IN THE SUPREME COURT OF MISSISSIPPI

STEPHEN GORDON — APPELLANT

v. — CAUSE NO. 2010 CA 01227

PAMELA GORDON — APPELLEE

BRIEF OF APPELLANT STEPHEN GORDON

APPEAL FROM RULING AND JUDGMENT OF DIVORCE GRANTED FEBRUARY 18, 2010 AND FROM RULING DENYING ON APPELLANT'S POST-JUDGMENT MOTION ENTERED ON JULY 2, 2010 BY THE CHANCERY COURT OF PEARL RIVER COUNTY, MISSISSIPPI

STEPHEN J. MAGGIO
Attorney At Law
2201 24th Ave.
Gulfport, MS 39501
(228) 863-9111
ATTORNEY FOR APPELLANT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

1. Pamela Gordon- Plaintiff below and Appellee herein.

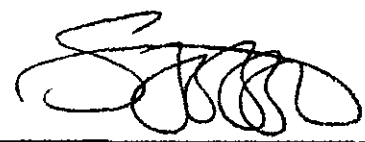
2. Stephen Gordon- Defendant below and Appellant herein.

3. Stephen J. Maggio,- Attorney for Stephen Gordon and on appeal.

4. David Pumford- Attorney for Pamela Gordon below.

5. Erik Lowrey, PA- The Hattiesburg law firm with whom Mr. Pumford was associated.

Dated: April 20, 2011.



STEPHEN J. MAGGIO
MSB NO. [redacted]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

1. Whether the Chancery Court committed a miscalculation of the equitable distribution of the marital estate by failing to grant Stephen Gordon his separate interest as determined by the Court?
2. Whether the Chancery Court erred in declaring three vacant lots purchased by Stephen Gordon prior to the marriage solely in his name and solely with his funds were marital property subject to equitable distribution when the lots remained unimproved vacant lots at the time of the divorce and there was no evidence of the Pamela Gordon's active participation in the increase of the value of the lots as opposed to a passive increase in the value of the lots not attributable to either party?
3. Whether the Chancery Court erred in denying Stephen Gordon's post judgment motion for correction of the judgment and his post judgment request for contempt based on non-compliance with the Court's Temporary Order and Judgment of Divorce?

STATEMENT OF CASE

On May 7, 2009, Pamela Gordon [hereinafter "Pam"] filed for divorce from her husband, Stephen Gordon [hereinafter "Steve"]. (CP 3-11, RE 8-16). On August 3, 2009 the Chancery Court, per Judge James Thomas, entered a Temporary Order. (CP 33-35, RE 17-19). The Temporary Order, paragraph 9, provided that, "Pamela is ordered to pay the approximately $400 monthly payment on the loan which was obtained to secure the rental and storage properties owned by the parties." (CP 34, RE 18). Further, paragraph 12, the parties were to be, "[E]qually responsible for the utilities owing on the former marital home at Idelwild Lane. However, to the extent that Pamela Gordon is paying medical insurance premiums for the minor child, she is entitled to an off-set of this amount toward the payment of the utility bills for the former marital home." (CP 34, RE 18). Trial was set for October 28, 2009. (CP 35, RE 19).

On August 10, 2009, Stephen Gordon filed his Answer and Affirmative Defenses to the Complaint for Divorce. (CP 37-39, RE 20-21).

On October 28, 2009 the parties entered into an Irrevocable Consent for Divorce. (CP 55-56, RE 22-23). The parties also filed that same day a Joint Motion to Withdraw Fault Grounds. (CP 57, RE 24) and the Court entered an agreed Order Dismissing Fault Grounds and granting the parties a divorce on irreconcilable differences. (CP 58, RE 25).

The matter proceeded to trial pursuant to the stipulation on October 28, 2009. (Tr 1, RE 63).

