IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILBUR HAROLD WILLIAMSON, SR. — APPELLANT

VS. — NO. 2010-CA-00400

MARY JEAN (WADDELL) WILLIAMSON — APPELLEE

BRIEF OF APPELLEE MARY JEAN (WADDELL) WILLIAMSON

APPEAL FROM THE CHANCERY COURT
OF TATE COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

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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. Wilbur Harold Williamson, Sr., Appellant.
2. Mary Jean (Waddell) Williamson, Appellee.
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5. Bobby Taylor Vance, Attorney at Law, Attorney for Wilbur Harold Williamson, Sr., Post Office Box 307, Batesville, MS 38606-0307.
6. John L. Bailey, Attorney at Law, Attorney for Wilbur Harold Williamson, Sr., Post Office Drawer 568, Batesville, MS 38606-0568.
7. Honorable Vicki Cobb, Tate County Chancery Court, Post Office Box 1104, Batesville, MS 38606.
8. Honorable Percy Lynchard, Tate County Chancery Court, 2535 Highway 51 South, Hernando, Mississippi 38632.

SO CERTIFIED this the 24th day of March, 2011.

Respectfully submitted,

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2. Whether the Chancellor considered an incorrect legal standard, was clearly erroneous, committed manifest error or abused her discretion in awarding periodic alimony to Mary Jean (Waddell) Williamson.

3. Whether the Chancellor considered an incorrect legal standard, was clearly erroneous, committed manifest error or abused her discretion in finding Wilbur Harold Williamson, Sr. in contempt of court and ordering the payment of attorney's fees in connection with that finding.

II. STATEMENT OF THE CASE

A. Nature of the Case and Disposition Below

Mary Jean (Waddell) Williamson (hereinafter "Mary") filed an Original Bill of Complaint for Divorce, Etc. and Temporary Relief in the Chancery Court of Tate County, Mississippi on February 4, 2009. (Record at 11-16 (hereinafter R. 11-16); Appellant's Record Excerpts at Tab 2 (hereinafter WHWRE Tab 2)). Mary sought a divorce on the grounds of habitual cruel and inhuman treatment or, in the alternative, irreconcilable differences. (R. 11-16; WHWRE Tab 2). Wilbur Harold Williamson, Sr. (hereinafter "Will) filed an Answer to Complaint for Divorce and Counter-Claim for Divorce and Other Relief on March 10, 2009. (R. 17-21; WHWRE Tab 3). Will denied the allegations of Mary's Original Bill and sought a divorce on the grounds of habitual cruel and inhuman treatment or, in the alternative, irreconcilable differences. (R. 17-21; WHWRE Tab 3). A Temporary Agreed Order was entered on April 7, 2009, pursuant to which both parties were to remain in the marital home and to continue to "pay the household bills as they have done in the past." (R. 29-31; WHWRE Tab 15).[1]

On September 28, 2009, Mary was forced to file a Motion for Order Compelling Discovery to obtain responses to discovery served upon Will on March 31, 2009. (R. 41-44). On November 2, 2009, the Chancellor entered an Order on Plaintiff's Motion to Compel that required Will to respond to all discovery requests within 16 days from the date of the Order. (R. 53; WHWRE Tab 5). That Order specifically reserved the "issue of attorney fees" to the trial on the merits of the case. On December 16, 2009, Mary filed a Petition for Contempt on the grounds that Will was not in compliance with the Temporary Agreed Order. (R. 55-58;

[1] On September 29, 2009, Will filed a Motion to Modify Temporary Order and for Trial Setting (R. 46-47); however, there is no evidence in the Record that Will ever advanced the Motion to Modify the Temporary Order. Certainly there is no ruling from the Court; therefore, the Temporary Agreed Order remained in effect throughout the pendency of the divorce action.

WHWRE Tab 6). The Chancellor heard this Petition in conjunction with the trial on the merits of the Complaint and Counter-Complaint for Divorce on January 13, 2010. (Trial Transcript at pp. 150-54 (hereinafter T. 150-54).

