

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO.: 2010-CA-01777

ALFREDO SANDOVAL
APPELLANT

v.

KIMBERLY SANDOVAL
APPELLEE

APPELLANT'S ORIGINAL BRIEF

ORAL ARGUMENT NOT REQUESTED

APPEALED FROM THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies, pursuant to Miss. Rules App. Procedure 28 (A) (1) that the following persons have interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

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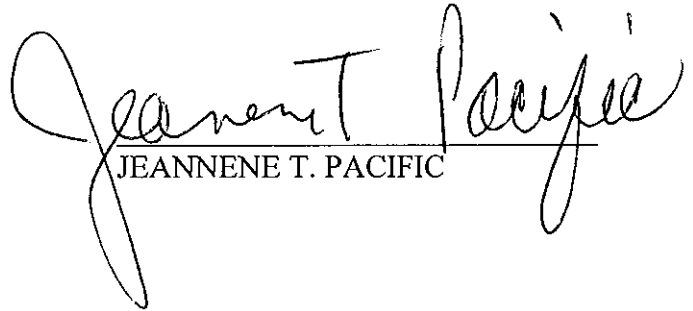
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So Certified on this the 10th day of March, 2011.



MICHAEL D. MITCHELL



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STATEMENT OF THE ISSUES

THE TRIAL COURT ERRED IN DETERMINING WHICH ASSETS WERE
MARITAL BASED UPON THE DATE OF THE MARRIAGE AND THE
PARTICIPATION OF THE PARTIES IN THE ACCUMULATION OF SAID ASSETS
AND IN THE DIVISION OF THE MARITAL ASSETS

STATEMENT OF THE CASE

Alfredo Sandoval filed a Complaint for Divorce on April 23, 2009.

On May 7, 2009, Kimberly Sandoval filed a Waiver of Service of Process and Entry of Appearance.

An Answer and Counterclaim was filed on June 11, 2009.

A Temporary Order was entered by the Chancery Court of Forrest County, Mississippi on June 25, 2009.

A Motion for Appointment of *Guardian Ad Litem* and Request for Supervised Visitation was filed on July 23, 2009.

An Answer to Counter-Claim for Divorce was filed on March 29, 2010.

The Judgment Incorporating Findings of Fact and Conclusions of Law was filed on October 13, 2010 after a trial on September 16, 2010.

The Notice of Appeal, Designation of the Record, and Certificate of Compliance with Rule 11 (B) (1) was filed on October 28, 2010.

STATEMENT OF THE FACTS

Prior to the calling of any witnesses, Alfredo Sandoval was granted leave by the Court to amend his answer to Kimberly Sandoval's Counter-Complaint and admitted Adultery. (T.p. 6). Then, Kimberly Sandoval, hereinafter referred to as "Kimberly," was called as the first witness. (T.p. 7). Kimberly testified she lived at 110 Larawood Point in Petal, Forrest County, Mississippi, and had lived there for five (5) years. (T.p.7). Kimberly testified she and Alfredo Sandoval were married on March 14, 2007. (T.p. 7).

Kimberly went on to testify she and Alfredo Sandoval have three (3) children. (T.p. 8). Kimberly testified two of these children, Victoria Sandoval, born August 2, 2000, and Christian Sandoval, born February 17, 2002, were born prior to her marriage to Alfredo. (T.p. 8). Kimberly also testified her youngest child, Jessica Sandoval, was born on August 17, 2007. (T.p. 8-9). Kimberly explained the children reside with her in Petal, Mississippi. (T.p. 9). Kimberly testified she had lived at her Petal address since May of 2005, that she and Alfredo purchased the home prior to their marriage, and that she was listed on the deed to the home. (T.p. 9). Kimberly went on to testify Alfredo had admitted adultery to her, and he had another child born on December 25, 2009. (T.p. 9-10).

During Kimberly's testimony Alfredo, by and through his attorney, stipulated to certain facts. Alfredo stipulated he was the father of the three (3) children Kimberly testified about. (T.p. 10). Alfredo stipulated to the child born out of wedlock. (T.p. 10). Alfredo further stipulated that Kimberly should have primary physical custody of the minor children, and that he (Alfredo) should share joint legal custody with visitation rights to his minor children. (T.p. 10).

Kimberly went on to testify about the health of the children. Kimberly testified the

children were on Medicaid, but she was asking the Court to Order Alfredo to provide medical insurance on the children. (T.p.10-11). Kimberly also testified Victoria suffers from ADD and is on Adderol. (T.p. 11). Kimberly testified her two younger children have asthma and require daily medications. (T.p. 11).