Following trial, the parties were requested by the Court to meet and determine if there could be an agreed upon distribution of any of the claimed marital assets, both real and personal property. On February 3, 2010, the parties submitted a further Stipulation. (CP 66-69, RE 26-

29). The parties determined that certain real property and bank accounts were non-marital and not subject to equitable distribution. (CP 67, RE 27). All items of disputed jewelry were divided by the parties. (CP 67, RE 27). The remainder of the property, including the marital home, two other houses and three lots were submitted to the Court for distribution.

On February 18, 2010 the Chancery Court, per Judge James Thomas, entered its Judgment of Divorce. (CP 70-76, RE 30-35A). On March 8, 2010, Stephen Gordon filed his Motion for Relief from Judgment pursuant to MRCP 60. (CP 77-86, RE 36-45) alleging that there was a clerical error in the judgment. On March 15, 2010, Stephen Gordon filed his Motion for Citation of Contempt. (CP 87-118, RE 46-61). On March 31, 2010, Pamela Gordon filed her Answer to Motion for Relief From Judgment. On March 31, 2010, Pamela Gordon filed her Answer to The Motion For Citation of Contempt.

On June 14, 2010 a hearing was held off the record and in chambers by Judge Sebe Dale.[1] An order dismissing both motions, with prejudice, was signed on June 14, 2010, but not entered by the Clerk until July 2, 2010. (CP 119, RE 62).

Aggrieved of these rulings, Stephen Gordon perfected his appeal on July 28, 2010.

---

[1] In between the entry of the Judgment of Divorce and hearing on the post trial motions, Judge Thomas suffered a stroke and Judge Dale was covering his docket. Unfortunately, Judge Thomas subsequently died.

STANDARD OF REVIEW

> The standard of review of a Chancellor's judgment is one familiar to the Court.
>
> This Court's review in domestic relations matters is limited such that the Court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied the wrong legal standard.

A & L, Inc. v. Grantham, 747 So.2d 832, 838 (Miss. 1999).

As to the post trial motions, the standard is abuse of discretion. The Appellant contends there was an abuse of discretion in not allowing him a hearing and failing to make findings of fact and conclusions of law. *See TXG Intrastate Pipeline Co v. Grossnickle*, 716 So.2d 991, 1024-1025 (Miss. 1997). There are instances in which a chancellor must set out findings of fact, especially where the facts of that case are complex. *Tricon Metals & Servs., Inc. v. Topp*, 516 So.2d 236, 239 (Miss.1987). In such cases, it is considered an abuse of discretion for a judge to fail to set out such findings of fact. *Id.* Furthermore, "Failure to provide this Court with findings of fact and conclusions of law precludes us from performing our appellate duties. *Tricon Metals & Servs., Inc. v. Topp*, 516 So.2d 236, 238 (Miss.1987)

SUMMARY OF ARGUMENT

Pam and Steve Gordon married in Pearl River County, Mississippi on August 15, 1992. One child was born to them, David S. Gordon, IV on March 26, 1996. Prior to their marriage, Steve had purchased a home, which had a mortgage and he had purchased three unimproved lots, being Lots 9, 127 and 128 of Ponderosa subdivision in Pearl River County. There were no mortgage owing on the lots. Subsequent to the marriage, Steve sold his separate home in 1999. He netted $70,000.00 and this was used as the down payment on the parties marital home at 711 Idlewild. In the Judgment of Divorce, the Chancellor found this $70,000 to be the separate property of Steve.

As to the three unimproved lots, the testimony of both parties was that the lots had been purchased by Steve prior to the marriage with his separate funds. They had remained unimproved and the only upkeep done was to cut the grass. The testimony of the parties was that the lots were purchased for nominal value and, at the time of trial, the parties agreed they were worth $15,000.00 each. The Chancellor found fifty percent of the increase in value to be marital property.

Regarding the post trial motions, prior to trial, the Court had entered a Temporary Order. At trial, Steve testified that he had made mortgage payments on the loan his wife was required to pay under the temporary order and that he had paid utilities payments on the marital home during the separation. In his post trial motion, he sought to have Pam held in contempt for her failure to pay what she owed under the Temporary Order. Pam argued, and is contended incorrectly, that the entry of the Judgment of Divorce divested the Chancery Court of any authority to hold her in contempt for failure to comply with the Temporary Order.