Prior to commencement of the trial, the parties filed an Agreed Order Withdrawing Contest and a Stipulation Pursuant to M.C.A. Section 93-5-2, which submitted the following issues for the Court's determination: "[d]ivision of marital assets; [t]he award of attorney's fees, if any; the award of alimony, if any; and [t]he issue of contempt, if any." (R. 63 and 60-62; WHWRE Tab 7; Mary Jean (Waddell) Williamson Record Excerpts Tab 1 (hereinafter MJWWRE Tab 1)). On the record at the beginning of the January 13, 2010, trial, the parties stipulated that they had agreed to a division of their personal property.[2] (T. 4-13). Thereafter, a trial on the merits ensured, and the Chancellor, at the conclusion of testimony from both parties, announced an oral ruling. (T. 150-78; WHWRE Tab 20). The oral ruling was memorialized in the Decree of Divorce (hereinafter "Decree") entered on January 27, 2010 nunc pro tunc to January 13, 2010. (R. 86-91; WHWRE Tab 9). Both parties filed Motions for Reconsideration and Other Relief, which were denied by the Chancellor. (R. 93-95, 97-99, 102 and 110; WHWRE Tab 10, 11, and 12). On March 5, 2010, Will thereafter filed a Notice of Appeal from the Decree and the Order Denying His Motion for Reconsideration and Other Relief. (R. 103-04; MJWWRE Tab 2).[3]

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[2] The parties initially disputed the division of certain audio-visual equipment but that matter was resolved by the parties after the beginning of testimony. (T. 82, 154).

[3] On April 6, 2010, one month after Will filed his Notice of Appeal, Mary filed a Petition for Contempt based upon Will's failure to abide by the terms of the Decree. (R. 120-23; WHWRE Tab 14). Will filed his Response to Petition for Contempt on April 22, 2010. (R. 128-29; WHWRE Tab 16). A hearing was held on this matter, and an Order on Petition for Contempt, holding Will in contempt and awarding Mary attorney's fees, was filed July 19, 2010. (R. 142-43; WHWRE Tab 17). Although the pleadings and transcript related to this finding of contempt are included in the record before the Court, Will did not file a Notice of Appeal from the Order on Petition for Contempt. Therefore, that Order is not before the Court at this time, in spite of Will's inclusion of the matter in his brief on appeal. See Miss. R. App. P. 3(c), 4(a) and 4(d).

B. Statement of Facts Relevant to Appeal

Because this appeal involves questions that require fact-specific analysis, many of the facts necessary for consideration are contained within the Argument section below and will not be restated here. However, in order to provide the Court with the general background of the parties, Mary offers the following brief statement of facts related to this matter.

The parties were married on August 5, 1967. (R. 11; WHWRE Tab 2). There were two children born of the marriage: a son in 1970, and a daughter in 1977. (R. 12; WHWRE Tab 2). At the time the Original Bill of Complaint for Divorce, Etc. and Temporary Relief was filed by Mary, the parties' children were both adults and the parties were 59 (Mary) and 61 (Will) years old, having been married for over 41 years. (WHWRE Tab 18; T. 127). At the time of trial, Mary made approximately $28,000 per year working for a bank, and Will made approximately $58,000 per year as an insurance salesman and from a monthly pension payment.[4] (T.20, 61; WHWRE 18, 19).

The parties separated on or about December 30, 2008, (R. 12; WHWRE Tab 2); however, both parties continued to reside in the marital home along with their two adult children, their son-in-law and two grandchildren. (T. 76). The testimony at trial revealed that the parties had few marital assets other than the marital home (with its accompanying debt) and various retirement accounts. The division of these assets and the award of periodic alimony to Mary gave rise to this appeal.

[4] Will argues that the Chancellor should have considered the approximately $300 per month that Mary is scheduled to receive when she reaches age 65. (B. 19). However, that amount is not current income to Mary and should not be considered in assessing her current financial situation. (T. 61).