Kimberly testified she was a full-time student at Pearl River Community College and that she had no other source of income other than the child support paid by Alfredo. (T.p. 12-13). Kimberly testified the home she lived in was valued at \$240,000.00, had a \$130,000.00 mortgage, and approximately \$110,000.00 in equity at the time of the trial. (T.p. 13). Kimberly asked for use and possession of the home whose monthly note is approximately \$1,700.00. (T.p. 14).

Kimberly testified Alfredo and Jose Padilla each own a 50% interest in certain businesses. (T.p. 14). Kimberly testified Alfredo owned a 50% interest in LaMoreliana, an ethnic grocery store in Forest, MS. (T.p. 13-14). Kimberly testified the store in Forest, MS was founded out of Alfredo's store in Laurel, MS, and she felt she was entitled to 25% of the value of that business. (T.p. 14-17). Kimberly testified the business in Forest was started in 2002, prior to the marriage. (T.p. 17). Kimberly testified she was responsible for doing the paperwork for the businesses. (T.p. 18). Kimberly noted, however, that neither she or Alfredo worked in the Forest business. (T.p. 18-19).

Kimberly claimed she and Alfredo started a Hispanic grocery store in Laurel also named La Moreliana. (T.p. 19). Kimberly testified this business started in 2000 with Alfredo as a 50% owner in the business with Jose Padilla owning the other 50%. (T.p. 19). Kimberly testified her name was on the deed to the building housing La Michoacana, another ethnic grocery store,

along with Alfredo, Jose Padilla, and his wife. (T.p. 21). Kimberly alternately claimed she worked two days a week at the business, and that she worked daily in the business. (T.p. 21-22). Kimberly asked the court to grant her a 25% interest in the business in Laurel, started before the marriage. (T.p. 23). Kimberly testified there was another store in Laurel on Ellisville Boulevard which she claimed to have trained the employees to operate. (T.p. 24). Kimberly claimed in her testimony the capital to open all subsequent stores came from the first Laurel store. (T.p. 24).

Kimberly testified she has a vehicle which is titled in her mother's name. (T.p. 26). Kimberly testified Alfredo paid the \$3,000.00 down payment on the vehicle, and that her mother had made all other payments. (T.p. 26). Kimberly went on to testify she does not have money to pay her doctor's bills or cellular phone bill and the remaining balance financed on a car she owned which was stolen. (T.p. 27-28). Kimberly testified she was sued for the unpaid medical bills and for her vehicle. (T.p. 29).

On Cross-Examination Kimberly admitted she was given "absolute control" over El Taco Loco, a restaurant in Hattiesburg, but claimed the manager poorly operated the business causing it to go from making a good profit to being closed down in debt. (T.p. 30). Kimberly admitted she withdrew almost \$10,000.00 from El Taco Loco, but claimed Alfredo told her to do so. (T.p. 31). Kimberly denied she incurred almost \$1,500.00 in insufficient funds fees for the business during her tenure as manager. (T.p. 32). Kimberly admitted El Taco Loco is still operating as of the date of the trial under new owners. (T.p. 33).

On Re-direct examination, Kimberly blamed the insufficient funds fees, overdraft fees, and failure of El Taco Loco on the manager who was operating the business when she obtained absolute control over the business. (T.p. 40).

Alfredo Sandoval, referred to herein as "Alfredo," was called adversely by Kimberly. Alfredo testified he lived in Laurel, MS, and that he was married to Kimberly on March 14, 2007. (T.p. 41). Alfredo acknowledged he and Kimberly lived in Forrest County, Mississippi during the marriage, and they separated in January 2009. (T.p. 41-42). Alfredo acknowledged paternity of Victoria and Christian Sandoval and of a child born out of wedlock, therefore admitting adultery. (T.p. 42). Alfredo denied Kimberly worked daily in the Laurel business and testified she never went back to work in the business after the birth of her first child, Victoria. (T.p. 43). Alfredo testified he and Jose started the business in Laurel with \$5,000.00, and that while Kimberly assisted in operating the business at first, she did not actively assist in the business for more than three months, from May to August. (T.p. 43).

Alfredo testified he obtained loans from his uncle, also Alfredo, and used profits from the Laurel business to open his other businesses. (T.p. 44). Alfredo testified the building housing the Laurel business is paid off, is worth about \$325,000.00, but needs approximately \$70,000.00 in roof repairs. (T.p. 44). During his testimony Alfredo stipulated Kimberly owned a one-fourth interest in the building owned in Laurel by virtue of having her name on the deed to that property. (T.p. 45). Alfredo also stipulated Kimberly was entitled to one-half interest in the domicile in Petal where her name and Alfredo's name was on the deed. (T.p. 45).

