

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

GERARD VAN SULLIVAN

APPELLANT

VS.

NO. 2009-CP-01657

NATASHA DONIELLE SULLIVAN

APPELLEE

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BRIEF OF THE APPELLANT

GERARD VAN SULLIVAN

**APPEAL FROM
THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI**

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. Theses 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. Honorable Denise Owens, Chancellor for the Fifth Chancery Court District;
2. Brad A. Oberhausen, Esq, Attorney for Natasha Donielle Sullivan;
3. Natasha Donielle Sullivan, Appellee;
4. Gerard Van Sullivan, Appellant.

Respectfully submitted,



Gerard Van Sullivan, Appellant
Pro Se

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STATUTES

None.

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BRIEF OF THE APPELLANT

STATEMENT OF ISSUES

ISSUE 1: The Chancellor erred in not granting a continuance as manifest injustice occurred which prejudiced the Appellant.

ISSUE 2: The Chancellor's division of marital property was manifestly wrong, clearly erroneous and clearly not equitable.

ISSUE 3: The Chancellor erred in awarding attorney's fees.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS

On or about April 20, 2009, Natasha Donielle Sullivan filed her Complaint for Divorce against Gerard Van Sullivan seeking a divorce on the grounds of habitual drunkenness, cruel and inhumane treatment, and adultery. On or about May 27, 2009, Gerard Van Sullivan filed his Answer to the Complaint for Divorce denying the allegations. On or about June 9, 2009 a Temporary Order was entered. On or about August 14, 2009, the Appellant's attorney filed a motion to withdraw as counsel. On or about August 19, 2009, the Court via a letter advised that the Appellant's attorney could not withdraw because the matter was set for trial. However, in an Order dated August 25, 2009, the Court did allow the Appellant's attorney to withdraw but kept the trial setting for

September 14, 2009, per agreement of the attorneys, but without the agreement of the Appellant and without his being present. The Appellant requested a continuance to retain another attorney but the Court denied that request. [Page 2-3 of transcript]

II. STATEMENT OF FACTS

Gerard's attorney withdrew some 21 days before trial and the Court refused to continue this case to allow him to get an attorney. As such, the attorney for Natasha Sullivan attempted to and did in fact enter evidence which would have been otherwise inadmissible had opposing counsel been present at the trial. Furthermore, Natasha Sullivan, (hereinafter Natasha) accused Gerard of adultery among other things, but did not present sufficient proof to establish adultery by clear and convincing evidence. Also, the Court did not make an equitable division of marital property. Finally, the Court abused its discretion in awarding attorney's fees.

ARGUMENT

ISSUE 1.: The Chancellor erred in not granting a continuance as manifest injustice occurred which prejudiced the Appellant.

Gerard was forced to represent himself pro se at the trial because his attorney withdrew only three weeks before trial. The Court initially refused to allow the attorney to withdraw because of the proximity of the trial. However, for no apparent reason, changed her mind and allowed him to withdraw, but kept the trial date set. This case was only five months old from the date the complaint was filed to the date of the trial. Gerard was not even afforded thirty (30) days in which to consult with and retain new counsel for trial. This refusal severely prejudiced him at the trial. Although the Judge has the discretion to grant or deny continuances, she abused her discretion in failing to grant a continuance. The former attorney should not have agreed to keep the trial date when he executed the order to withdraw as he was setting in motion the chain of events which led the

Appellant to being forced to represent himself. The Mississippi Supreme Court has said, "The grant or denial of a continuance is within the discretion of the trial court. The only time this Court will overturn the denial for a continuance is when manifest injustice has occurred. Prejudice must result from the denial in order to have that decision reversed." Henderson v. Henderson, 952 So.2d 273 (Miss. App.2006). The manifest injustice in this matter is the entirely one-sided award of practically all marital property begin awarded to Natasha. If Gerard had been afforded a short continuance in which to retain counsel for trial, objections to inadmissible evidence such as hearsay would have been made. Also, an attorney could have and would have been able to better question witnesses and expose personal prejudices, and/or inconsistencies in their testimony. A short continuance would not have prejudiced Natasha at all as this case was only a couple of months old and no other prior continuances had been sought or granted. Gerard even advised the Court that he was willing to agree to a divorce but not the property settlement proposal by Natasha [Transcript page 4] However, Natasha's attorney made it sound like this case was being dragged out by stating that they would not agree because "We've been down that road". It is obvious that Natasha's attorney wanted to have no other attorney present when this case was tried so that his client could get everything she wanted. There was manifest injustice in how this matter was handled and it resulted in extreme prejudice to Gerard. By his former attorney being allowed to withdraw, he had no authority to agree to keep the previous trial setting. As such, this case should be reversed and remanded for further proceedings.