III. SUMMARY OF THE ARGUMENT

The Chancellor's Decree should be affirmed in all respects because Will has failed to demonstrate that any of the decisions about which he complains were the result of the application of an improper legal standard, were manifest error, clearly erroneous or an abuse of discretion. The Decree is supported by the testimony and evidence presented at the trial of this matter and should not be disturbed on appeal.

The Chancellor applied the correct legal standard to both her division of the marital estate and the award of periodic alimony. See Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994), Armstrong v. Armstrong, 618 So.2d 1278 (Miss. 1993). Moreover, the Chancellor's findings of fact are support by evidence presented at trial; therefore, they are not clearly erroneous, manifestly in error or an abuse of discretion and should be affirmed on appeal. Kennedy v. Kennedy, 650 So.2d 1362 (Miss. 1995).

The question of whether the Chancellor correctly found Will in contempt of the Decree and awarded Mary her attorney's fees by Order filed July 19, 2010 is not properly before this Court on this appeal, because it was not identified in the Notice of Appeal. See, e.g., In the Matter of the Appointment of a Conservator of Gladys Lucille Eldridge, 813 So.2d 753, 755 (Miss. Ct. App. 2001). To the extent Will complains about the finding of contempt and corresponding award of attorney's fees that was addressed during the trial of this matter, the Chancellor properly concluded that Will was in contempt of the Temporary Agreed Order and acted within her discretion in awarding such fees. Varner v. Varner, 666 So.2d 493, 498 (Miss. 1995). Her findings should not be overruled.

For all of these reasons, and as set forth more fully below, Will has failed to bear his burden of demonstrating that the Chancellor's opinion and Decree should be reversed.

IV. STANDARD OF REVIEW

"This Court will not overturn the decision of a chancellor in domestic cases when those findings are supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, or applied an erroneous legal standard." Kennedy, 650 So.2d at 1366; see also Brady v. Brady, 14 So. 3d 823, 826 (Miss. Ct. App. 2009), Graham v. Graham, 767 So. 2d 277, 280 (Miss. Ct. App. 2000).

Therefore, the Appellant in this matter has a heavy burden on appeal to demonstrate that the Chancellor applied an erroneous legal standard, committed manifest error or otherwise abused her discretion in dividing the marital estate, awarding periodic alimony or holding the appellant in contempt and awarding attorney's fees. For the reasons contained in this brief, as supported by the record from the trial court, he has failed to satisfy that burden, and the Chancellor's ruling should be affirmed in all respects.

V. ARGUMENT

A. The Chancellor Did Not Commit Reversible Error in Dividing the Marital Estate.

The Chancellor found that the parties had agreed to the division of the marital property with the exception of their automobiles, 401k accounts and the marital home. (T.155-56, WHWRE Tab 20). This finding is supported by the evidence presented at trial. In fact, Will testified that there were no assets other than the 401k accounts, the house and the automobiles. (T. 44-45).

The Chancellor first noted that each party would maintain ownership and possession of his/her automobile and be responsible for any debts associated with that automobile.[5] (T. 155). Then, in determining how the remaining assets – the 401k accounts and the marital home – should be divided, the Chancellor made verbal findings of fact in which she announced that she was dividing the marital estate 50-50. (T. 158-61). In reaching that conclusion, the Chancellor found that the parties had contributed equally to the accumulation of the assets (T. 158, 160-61), that neither party had "made any more of a dissipation of the assets than the other" party (T. 159), and that neither party had any significant non-marital assets (T. 159). These findings are consistent with the requirements of Ferguson, which sets forth the factors to be considered in the division of marital assets. Therefore, the Chancellor did not apply an incorrect legal standard in