ARGUMENT

Steve and Pam Gordon married in 1992 and separated in 2009. (CP 3, RE 8). Prior to the marriage, in 1980, Steve had purchased Lot 9 of the Ponderosa subdivision. In 1991, also prior to the marriage, he purchased lots 127 and 128 of the Ponderosa subdivision in Pearl River County. (CP 71, RE 31). Lots 9, 127 and 128 remained unimproved vacant properties.

At the time of the divorce the marital home was located at 711 Idlewild Lane in Picayune. This property was purchased after the marriage, but the $70,000.00 down payment came from the sale of Steve's premarital home. (CP 71, RE 31).

During the course of the marriage, the parties had also purchase two additional investment properties located at 507 East Third and 514 East Third in Picayune. 507 East Third and 514 East Third had houses on them in the state of being renovated.

Steve does not contest that 711 Idlewild, 507 East Third, and 514 East Third were properly characterized as marital property. They were acquired during the course of the marriage, used by the family and there was evidence that some of the loan funds were secured by a loan against Pam's certificates of deposit.

> We define marital property for the purpose of divorce as being any and all property acquired or accumulated during the marriage. Assets so acquired or accumulated during the course of the marriage are marital assets and are subject to an equitable distribution by the chancellor. We assume for divorce purposes that the contributions and efforts of the marital partners, whether economic, domestic or otherwise are of equal value.

Hemsley v. Hemsley, 639 So. 2d 909, 915 (Miss. 1994).

What is at issue here is a mathematical error in the Judgment of Divorce. The

Chancellor determined that the first $70,000 of equity in 711 Idlewild Lane was the separate premarital property of Steve Gordon.

> 711 Idlewild Lane, Picayune, valued at $245,000 by the Court, less debt of $50,000.00 with an equity value of $195,000.00. Defendant [Steve Gordon] contributed $70,000.00 toward the down payment with proceeds from the sale of premarital home, leaving a marital equity of $125,000.00.

(CP 71, RE 31)

The Court then went on to list the remainder of the marital properties, their values and marital equity reaching a final determination of the accumulated marital equity by the parties.

> The Court finds there to be a total equitable value of $225,000.00 in the real estate considered to marital property, subject to distribution, which includes the $125,000.00 for the 711 Idlewild Lane; $28,500 for 507 E. Third; $79,500.00 for 514 E. Third; and $22,500.00 marital interest in the Ponderosa lots, for a total marital value of $225,000.00. .... Each party is entitled to a value credit of $127,500 for real property equitable distribution purposes.

(CP 74, RE 34).

The Chancellor then continued by awarding Pam the home on Idlewild and crediting her with $125,000.00 in equity. He awarded Steve the houses on East Third and the lots in the Ponderosa subdivision for a total of $130,500.00; being $28,500.00 for 507 East Third, $79,500.00 for 514 East Third and the $22,500.00 in accumulated value in the lots. He then awarded Pam a judgment for $5,500.00 for the difference in the equitable distribution. (CP 74, RE 34). However, the Judgment of Divorce did not address Steve's $70,000.00 share of the Idlewild property. It is his contention that he should have received his $127,500.00 in martial equity, as should have Pam, but he also should have received an additional $70,000.00 for his separate interest in Idlewild. The Judgment of Divorce does not reflect the Chancellor's intent. The Chancellor found that $70,000.00 was premarital and not subject to division. However, the

ruling, in effect, awarded Steve's $70,000.00 premarital interest in Idlewild to Pam without any adjustment, credit or requirement that he be reimbursed. She now has a home valued at $245,000.00 which had a marital equity of $125,000.00 but which now actually has an equitable value of $195,000.00. When a judgment is clearly erroneous or manifestly wrong it should be reversed. *A & L, Inc. v. Grantham*, 747 So. 2d 832, 838 (Miss. 1999). Allowing the Judgment of Divorce to stand as entered results in an unjust enrichment to Pam in the amount of $70,000.00. The judgment should be reversed and remanded for proper equitable distribution.

