ground of habitual cruel and inhuman treatment, habitual drunkenness and constructive desertion for a period of one year.

Prior to trial the parties agreed to withdraw fault grounds and proceed on the ground of irreconcilable differences submitting the contested issues of child custody, child support, medical insurance for the children, value of the assets and real property of KMJ, Inc., the parties co-owned business, division of marital assets, debts and a determination of dissipation of marital assets, if any. (C.P. 53)

Although not at issue, both parties requested custody of the minor children, Johnny was awarded their sole physical and legal custody with Kathryn being ordered to pay child support to Johnny in the amount of \$326.00 a month. (R.E. 8)

The testimony adduced at trial indicated that the Trustmark Visa credit card debt of \$7,312.10 was incurred solely for family expenses and was used by Johnny and Kathryn solely for this purpose. However, contrary to the law and facts, the Chancellor ruled that Kathryn be solely responsible for this joint indebtedness. (T. 144-145, R.E. 14)

During the course of the marriage the parties acquired a business which they incorporated as KMJ, Inc., and did business as Automuff Discount Muffler. (T. 99, R.E. 4) An appraisal of the business was performed by agreement of the parties revealing that the business and its real estate were valued at \$251,000.00. (R.E. 12) Taking into consideration Kathryn's dissipation of marital assets and offsetting the same against her otherwise one half interest in KMJ, Inc., the Chancellor awarded Kathryn a Judgment



against Johnny in the amount of \$115,000.00, to be paid in installments of \$500.00 per month at 6% interest, until fully paid. (R.E. 15) On Motion for Reconsideration seeking relief from the Chancellor's ruling on the credit card debt and deferring payment.

### **SUMMARY OF THE ARGUMENT**

In adjudicating the contested issues submitted to the Chancellor in a divorce on the ground of irreconcilable differences between Kathryn and Johnny, Kathryn submits that the Chancellor committed manifest error and abused her discretion in requiring her to be solely responsible for the Trustmark Visa credit card debt in the amount of \$7,312.10. (R.E. 14) The credit card debt was accumulated by both Johnny and Kathryn in its use and no evidence was produced to the contrary. (T. 144) *Schoffner v. Schoffner*, 909 So.2d 1245 (Miss. Ct. App. 2005), a case where the Chancellor equally divided the credit card debt between the husband and wife on the basis that the "charges were for the benefit of the marriage." The Court of Appeals affirmed the Chancellor's decision holding that "[T]he courts in this 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." *Id.*, at 1251 ¶17. Here, the credit card at issue being marital debt incurred for family purposes, the Chancellor committed error in requiring Kathryn to be the sole responsible party for its payment and that portion of the Chancellor's judgment should be reversed and rendered.

Kathryn further submits that the Chancellor committed manifest error and abuse of discretion by awarding a judgment of \$115,000.00 at 6% interest to Kathryn against Johnny, but deferred payment of said judgment so long as Johnny paid Kathryn \$500.00 per month. (R.E. 15) This judgment represented Kathryn's interest in her and Johnny's

business KMJ, Inc., d/b/a Automuff Discount Mufflers. Kathryn was ordered to convey all of her interest in KMJ, Inc., to Johnny and on Motion for Reconsideration Kathryn was granted a Vender's Lien on the business. (R.E. 17-18)

The record reflects that KMJ, Inc., and its assets were lien free and that since Johnny was awarded the entire business and its income, Kathryn should receive her judgment of \$115,000.00 immediately. (T. 99, R.E. 10) The Chancellor's judgment of deferred payments is manifestly unfair and unjust on the basis that it will take approximately twenty years or more for this judgment to be paid at the rate of \$500.00 per month with interest included in each payment. At the time of trial Kathryn was 49 years of age and Johnny was 57. (R.E. 6) Consequently, Kathryn will be approximately 70 years of age and Johnny 80 when the last payment is made.