[5] The Court in its ruling from the bench noted that there had been no proof regarding the value of the automobiles or any debts associated with the automobiles. The record bears this out, as there is no testimony or related to the value of either vehicle, although the parties did testify regarding the existence of the vehicles and mentioned loan payments on the vehicles. The only evidence of the value of the vehicles is from the parties' 8.05 disclosures. Will indicated that his vehicle was valued at $6,500 and had a loan in that same amount. (WHWRE Tab 19). Will's 8.05 disclosure does not mention Mary's automobile. (WHWRE Tab 19). Mary's 8.05 disclosure indicates that her vehicle is worth approximately $8,000 and that there is a loan against the vehicle for approximately $7,000. (WHWRE Tab 18). Mary's 8.05 disclosure does not contain any information about Will's car other than the make and model. (WHWRE Tab 18). When considering that no other evidence regarding the value of the vehicles was introduced, it is clear that the Chancellor did not abuse her discretion in awarding each party his/her own car, as neither car had significant equity and the values were substantially similar.

reaching her decision. See, e.g., Sproles v. Sproles, 782 So.2d 742, 748 (Miss. 2001) (holding that not all Ferguson factors need to be addressed in every case).

Likewise, the Chancellor was not clearly erroneous nor did she commit manifest error or abuse her discretion in her division of the marital property. The Chancellor took the evidence of the value of the 401k accounts as presented at trial in calculating the equitable division. (T. 156-58). It was not an abuse of discretion to use this information, particularly where no other evidence was available to the Court. Using the information found in the record, the Chancellor ordered that Will transfer a portion of his 401k account to Mary in order to accomplish an equitable division of this portion of the marital estate. (T. 162; R. 89; WHWRE Tab 9). The Chancellor further ordered that the marital home be sold and the equity equally divided between the parties. (T. 164-68). These provisions resulted in the equitable division of the marital assets and the Chancellor's ruling should not be disturbed.

On appeal, Will complains that the Chancellor did not consider the value of the personal property divided by the parties pursuant to their agreement. According to the 8.05 disclosures provided by the parties, the total value of the personal property that was divided was between $2,000 (Will's 8.05) and $4,400 (Mary's 8.05). (WHWRE Tab 18, 19). The parties did not produce any evidence regarding the value of the specific items each received; therefore, it was not manifest error for the Chancellor to consider the division to be equitable. See Bell, Deborah H., Bell on Mississippi Family Law (2005) § 6.07[2] (noting that "[a]n estimate of value may be appropriate if the parties fail to present evidence of value"); see also Wilson v. Wilson, 811 So. 2d 342, 346 (Miss. Ct. App. 2001) (stating that items of negligible value need not have actual value assigned to them).

Will also asserts on appeal that incorrect values were assigned to the 401k accounts; however, he presented no evidence and raised no objection to this issue at the trial. The values

used were those presented to the Chancellor for consideration. The date of the valuations were reasonably related to the filing of the divorce complaint and the trial and therefore their use was not an abuse of discretion and should not be overturned – particularly where, as here, the appellant has presented no evidence of the value he contends should have been utilized. See, e.g., Hensarling v. Hensarling, 824 So.2d 583, 591 (Miss. 2002) (holding that date of valuation is matter within Chancellor's discretion).

Will also complains that he should have been allowed to pay the amounts he was ordered to pay pursuant to the Temporary Order – and apparently the attorney's fees he was ordered to pay for his failure to comply with that order – from his 401k accounts before those accounts were divided. The effect of such an interpretation would be to penalize Mary for paying the amounts she was ordered to pay under the Temporary Agreed Order from other funds while allowing Will to deplete his 401k account and thereby reduce the amount available to Mary. Additionally, such an application of payments would have the practical effect of charging Mary with a portion of the payments and penalties assessed to Will. This outcome is not equitable – Will failed to comply with the Chancellor's orders and he should be held responsible for that failure. This allegation does not demonstrate reversible error on the part of the Chancellor.

The findings and ruling of the Chancellor are supported by ample evidence produced at trial, and Will on appeal has produced no evidence of manifest error or abuse of discretion in connection with the division of the marital estate. Therefore, the ruling of the Chancellor should be affirmed, as the division was equitable and within the discretion of the court.