Alfredo denied Kimberly was entitled to a percentage of the businesses because she did not actively participate in the operation of the businesses. (T.p. 46-47). Alfredo testified he worked every day in the businesses for 10 years to keep them operating. (T.p. 46-47). Alfredo admitted he and Jose own the building housing the businesses in Forest, Mississippi free and clear, and the building is worth \$305,000.00 which is shared equally with Jose Padilla. (T.p. 48).

Alfredo testified he and Jose purchased the land for the Forest building in 2003 or 2004, built the building in 2006, and got married to Kimberly in 2007. (T.p. 51). Alfredo noted that Jose is responsible for the operation of the Forest store, and he takes no part in the operation thereof. (T.p. 48-51). Alfredo testified the Laurel store opened in 2000 and the Forest store opened in May 2002. (T.p. 51).

Alfredo testified, and listed in his financial disclosure, income of \$1,600.00 per month. (T.p. 52). As an adverse witness Alfredo admitted he had taken wire commissions from the Forest store to use in paying Kimberly's house note and utilities. (T.p. 53-54). Alfredo testified he did not object to Kimberly keeping the house in Petal, but he could not agree to keep paying the house note and utilities because he did not know how much money he was going to make from month to month and he had other obligations such as \$150, 000.00 debt to the IRS from the Forest store. (T.p. 58).

SUMMARY OF THE ARGUMENT

The businesses partially owned by Alfredo Sandoval were begun prior to his marriage to Kimberly. Neither Alfredo or Kimberly took an active role in the operation of each business. The testimony was disputed, and Kimberly contradicted herself, regarding Kimberly's role in the operation of the businesses.

The Chancellor did not make a finding that Kimberly and Alfredo had a partnership prior to their marriage. The Chancellor erred in determining which property was marital and which was separate. Alfredo's businesses were started prior to his marriage to Kimberly. The only marital property is the increase in value, if any, of the businesses Alfredo actively participated in during the marriage, not in the total value of the businesses. The Chancellor erred in his classification and division of Alfredo's businesses as marital property.

LAW AND ARGUMENT

THE TRIAL COURT ERRED IN DETERMINING WHICH ASSETS WERE
MARITAL BASED UPON THE DATE OF THE MARRIAGE AND THE
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“Assets acquired or accumulated during the course of a marriage are subject to equitable division unless it can be shown by proof that such assets are attributable to one of the parties’ estates prior to the marriage or outside the marriage.” Wilson v. Wilson, 820 So.2d 761, 763 (¶ 5) (Miss.Ct.App. 2002) citing Parsons v. Parsons, 741 So.2d 302, 306 (¶ 21) (Miss.Ct.App. 1999).

Where applicable the Chancellor must consider the following factors when making an equitable distribution of marital property:

(1) economic and domestic contributions by each party to the marriage, (2) expenditures and disposal of the marital assets by each party, (3) the market value and emotional value of the marital assets, (4) the value of the nonmarital property, (5) tax, economic, contractual, and legal consequences of the distribution, (6) elimination of alimony and other future frictional contact between the parties, (7) the income and earning capacity of each party, and (8) any other relevant factor that should be considered in making an equitable distribution.

Shoffner v. Shoffner, 909 So.2d 1245, 1249 (¶ 11) (Miss.Ct.App. 2005), citing Love v. Love, 687 So.2d 1229, 1231-1232 (Miss. 1997). A Chancellor is required only to address and consider only those factors which are applicable to the marital property in each case. Wells v. Wells, 800 So.2d 1239, 1244 (¶ 8) (Miss.Ct.App. 2001). Passive appreciation, which is not a result of the active efforts of the spouses remains separate property. Rhodes v. Rhodes, 52 So.3d 430 (¶ 20) (Miss.Ct.App. 2011).

“This Court has limited powers of review over a chancellor’s equitable division of marital

property.” Wilson v. Wilson, 820 So.2d at 762 (¶ 4) (Miss.Ct.App. 2002). “A chancellor’s findings of fact will not be disturbed unless manifestly wrong or clearly erroneous.” Duncan v. Duncan, 774 So.2d 418, 419 (¶ 4) (Miss. 2000). It is up to the Chancellor to determine the credibility of the witnesses and the weight to give to the testimony and evidence. Powell v. Ayars, 792 So.2d 240, 243 (¶ 6) (Miss. 2001).

