

**SUPREME COURT OF MISSISSIPPI
CASE NO. 2010-CA-00646**

HOWARD WILSON CARNEY III

APPELLANT

VS.

ANDREA LEIGH BELL CARNEY

APPELLEE

**REPLY BRIEF
OF APPELLANT**

ORAL ARGUMENT NOT REQUESTED

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TABLE OF AUTHORITIES

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LEARNED TREATISES

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REPLY TO APPELLEE'S ARGUMENTS

The gist of Andrea's argument is that the chancellor correctly awarded her the entire equity in the marital home, because (1) it was her family "home place" and (2) she contributed of a life insurance proceeds check of \$175,000 to the marital estate that was used for the down payment. The Appellee's Brief speaks over and over about how the marital home is "the Bell family home", the "Bell Property", etc. Yet the chancellor considered the family home issue and still determined the house to be a marital asset. Andrea has not disputed this decision on appeal. Andrea's rights as a member of the Bell family were more than compensated for by awarding her physical possession of the house, as the chancellor did. The question is whether Andrea was also entitled under principles of equitable distribution to 100% of the equity in the home and 95% of the total marital assets.

Andrea contends that, because her life insurance benefits from her sister's death were used to make the down payment on the house, the chancellor was justified in giving Andrea all of the equity. However, it is important to remember that Andrea's \$175,000 insurance check was commingled into the couple's joint account and itself became a marital asset. Chancellor's Judgment at 22 (R.E. 7). The \$165,000 down payment on the marital home was later paid from the joint account. So, in truth, the down payment was not paid with the insurance proceeds; it was paid with commingled marital funds.

The insurance proceeds are merely to be weighed in determining Andrea's contribution to the totality of the marital estate, for equitable distribution purposes. As the Supreme Court said in *Magee v. Magee*, 661 So.2d 1117, 1124 (Miss. 1995), a "court should make an equitable division of marital assets acquired during the marriage where, as here, the [husband] has made material contributions to the accumulation of the total wealth of the parties." *Dobbs v. Dobbs*, 912 So.2d 491 (Miss. App. 2005), is a case on point. There, the husband - like Andrea in this case - claimed that he made he made the down payment and monthly mortgage payments on the home, and that it should be considered his separate non-marital property or that he at a minimum should have been given credit in the equitable distribution for the amounts he paid on the home. 912 So.2d at 492-493.

The chancellor and the Court of Appeals rejected the husband's argument and declined to consider the marital home in isolation. They instead held that, under the equitable distribution analysis of *Ferguson v. Ferguson*, 639 So.2d 921, 928 (Miss. 1994), the husband's down payment and monthly mortgage payments were to be considered as part of the totality of both parties contributions to the estate as a whole. The wife was also entitled to credit the amounts she paid out of her income for household expenses. The Court of Appeals held that the chancellor properly applied the *Ferguson* factors to the entire marital estate and correctly awarded the wife 55% of the total estate, which 55% share included the home. *Dobbs*, 912 So.2d at 492-493.

In the present case, Andrea makes the same argument as did the husband in *Dobbs*, i.e., because she made the down payment on the marital home, she claims she is entitled to all of the equity in the house. Yet, an evaluation of the parties respective total financial contributions to the marriage - as is required under *Ferguson* - does not support this outcome. The record in this case establishes that Howard contributed \$423,000 in his personal earnings to the marital estate, along with \$12,473 in proceeds from the sale of his non-marital real estate, for a total of \$435,473. The only quantified contribution by Andrea was the \$175,000 life insurance check she received on the death of her sister. While Andrea also earned a salary during the marriage, the amount that she contributed to the marriage from her salary was never put in evidence at trial. Based on the evidence submitted at trial, Howard's contribution to the marriage was far larger than Andrea's, and yet the Court awarded her 95% of the estate and 100% of the home.