ISSUE 2: The Chancellor's division of marital property was manifestly wrong, clearly erroneous and clearly not equitable.

In the Judgment of Divorce entered on September 15, 2009, the Court awarded Natasha the marital home located at 3743 Kimbell Road, Terry Mississippi, along with all household furnishings,

presently in her possession which was essentially everything. The home had considerable equity, but was not considered nor divided by the court. Natasha was also awarded a 2006 Dodge Charger, a 2000 Ford F250 truck (which was Gerard's "work truck") and a 1989 Corvette, all of which which little or no debt was owed. Gerard was awarded a 1992 Corvette that was a gift from his father, which the court stated was not marital property. [Transcript page 68] The Final Judgment of Divorce did not award Gerard any other property from the marriage. At trial when Gerard asked about this the household furnishing, the Court stated that she understood that Gerard had "a dirt bike and a big screen TV". By this statement, the trial court confirmed that out of this six (6) year marriage, Natasha was awarded the marital dwelling and all furnishings, 2006 Dodge Charger, a 2000 Ford F250 truck (which was Gerard's "work truck") and a 1992 Corvette, while Gerard was awarded a dirt bike, and a big screen TV. Other than the home which appraised for \$170,000.00, the Court considered no evidence as to the value of these items. Nevertheless, it is obvious that a dirt bike and big screen TV would not be valued anywhere near the property awarded to Natasha, especially when the 1992 Corvette awarded to Gerard was not even marital property.

The house was appraised at \$170,000.00. Natasha testified that she had a potential buyer at \$150,000.00 and wanted to sale. It is to be noted that the marital home in question belonged to the Gerard's parents who had sold it to Natasha just prior to her marriage to Gerard. Then after the marriage, the parties refinance and/or made equity loans on the home further co-mingling this asset. The written Final Judgment did not award Gerard any of the marital property or the equity therein as the 1992 Corvette was not marital property. Only in the oral opinion from the bench did the trial court even reference the dirt bike and big screen TV. This is not fair or equitable under Mississippi law. The Court erred in not considering a "fair" division of marital property based on the factors

in Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994). Furthermore, other than the appraisal on the home there was no evidence either by testimony of the parties, expert witnesses, or other documentation to demonstrate the value of the household furnishings, vehicles or other marital property. Regardless of the values however, the Court awarded practically everything to Natasha. Furthermore, the Court erred in not making on the record findings as to other property listed out in the temporary order in which each party was granted the *temporary use*. One assumes that the Court intended each party to keep what was in their possession other than the items listed in the Final Judgment, but it is not stated that way in the Judgment. Further, the Final Judgment did not accurately reflect the Court's ruling as to the dirt bike and big screen TV referred to in the ruling from the bench. No where in the written Final Judgment of Divorce is Gerard awarded any marital property.

The Final Judgment should be set aside because it is blatantly one-sided. In addition to not being awarded any equity out of the marital dwelling, Gerard was ordered to pay one-half (½) of the appraisal of the property, while not receiving any benefit from said appraisal. Also, the record indicates that Natasha prevented Gerard from cleaning up the property and/or removing old vehicles and/or scrap metal, but then *paid* to have it removed. Again the Court ordered that Gerard pay one-half (½) of the clean up of the property even though he was not receiving any equity from any supposed sale. Requiring Gerard to pay one-half of the appraisal and clean up for property to which he was not to receive any equity was improper.

The Court further erred in its finds regarding the sale of the home. The Court stated, "I would say that the Court would grant her the right to the use, possession and ownership of the property if it is going to be sold as indicated. If not, then the property should then be assessed and

the parties split one-half any equity in the property. So I think what's going to have to happen is it's going to be sold for a loss in that sense, and there will be no equity, but if by whatever reason Mrs. Sullivan determines that she wants to keep the marital residence then we will have to reassess that division of equity." First and foremost if the court thought that the property should have been sold then it should have ordered a judicial sale. The Court assumed facts that were not properly before it when Natasha testified that she wanted to sale the house and had a potential purchaser at \$20,000.00 less than the appraised value. No evidence of an intent or option to purchase was presented. The Court on page 66-67 of the transcript considered facts not in the record when it stated that "in this economic market it is difficult to sell property for the amount that it is appraised."