In *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994), the Supreme Court of Mississippi instructed the Chancellors of this State to apply the numerous factors stated in the opinion in attempting to equitably divide the marital property. In considering such division Chancellors are to explore ways to "eliminate periodic payments and other potential sources of future frictions between the parties." *Id.*, at 886 ¶14. It is unclear why the Chancellor below determined that payment of Kathryn's judgment should be deferred by the payment of monthly installments when the business and its assets were lien free. Furthermore, no explanation is given by the Chancellor as to why this arrangement was deemed equitable to both parties. It certainly benefits Johnny but is clearly inequitable to Kathryn, especially when *Ferguson*, supra, requires the Chancellor to consider "...needs of the parties for financial security." *Id.*, at 886 ¶14. The record reflects that Kathryn receives a monthly retirement check as her sole means of income in

the amount of \$1,630.00 and Johnny receives the entire income from the business which Kathryn was ordered to convey all of her interest. (R.E. 16)

While concerning themselves with judgments for child support and lump sum alimony, as apposed to a judgment awarded for one half of an ongoing business in the case at bar, the following Mississippi cases have dealt with deferment and circumvention of collection of judgments which, if applied to this case, place the Chancellor in manifest error and abuse of discretion.

In *Abshire v. Abshire*, 459 So.2d 802 (Miss. 1984) it was held that the “chancellor abused his discretion in deferring” payments on a “\$200,000.00 lump sum alimony” wherein the Court added that the “annual installments of \$5,000.00,” to begin five years post judgment, would make Mrs. Abshire “98 years old” when the last installment was paid. In reversing the Chancellor’s deferment of payments, it was determined that this was an “unreasonable length of time.” *Id.*, at 804-805.

In *Walters v. Walters*, 383 So.2d 827 (Miss. 1980) the Chancellor was reversed for “granting a stay of execution” on a judgment for past-due child support. It was determined that the payment of “\$25.00 per month toward” the \$3,350 judgment “would take about 11 ½ years to pay.” *Id.*, at 829.

In the case of *Peeples v. Yarbrough*, 475 So.2d 1154 (Miss. 1985) it was held that “the chancellor abused his discretion in circumventing Mrs. Peeples statutory right to use garnishment” on a judgment awarded her for past due child support.

The portion of the Chancellor’s judgment in the case at bar deferring payment of Kathryn’s judgment of \$115,000.00 over an approximate twenty year payout period

should be reversed and rendered due to its obvious inequity and constitutes manifest error and an abuse of discretion on part of the Chancellor.

### **STANDARD OF REVIEW**

“When reviewing a decision of a chancellor, this Court applies a limited abuse of discretion standard of review. This Court will not disturb the findings of a chancellor ‘unless the chancellor was manifestly wrong, clearly erroneous, or applied the wrong legal standard.’” *Mabus v. Mabus* 890 So.2d 806, 810 (Miss. 2003) (internal citations omitted). “[T]his Court will accept the chancellor’s findings of fact as long as the evidence in the record reasonably supports those findings.” *Norton v. Norton*, 742 So.2d 126, 128 (Miss. 1999) (quoting *In re Estate of Taylor v. Thompson*, 609 So.2d 390, 393 (Miss. 1992)).

### **ARGUMENT**

#### **I. Whether the Chancellor committed error in ordering Kathryn to be solely responsible for credit card debt accumulated during the marriage?**

The first subject of this appeal to be addressed applies to that aspect of the Chancellor’s judgment requiring Kathryn to be solely responsible for the Trustmark Visa credit card debt in the amount of \$7,312.10. (R.E. 14) Kathryn argues that this portion of the judgment constitutes manifest error and is contrary to the law and evidence as applies in this case.

The only evidence adduced at trial indicated that the Trustmark Visa credit card was a personal credit card used for family purposes, as testified to by Kathryn. Kathryn’s testimony on direct examination is as follows:

By Mr. Prewitt:

“Q: With regard to the lawsuit for the credit card that has been introduced as an exhibit in this action, you and Johnny have been sued for \$7,312.10.”

“A. This debt was a personal credit card that Johnny and I had, and it wasn’t that much when I left the house.”

“Q. How would that debt be disposed of?”

“A. It should be split in half, right down the middle. He’s just as responsible and charged on it like I did.”

“Q. All right. That was used for what purpose?”

“A. The credit card. This was a personal credit card. As I recall, he bought me a ring on that credit card.” (T. 144)

\*\*\*

“Q. Are you suggesting that if you are successful in negotiating that that you and Johnny split this debt—”

“A. Yes.”

“Q. – whatever amount it ends up being?”

“A. Yes. It was incurred during our marriage.” (T. 145)

There was no cross examination on the credit card debt, therefore Kathryn’s testimony stating that the debt was incurred on the Trustmark Visa credit card during the course of the marriage and used by her and Johnny stands uncontradicted.