As to the timing of the request for relief from the judgment of divorce, it is appropriate pursuant to Rule 60 to request that a court reform its order to express its true intentions. It is clear from the Judgement of Divorce that the Chancellor intended for Steve to have a separate $70,000.00 interest in the marital home, but did not compensate him for same. Such an oversight can be rectified by a Rule 60 motion.

> Mr. Seymour ... argues that the court could not use the rule that allows a court to correct clerical mistakes that arise from oversight or omission. M.R.C.P. 60(a). .... *Edwards* ... stated that Rule 60(a) ... can ... be used to correct an order that failed accurately to reflect the judge's original decision. *Id.* It was within the scope of Rule 60(a) for the judge to clarify what his decision in the divorce decree in fact was.

Seymour v. Seymour, 869 So. 2d 1035, 1036 (Miss. App. 2004). *See also Jones v. Mayo*, 53 So. 3d 832, 836 (Miss. App. 2011).

Turning now to the Ponderosa Lots, the testimony of the parties was that these lots were vacant property and were purchased by Steve prior to the marriage. Pam testified as follows:

> Q. These are three lots listed in the Ponderosa subdivision. Tell the Court when these were acquired.
>
> A. Lot No. 9, he acquired that in 1980. ....

....

Q. Tell me about the other two lots 127 – there's no house there, is there?

A. No. There's no houses on any of these three lots.

(Tr. 33, RE 66).

Q. So Lots 127 and 128, Ponderosa, they were acquired during your marriage?

A. No .... They were purchased in 1991.

(Tr. 34, RE 67)

As to the parties financial practices during their marriage, Pam admitted that they had maintained separate finances.

Q. .... You maintained a separate checking account and he maintained a separate checking account?

A. Yes.

Q. You maintained a separate savings account and he maintained a separate savings account?

A. I don't have a savings account.

Q. Well, he maintained a separate savings account?

A. Yes, he definitely did.

(Tr. 61, RE 69).

So the acquisition of the lots was premarital and solely from Steve's funds. As to the maintenance of the lots, Steve testified as follows:

Q. Now, Lot 9, Lot 127 and Lot 128 of the Ponderosa subdivision, those are all vacant lots?

A. Right.

Q. And you purchased those all before you got married to Pam?

A. Yes.

Q. What was required to maintain those lots during the course of y'all's marriage?

A. Well, for the last 10 years, since I've been doing this work, I have paid somebody out of my checking account to maintain them, and he cuts some of the lots every month.

Q. How much does it cost to have somebody cut those lots?

A. Nine dollars every cutting.

Q. How many times a month does the person cut them?

A. Anywhere from one to two, depending on the growing season.

Q. And in the wintertime?

A. No.

Q. Okay. And that's all that's ever been done to the lots?

A. Yes, for years. Now, before we married, Pam and I were married, we planted some oak trees and stuff on them, 17 years ago.

Q. That was before you married?

A. Yes.

Q. Now, who has paid the property taxes on ... these properties during the course of y'all's marriage?

A. I have.

(Tr. 155-156, RE 73-74).

Q. Now, on Lots 9, 127 and 128 of Ponderosa, you said since you started working for FEMA you have hired somebody and paid somebody to cut the grass?

A. Yes.

Q. Prior to that, who cut the grass on those lots? Let's say from 1980 to 1992, when you and Pam got married, on Lot 9, who cut the grass?

A. I did.

Q. And on Lots 127 and 128 prior to y'all's marriage, who cut the grass?

A. I did. Of if she was over by the house, she might have helped.

Q. Did Pam ever cut the grass over there?

A. Oh, yeah. We both did.

....

Q. Do you have a riding lawn mower?

A. Yes.

Q. They could be cut with a rider?

A. Oh, yeah.

Q. How long does it take to cut one of those lots?

A. Thirty-five minutes.

(Tr. 178-179, RE 75-76).