Andrea claims that Howard spent all of his \$435,000 on himself, and yet there is absolutely no evidence in the record to back up this allegation. In fact, Howard testified that he put all of his income into the couple's joint account, which was used to pay family expenses. T.R. 276-277. Andrea also claims that she paid all of the mortgage payments (Howard was a co-borrower on the mortgage) and taxes on the home, when the record reflects that these amounts were paid out of the joint account, into which Howard deposited his money. In short, for the paltry %5 of the marital assets which Howard received, he contributed well more than Andrea to the marital estate, based on

the evidence presented at trial, and he helped pay for a marital home that was given 100% to Andrea.

Andrea would have the Court believe that her claim to a disproportionate share of the equity in the marital home is supported by *Bresnahan v. Bresnahan*, 818 So.2d 1113 (Miss. 2002) and *Allgood v. Allgood*, 62 So.3d 443 (Miss. App. 2011). Yet, in both of those cases, the overall equitable distribution of the marital estate was in line with Professor Bell's benchmark of a minimum 66%-33% split. Bell *Mississippi Family Law* §6.08[2] at 184 (1st ed 2005). In *Breshahan*, the split was 55% to the husband and 45% to the wife, which the Supreme Court held was reasonable on its face. 818 So.2d at 1119. The split in *Allgood* was 65%-35%. In sharp contrast, the chancellor in this case awarded 95% of the marital estate to Andrea and only 5% to Howard. A 95%-5% division is a far cry from what the Supreme Court found to be reasonable and equitable in *Breshahan*.

Andrea's reliance on *Sandlin v. Sandlin*, 906 So.2d 39, 42-43 (Miss. App. 2004) is equally misplaced. The case merely echoes what occurred in the present case with regard to a wife with emotional ties to the marital home - physical possession was awarded to her. The Court did not even mention the value of the equity in the home or state any data about how the value of any equity compared to the assets retained by the husband. The Court merely said that, for equitable distribution purposes, the wife's receipt of the home was more than offset by the husband's being permitted to retain his

retirement account. On the other hand, Howard's retention of \$13,000 in assets was massively and inequitably overpowered by Andrea's receipt of \$224,000 in marital assets.

Contrary to Andrea's argument, the decision in *Belding v. Belding*, 736 So.2d 425, 432 (Miss. App. 1999) is indeed highly applicable here. In *Belding*, the wife did not contribute her inheritance to the marital home, she contributed the marital home itself, along with her equity interest in the home at that time. Just as with an inheritance, this was the wife's separate property. Yet, by commingling it into the marital home, the property became subject to equitable distribution, just like the insurance proceeds that Andrea commingled into the marital estate in this case. Thus, in *Belding*, the court awarded a 50-50 split of the equity in the house, which is what should have been done here.

Another case relied upon by Andrea - *Berryman v. Berryman*, 907 So.2d 944 (Miss. 2005) - is too sketchy on facts to be of much use here. In *Berryman*, the Court held that the wife was entitled to all of the equity in the marital home because of her contribution of \$145,000 to purchase the home. However, the Court never mentioned whether the husband made any contributions at all to the marital estate. In contrast, in the present case, Howard contributed \$435,000 to the marital estate, as compared to the \$175,000 insurance check contributed by Andrea.

CONCLUSION

The trial court was manifestly in error in its application of the *Ferguson* factors in this case. Howard Carney made a greater contribution to the marriage than did

Andrea Carney, yet the chancellor only awarded Howard 5% of the marital estate. This Court should reverse and remand for a proper equitable distribution.

RESPECTFULLY SUBMITTED,

HOWARD CARNEY III

BY:


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CERTIFICATE OF SERVICE

I, CLIFFORD C. WHITNEY III, attorney for Defendant, Howard Carney III, do hereby certify that I have this day mailed, postage prepaid, by United States Mail, hand-delivered, or via facsimile, a true and correct copy of the above and foregoing document to the following counsel of record and to the trial court:

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This the 7th day of September, 2011.


CLIFFORD C. WHITNEY III