Citing *Bullock v. Bullock*, 699 So.2d 1205, 1212 (Miss. 1997), the Court of Appeals in *Schoffner v. Schoffner*, 909 So.2d 1245 (Miss. Ct. App. 2005) stated:

The courts in this 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.

*Id.*, at 1251 ¶17.

In *Shoffner*, the Court, in affirming the Chancellor's ruling, was called upon to review the decision to equally divide the divorcing parties credit card debt between them. The Court of Appeals in *Shoffner* stated, "There is no evidence in the record, aside from Mrs. Shoffner's assertions, that the credit card debt was not marital debt. Mrs. Shoffner produced no evidence that the debt was Mr. Shoffner's alone. Her contention that the cards were in his name alone is of no help to her argument. ...The chancellor found these charges were for the benefit of the marriage." *Id.*, 1251 ¶17.

Like *Shoffner*, the only evidence produced during trial of the case at bar was that the credit card charges were a joint marital debt and, contrary to the Chancellor's ruling, should have been equally divided.

Finally, the Chancellor gave no legal or factual basis as to the reason Kathryn was required to pay the entire credit card debt on the Trustmark Visa credit card. Accordingly, in light of the facts and law regarding joint marital debt, Kathryn asserts that the Chancellor abused her discretion on this issue.

**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, at 6% interest.**

Kathryn's next point of contention lies in the deferment of her equitable and legal right to receive full payment or execute on the judgment awarded her against Johnny in the amount of \$115,000.00. It is asserted that the Chancellor abused her discretion and committed error when she was awarded a Judgment against Johnny for her one half interest in KMJ, Inc., doing business as Automuff Discount Muffler, in the amount of \$115,000.00 at 6% interest and deferred collection on this Judgment so long as Johnny pay \$500.00 per month. (R.E. 15)

On Motion for Reconsideration, Kathryn argued to the Chancellor that in requiring installment payments of \$500.00 per month, which apparently includes the 6% interest, it would take approximately twenty (20) years for Johnny to payoff the Judgment. (R.E. 17) Kathryn being 49 years of age and Johnny 57 at the entry of the Final Judgment, Kathryn will be 70 years of age and Johnny 80 when the last installment on the \$115,000.00 Judgment is made. The inequities of this arrangement are obvious.

The only reason that can be gleaned from the Chancellor's Opinion for deferment of the judgment awarded Kathryn and paid in installments is that Johnny "wants the business to continue but is adamant that the business is unable to buy out Kathryn's share." (R.E. 14) Johnny's blanket and factually unsupport assertion that he cannot afford to pay Kathryn for her interest in KMJ, Inc., is insufficient to deny her the rights afforded her by law and forms no basis for the Chancellor to defer payments over an unreasonable length of time. To the contrary, the evidence clearly reveals that KMJ, Inc., its assets, including land, are lien free, thereby allowing Johnny to secure a loan against the business and pay Kathryn in full for her judgment as awarded. (T. 99, R.E. 10) To do otherwise would allow Johnny to have the full benefits of the business and Kathryn to suffer the dangers of its failure.

*Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994) set forth numerous factors to be considered in attempting to equitably divide the marital property. With regard to this appeal, factors 6 and 7 of *Ferguson*, supra, apply for the purposes of argument. Factor 6 states "[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;" and, factor 7 states "[T]he needs of the parties for financial security

with due regard to the combination of assets, income and earning capacity..." *Id.*, at 886 ¶14 (Emphasis added).

Sub judice, periodic payments made by Johnny to Kathryn could be eliminated eliminating future friction by requiring Johnny to take out a loan against the debt free business and its assets and, in so doing remove Kathryn as a lien holder. The Chancellor's Opinion fails to address these factors or take them into consideration in deciding this issue.

Moreover, Kathryn is retired earning \$1,630.00 per month and payment of the judgment awarded her in a lump sum would provide her with some financial security. This is especially true since Kathryn pays Johnny \$326.00 a month in child support, thus reducing the \$500.00 a month Johnny pays Kathryn for her judgment, thus seriously affecting her financial security. (R.E. 16)

As persuasive argument, the Supreme Court of Mississippi reversed and rendered the Chancellor in *Abshire v. Abshire*, 459 So.2d 802 (Miss. 1984) for abuse of discretion by deferring payments on a judgment for lump sum alimony over a lengthy period of time, stating:

The only issue presented on this appeal is whether the chancellor abused his discretion in deferring the payment of the \$200,000.00 lump sum alimony award for a period of five years and ordering payment in annual installments of \$5,000.00 without interest.