So as to the lots it is uncontested that the were purchased separately by Steve prior to the marriage and that the only improvement, if it could characterized as such, was the premarital planting of a few trees and plants. Subsequent the marriage, the only maintenance done to the lots was cutting the grass and that for the last ten years that had been done at a minimal cost by a lawn service hired and paid for by Steve. Although both parties agreed that the lots were now worth more than when originally purchased, there was no testimony as to why other than the passage of time and the general inflationary increase in value. Such passive increases in the

value of an asset are not marital.

In *Langdon v. Langdon*, 854 So. 2d 485 (Miss. App. 2003) the Court held that a vacant lot purchased after the marriage was the wife's separate property as, "There was no evidence that Kent expended efforts that resulted in the lot's appreciation in value." *Langdon*, 854 So. 2d at 493 (Miss. App. 2003). This Court has held that if the increase in value to a premarital or separate asset is only passive, then that increase is separate and not marital.

> Though "marital property" is perhaps reducible to a relatively simple definition, there are several corollaries to the general rule. The chancellor must inquire whether any income or appreciation resulted from either spouse's active efforts during the marriage. If so, that income or appreciation becomes part of the marital estate. *Craft v. Craft,* 825 So.2d 605, 609 (Miss.2002); *A & L, Inc. v. Grantham,* 747 So.2d 832, 839 (Miss.1999). Appreciation that is merely passive and not a result of either spouse's active efforts remains separate property. *Craft,* 825 So.2d at 609; *Grantham,* 747 So.2d at 839. This standard has been referred to as the "active/passive test." Deborah H. Bell, *Bell on Mississippi Family Law* § 6.03[4][a] (2005).

Rhodes v. Rhodes, 52 So. 3d 430, 436 (Miss. 2011).

Dorsey v. Dorsey, 972 So. 2d 48, 52 (Miss. App. 2008) held that the Chancellor was correct in determining that a lot donated to the husband by his siblings during the course of the marriage was not marital property. The wife testified that joint funds were used to pay the property taxes for one year and that the children used the lot to ride four wheelers. The *Dorsey, supra*, Court held that there was insufficient evidence of commingling as the property remained separate and the funds used to pay one years worth of taxes was small and easily traceable. As to the family use issue, the Court held that the wife presented no evidence of the number, frequency or consistency of the children's use. As such, the Court held the lot was the separate property of the husband.

In the case at bar, there was no substantial credible evidence to support a finding that the increase in value of the lots was due to the active efforts of either spouse and certainly none to support the finding that it was due to the active efforts of Pam. The only testimony was that at the beginning of the marriage that Steve mostly cut the grass and sometimes Pam would help and that for the last ten years Steve had paid a lawn service out of his separate checking account. Furthermore, the taxes were paid solely by Steve. In this regard the Chancellor was clearly in error and should be reversed.

Following the entry of the Judgment of Divorce, Steve filed to have Pam held in contempt for her non compliance with her obligations under the Temporary Order. Additionally, he sought to hold her contempt for locking him out of 507 and 514 East Third Street and absconding with the contents of the 507 and 514 East Third properties which had been awarded to him by the Court. In his post trial motion he provided a detailed list of the items taken from the properties. These included building materials which had been paid for during the marriage and were intended to be used to complete the renovation of the properties. Pam, through her counsel, generally responded that a final judgment had been entered and this prevented Steve from raising issues under the temporary order in a post trial contempt proceeding. There was no reason stated as to why she could not be held in contempt for failing to comply with the Judgment of Divorce. A Chancery Court retains jurisdiction in order to enforce its final judgment.

> Here, the chancery court was correct in finding jurisdiction over Wallace in the contempt matter because a domestic relations case remains subject to recurring motions even after all prior contested matters are resolved. *Sanghi v. Sanghi*, 759 So.2d 1250, 1253 (Miss.Ct.App.2000). Once a court has personal jurisdiction over the defendant at the time of divorce, the court is presumed to have continuing

jurisdiction. *Powell v. Powell,* 644 So.2d 269, 274 n. 4 (Miss.1994).

Reichert v. Reichert, 807 So.2d 1282, 1286-1287 (Miss. App. 2002).