B. The Chancellor Did Not Commit Reversible Error in Awarding Mary Alimony.

After dividing the marital estate, the Chancellor turned to the question of alimony. (T.168). The Chancellor specifically found that "what I'm supposed to do is divide up your property. And, then, if there is still an[] inequity, then I can use alimony to even that out. . . I

think this is a case that alimony is going to be appropriate." (T. 169-70). This is the proper statement of the Chancellor's role in determining whether alimony should be awarded. See, e.g., Johnson v. Johnson, 650 So.2d 1281, 1287 (Miss. 1994). The Chancellor then went on to consider the factors set forth in Armstrong and awarded Mary $800 per month in periodic alimony. Initially this amount was to be allocated $594 to the payment of the marital home mortgage (1/2 of the monthly payment) and $200 in alimony payable to Mary. (T. 175.76). After the sale of the marital home, the amount would be $800 per month in periodic alimony. (T.175.76).

The Chancellor specifically discussed the following factors in her ruling determining the amount of the alimony award: (1) the health and earning capacity of the parties, (2) the needs of the party as evidenced by financial statements and expenses, (3) the obligations and assets of each party, (4) the length of the marriage, (5) the absence of minor children in the home for which the parties were responsible, (6) the age of the parties, (7) the standard of living of the parties (during the marriage and at the time of the trial), (8) the tax consequences of the award, (9) the fault or misconduct of the parties during the marriage, and (10) the wasteful dissipation of assets by a party. (T. 168-74). Thus, the Chancellor correctly applied the Armstrong factors, and her decision cannot be reversed based upon the application of an incorrect legal standard.

After considering the Armstrong factors, the Chancellor determined that the disparity in the parties' financial conditions should be corrected by an award of permanent alimony. Contrary to Will's assertions on appeal, the Chancellor did not err in seeking to equalize the parties' financial disparity. See, Bell, supra at § 9.06[3][a] (noting that in marriages over twenty years alimony awards have been upheld in amounts up to 100% of the financial disparity between the parties). In the present case, Will's income far exceeded Mary's income, (T. 20, 61,

WHWRE Tab 18, 19). Furthermore, because this was a marriage of over 40 years, an award of permanent alimony was appropriate. See, Bell, supra, §9.06.

The Chancellor properly considered the Armstrong factors in determining that Mary was entitled to an award of permanent alimony. The evidence supports the Chancellor's findings that there was a financial disparity between the parties that existed after the division of the marital estate; therefore, there is no basis for the reversal of the award of periodic alimony.

C. The Chancellor's Finding of Contempt Related to the Temporary Agreed Order and the Award of Attorney's Fees Was Not Error.

1. The Chancellor correctly found Will in contempt of the Temporary Agreed Order and acted within her discretion in awarding attorney's fees.

The testimony produced at trial clearly supported the Chancellor's finding that Will was in contempt of the Temporary Agreed Order. (T. 64-67, 27-31). In fact, Will testifies as follows:

> Q (by Mary's counsel): So, you are in contempt – You admit that you are in contempt of this Court's Orders and did not pay what you were ordered to pay?
>
> A (by Will): I didn't – That's correct.

(T. 31, lines 22-25). This testimony alone supports the finding of contempt.[6] (R. 86-87; WHWRE Tab 9). Once the contempt was established, the Chancellor acted within her discretion in awarding attorney's fees. Varner, 666 So.2d at 498.

Will argues that the Chancellor erred in failing to consider the factors enumerated in McKee v. McKee, 418 So.2d 764 (Miss. 1982), before awarding attorney's fees in connection with the finding of contempt related to the Temporary Agreed Order. (B. 23-26). However, in contempt actions, the McKee factors are not required, as the attorney's fees are awarded to "make the plaintiff whole." See, e.g., Bounds v. Bounds, 935 So. 2d 407, 412 (Miss. Ct. App.