Mrs. Abshire argues that in view of her age (53 at time of trial) and health, this payment scheme was manifest error. She submits that, unless Mr. Abshire predeceases her, she will not receive the full amount of the lump sum alimony award until she is 98 years old.

The rationale behind the payment scheme was to prevent oppressive liquidation of Abshire's assets.



\*\*\*

...We hold the chancellor erred by deferring payment of the lump sum award for an unreasonable length of time.

*Id.*, at 804-805.

In *Walters v. Walters*, 383 So.2d 827 (Miss. 1980), the Supreme Court of Mississippi reversed and rendered that part of the Chancellor's decision awarding a judgment for \$3,350.00 for past due child support and deferring payment over an extended period of time. In so doing, the Walters' Court stated:

The chancellor was in error in granting a stay of execution on the judgment for \$3,350 past-due child support for "so long as he pays unto the said Betty Sue Walters Young the sum of \$25.00 per month toward payment of such judgment." At this rate of payment it would take about 11 ½ years to pay out the judgment which would extend beyond the time that Dewayne Walters reached his majority.

*Id.*, at 829.

Again dealing with a judgment granted for past due child support, the Supreme Court stated in *Peeples v. Yarbrough*, 475 So.2d 1154 (Miss. 1985):

The chancellor thought \$200 was the amount Mr. Yarbrough could reasonably afford to pay and that requiring him to pay more would only make the situation worse than it already was.

However, the question of law in this situation should be whether the chancellor abused his discretion in circumventing Mrs. Peeples statutory right to use garnishment. Under the statutes governing practice in the chancery courts, Miss. Code Ann. §11-5-81, (1972) provides:

Whenever the court shall render an order, judgment, or decree for the payment of money against any executor, administrator, or guardian, or any other party litigant therein, a compliance with such order, judgment or decree may be enforced by process of fieri facias or garnishment.

\*\*\*

The order sub judice does not directly prohibit Mrs. Peebles from using garnishment, but its effect works indirectly to accomplish a restriction on her legal right to do so.

This Court has recently reversed the imposition of a stay of execution upon a legally obtained judgment in *Brown v. Gillespie*, supra. In *Walters v. Walters*, 383 So.2d 827, 829 (Miss. 1980), this Court recognized a similar prohibition to be inappropriate stating that:

[T]he appellant is being denied the right to attempt to collect the judgment through the normal collection processes, that is, writ of garnishment or writ of execution, or even the right to negotiate a mutually satisfactory plan of payment with the appellee.

Therefore, this Court reverses as manifest error that portion of the order relating to the appellant's right to pursue enforcement of her judgment and this Court renders the question by voiding that provision.

*Id.*, at 1159

While it is true that the above cited cases concern child support and alimony judgments, the rationale applied by the Court in these cases stress that a lengthy payout of a judgment constitutes manifest error and collection of a judgment may not be stayed or prolonged by a payment plan circumventing the right of garnishment or execution. The Chancellor's judgment rendered below not only defers payment of Kathryn's judgment over a period of approximately twenty years, but also circumvents her right of execution for collection.

### **CONCLUSION**

Kathryn seeks to reverse and render that portion of the Final Judgment that requires her to be solely responsible for the Trustmark Visa credit card debt. According to the facts, this is a joint marital debt and should be treated as such requiring Johnny and

Kathryn to be equally responsible for its payment according to well established precedent.

Kathryn likewise desires that this Court reverse and rendered that portion of the Final Judgment deferring payment of the \$115,000.00 judgment awarded her against Johnny and require Johnny to either pay the judgment in full or permit levy of execution for its collection.

Respectfully Submitted,  
KATHRYN MARTELLO JENKINS

BY: 

MARK W. PREWITT  
Attorney for Appellant

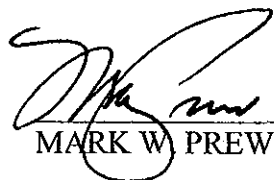
**CERTIFICATE OF SERVICE**

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 Brief of Appellant to the following:

John W. Christopher, Esq.  
P.O. Box 982  
Ridgeland, MS 39158

Honorable Cynthia Lee Brewer  
PO Box 404  
Canton, MS 39046

DATED this the 24<sup>th</sup> day of May, 2010.

  
MARK W. PREWITT