As to the other contempt issues being barred by *res judicata* or some other doctrine because they were related to failure to comply with the temporary order and that the entry of a final judgment foreclosed such a request for relief, this Court has made it clear that even after the entry of a final judgment of divorce a party may seek relief of contempt for failure to comply with a temporary order. *Lewis v. Lewis,* 586 So. 2d 740 (Miss. 1991) held that a Chancery Court retains jurisdiction to hold a spouse in contempt for non compliance with a temporary order even over a year after the entry of the final decree. In *Lewis, supra,* the divorce was filed on June 24, 1987 and the temporary order was entered on August 14, 1987. Pursuant to its terms the husband was to pay temporary alimony and certain medical bills. In July of 1988 the parties were divorced on basis of irreconcilable differences and agreed property settlement agreement ratified by the court. However, the husband was not specifically relieved of his obligation to have paid the temporary alimony and/or medical bills. In August of 1989 the wife filed for contempt. The husband asserted that the final judgment cut off her right to seek contempt. This Court disagreed. *Lewis v. Lewis*, 586 So. 2d 740 (Miss. 1991). In *McCarrell v. McCarrell*, 19 So. 3d 168 (Miss. App. 2009) this Court clearly held:

> Certainly, the chancellor possesses the authority to order temporary alimony and make all proper orders and judgments thereon. Miss.Code Ann. § 93-5-17(2); M.R.C.P. 77(a); *see also Langdon v. Langdon,* 854 So.2d 485, 496 (Miss.Ct.App.2003). The duty to pay temporary support terminates upon entry of the final judgment of divorce, but the judgment does not eliminate the obligation to pay temporary alimony arrearages which accrued before the entry of the final decree. *Prescott v. Prescott,* 736 So.2d 409, 416 (Miss.Ct.App.1999) (citing *Lewis v. Lewis,* 586 So.2d 740, 741 (Miss.1991)). Stated differently, a temporary order is not a final order; however, arrearages accrue on unpaid temporary support

payments. *Id.* Further, temporary support orders are enforceable through contempt actions. *McCardle,* 862 So.2d at 1292; *see also* Bell on Mississippi Family Law § 9.01[5][c], at 236 (2005).

McCarrell, 19 So. 3d at 171-172 (Miss. App. 2009).

As such, the Chancery Court was clearly in error in failing to allow Steve Gordon a hearing. However, because no record was made, it cannot be determined why the motion was denied and/or why the Court denied it, with prejudice. The failure to make a record prevents this Court from making any informed decision as to whether it was correct, incorrect, manifestly in error or abused its discretion. *Tricon Metals & Servs., Inc. v. Topp*, 516 So.2d 236, 238 (Miss.1987). The ruling should be reversed.

CONCLUSION

In this matter, Steve Gordon was, by miscalculation, deprived of the value of a $70,000.00 awarded to him by the Court. Furthermore, the Chancellor was in error in holding that the vacant lots were marital property subject to equitable division. Lastly, the Chancellor below erred in dismissing his post trial motions for contempt and certainly for not making any record as to his reasons for such decision. For these reasons, he submits that the Judgment of Divorce should be reversed as to the holding on the issue of the marital lots, that it should be remanded to allow a full hearing on the contempt issues and that it should be remanded to account for his $70,000.00 premarital interest in the 711 Idlewild Lane property.

Respectfully submitted, this the 20 day of April, 2011.

STEPHEN J. MAGGIO

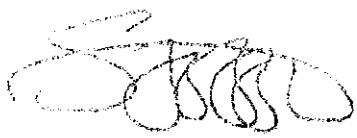
AMENDED CERTIFICATE OF SERVICE

I, the undersigned, counsel of record for the Appellant certify that I have served a copy of the foregoing Record Excerpts, upon the following:

Chancellor Deborah Gambrell
P. O. Box 686
Hattiesburg, MS 39403

Pamela Gordon, *Pro Se,* Appellee
711 Idlewild Lane
Picayune, MS 39466

Dated: April 26, 2011.



STEPHEN J. MAGGIO