The Chancellor took no testimony about current economic factors as it relates to the sale of real estate in Terry Mississippi. Further, there is no evidence that the appraisal was made before or after the "clean-up" of the property, begging the question that if it was after, then what was the appraised value. It was improper for the court to supposedly take "judicial notice" that economic times are hard and you might not be able to sale for the appraised value. However, because there was no evidence reflecting what, if any effect this had on property values in Terry, Mississippi her assumptions were not based on the evidence and therefore it is reversible error.

Furthermore, the Chancellor improperly considered the possibility of future events when rendering her decision. The Court should be duty bound to rule on the facts presented at the time of trial. To base the opinion on what may or may not occur in the future is reckless at best, and open to abuse by the Courts. For example, in a child custody matter, it would be improper for the Court to consider testimony that one parent intends on moving to a better neighborhood in six months. The Court should have provided that if and when the home is sold, Gerard should receive a set percent

of any equity from the sale.

When looking at the division of property, or the lack thereof, the Court erred in not properly valuing assets, and/or failed to make any equitable division of the property. The Final Judgment only awards Gerard a 1992 Corvette which was determined not to be marital property. (If it had been considered marital property it is apparent that Natasha would have been awarded that also). Because of the complete and utter failure to equitably divide the property and because the Court failed to address this one sided ruling using the Ferguson factors, the Final Judgment of Divorce as it relates to the property settlement should be reversed and remanded.

ISSUE 3: The Chancellor erred in awarding attorney's fees.

The Chancellor erred in awarding attorney's fees because she did not apply the proper standard. The Mississippi Supreme Court stated in McKee v. McKee, 418 So.2d 764 (Miss. 1982), that,

The fee depends on consideration of, in addition to the relative financial ability of the parties, the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, as well as the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case.

While Gerard testified that he was unemployed and unable to pay, the real error in awarding fees lies in the fact that Natasha did not testify that she had paid any fees, or her **inability to pay** her attorney. Further, Natasha's attorney improperly entered his fees. The only mention in the record of attorney's fees by Natasha is found on pages 30 and 31 of the record and on page 69 where the court ordered \$2,500.00 in attorney's fees. **There is no mention in the record of Natasha's inability to pay her own attorney.** In Norton v. Norton, 742 So.2d 126 (Miss. 1999) the Court

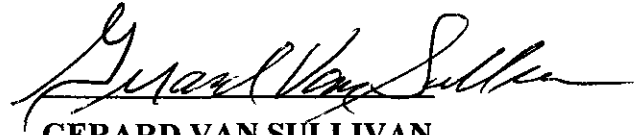
held, **“If the record is insufficient to show an inability by the requesting party to pay attorney's fees, it would be an abuse of discretion to award them.”** This record is void of that. In fact, Natasha was employed and was awarded practically the entire marital estate, thereby negating any possibility of “inability to pay”. As such, the award of attorney’s fees was an abuse of discretion and reversible error.

CONCLUSION

The Chancellor’s refusal to grant a continuance prejudiced Gerard and resulted in manifest injustice. Further, the one sided award of practically all martial property to Natasha demonstrates this manifest injustice. The Chancellor did not equitably divide the martial property in accordance with Mississippi law. The Chancellor abused her discretion in awarding Natasha the martial home and all furnishings without taking into account the full value, and/or presuming that the home could only be sold for less than the appraised value due to economic hard times. Because there was no testimony from the appraiser, it is entirely possible that he/she already took into account the “hard economic times” in his “comparable assessments” to reduce the appraised value. This division of marital property by the Chancery Court is so one sided as to shock the conscious. Further, it was abuse of discretion for the Court to order that Gerard pay one-half the appraisal fee, and clean up for the property but then not receive any equity from the sale.

Finally, the trial court abused its discretion by awarding attorney’s fees because there was no reference in the record which indicated that Natasha was unable to pay her own fees. Therefore the decision of the Chancery Court of Hinds County should be reversed.

Respectfully submitted,



GERARD VAN SULLIVAN

PRO SE

CERTIFICATE OF SERVICE

I do hereby certify that I have this day, via U.S. Postal Service, postage prepaid, served a copy of the Appellant's Brief to the following:

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Chancellor for the Fifth Chancery Court District
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Honorable Kathy Gillis,
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This the 20 day of January, 2010.



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