[6] Will's trial counsel also acknowledged Will's contempt by stating "We have agreed that he is in contempt as to what all she has asked." (T. 32).

2006). The award of attorney's fees under these circumstances was well within the discretion of the Chancellor and should be affirmed on appeal. Id. (holding that court is reluctant to disturb Chancellor's award of attorney's fees on appeal).[7]

2. The issue of the Court's finding related to Will's contempt of the Decree of Divorce is not properly before the Court on appeal.

Will argues in his brief that the Chancellor erred in finding him in contempt of the Decree of Divorce. (B. 21-26). This issue is not properly before the Court, as the Notice of Appeal referenced only the "Decree of Divorce entered of record in this case on February 9, 2010 and the Order Denying Motion for Reconsideration and Other Relief, by Order entered on March 4, 2010." (R. 103-04; MJWWRE Tab 2). The Notice of Appeal does not reference the Order on the Petition for Contempt entered on July 19, 2010 – nor could it have referenced that Order, as the Notice of Appeal was filed on March 5, 2010, which was one month prior to the filing of the Petition for Contempt. (R. 120-23 WHWRE 14).

Mississippi Rule of Appellate Procedure 3(c) states that an appellant must "designate as a whole or in part the judgment or order appealed from." Will complied with this rule in his Notice of Appeal by designating the Divorce Decree and Order denying his Motion for Reconsideration. That Notice of Appeal cannot be read to encompass the Order on the Petition for Contempt entered on July 19, 2010, because that Order is not referenced or incorporated into the Notice. See Eldridge, 813 So.2d at 755. Moreover, Will never filed a separate Notice of Appeal with respect to the July 2010 finding of contempt. In the absence of such a filing, this

[7] To the extent that Will complains about the award of $915.81 in attorney's fees flowing from the Motion to Compel that Mary was forced to file, that award was similarly within the sound discretion of the Chancellor and should not be disturbed on appeal. Magee v. Magee, 661 So.2d 1117, 1127 (Miss. 1995). Similar to the fees assessed in connection with the contempt finding, there is no requirement that evidence regarding the inability to pay be presented because the fees were incurred because of Will's failure to comply with discovery requests. See, e.g., Russell v. Russell, 733 So.2d 858, 862-63 (Miss. Ct. App. 1999); Bell, supra, §12.03[1].

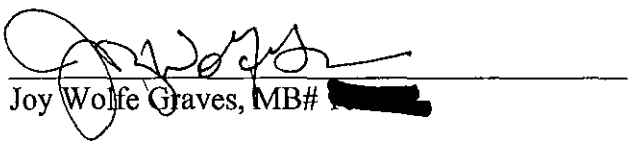
matter is not properly before the Court at this time.[8] Will's arguments related to this finding should be dismissed. In the alternative, if the Court deems these arguments to be subject to this appeal, Mary would request additional time to brief the matter.

VI. CONCLUSION

Will has failed to bear his burden on appeal of demonstrating that the Chancellor's findings related to the equitable division of property, alimony and contempt (and associated attorney's fees) were clearly erroneous, decided under incorrect legal standards or otherwise an abuse of discretion. For the reasons set forth herein, the Chancellor's ruling should be affirmed in all respects, and Mary should be granted all other relief to which she may be entitled.

Respectfully submitted,

MARY JEAN (WADDELL) WILLIAMSON



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[8] This is not a situation addressed by Miss. R. App. P. 4(b) or 4(d), where a Notice of Appeal filed prior to entry of certain rulings is deemed to include those rulings, as the Petition for Contempt filed in April 2010 was an entirely separate action and not a post-trial motion. See, e.g., Shavers v. Shavers, 982 So.2d 397, 402 (Miss. 2008) (noting that contempt actions are separate actions in spite of being filed under same cause number).

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CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that this day a true and correct copy of the foregoing instrument has been delivered to the following persons:

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So certified, this the 24th day of March, 2011.

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