In the case at bar all of the businesses partly owned by Alfredo were started prior to his marriage to Kimberly. Alfredo testified that the Laurel business he started with Jose Padilla began in 2000, roughly seven (7) years prior to his marriage to Kimberly. Alfredo testified Kimberly worked in the business for approximately three (3) months before their first child was born, and that she did not work any further in the business. The home the parties lived in during the marriage was also purchased prior to the marriage

The testimony was clear that the land for the business in Forest, Mississippi was purchased prior to the marriage. The building was also purchased prior to the marriage. Alfredo did not take an active role in the operation of the business in Forest, Mississippi. The testimony was undisputed that Alfredo’s partner, Jose Padilla, operated the business in Forest, Mississippi without any assistance from Alfredo. The testimony was also clear that Kimberly had never taken any role in the operation of the business in Forest, and any appreciation in the business was solely passive on the part of Alfredo.

None of the businesses partially owned by Alfredo were begun after his marriage to Kimberly. Although Kimberly and Alfredo were together for years prior to the marriage there was no finding by the Chancellor they had formed a partnership or other business association prior to the marriage. The testimony was disputed about what role Kimberly played in the

operation of Alfredo's businesses. Kimberly contradicted herself in her testimony about her role in Alfredo's business. Kimberly stated at one point she worked two days a week in the Laurel business, and later stated she worked daily in the business.

The one business Alfredo admitted Kimberly took an active role in the operation of was El Taco Loco in Hattiesburg, Mississippi. It is undisputed that Kimberly was placed in "absolute control" of a profitable business. It is also undisputed that after Kimberly was placed in control the business had to be sold because it went from being profitable to being unprofitable during her tenure. Kimberly withdrew almost \$10,000.00 from the business in checks and the business accumulated almost \$1,500.00 in overdraft fees during her management thereof.

Alfredo's businesses were began prior to his marriage to Kimberly. Although Alfredo did not take an active role in the operation of the Forest business, the Chancellor treated that business as if Alfredo had taken an active role in its operation and awarded Kimberly a portion of the appreciation in that business. The testimony was disputed about Kimberly's role in the businesses, with the exception of El Taco Loco, and Kimberly contradicted herself regarding her participation in the operation of the businesses.

The Chancellor erred in not taking into account the \$150,000.00 debt owed by Alfredo to the Internal Revenue Service. Alfredo's undisputed and uncontradicted testimony revealed a \$150,000.00 debt to the Internal Revenue Service from the Forest, Mississippi store he owns with Jose Padilla. The Chancellor did not take this debt into account when making his award to Kimberly in his Judgment Incorporating Findings of Fact and Conclusions of Law. This debt should have been taken into consideration when determining which property was marital and in dividing the marital property.

The Chancellor erred in dividing up the businesses partially owned by Alfredo, and the businesses that were started prior to Alfredo's marriage to Kimberly. Kimberly and Alfredo were married only a year or two prior to their separation. The only marital property is the appreciation in the businesses during the tenure of the marriage yet the Chancellor treated the entire lifetime of the businesses as marital property and conducted a distribution thereof based on the entire lifetime of the businesses. Admittedly Alfredo took an active part in the operation of the businesses, but the parties were not married during the entire existence of the businesses. The Chancellor should have made a determination of the increase in value of the businesses during the course of the marriage, if any, and conducted an equitable distribution of that appreciation rather than for the total current value of the businesses.

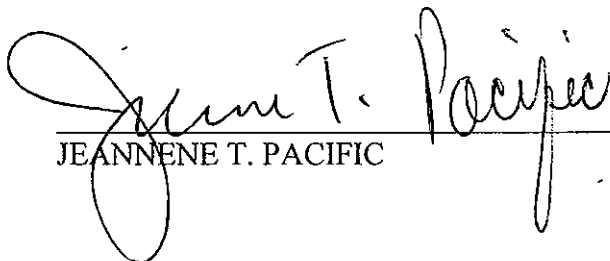
CONCLUSION

The Chancellor erred in determining which property was marital and in dividing such property. All of Alfredo's businesses were begun prior to the marriage, some by more than five (5) years. There was no finding of a partnership between Alfredo and Kimberly prior to the marriage to justify dividing the assets accumulated by Alfredo prior to his 2007 marriage to Kimberly. This Court should reverse and remand this cause to the Chancery Court of Forrest County, Mississippi for a new trial.

In the alternative, this Court should remand this case to the Chancery Court of Forrest County, Mississippi for a determination and equitable distribution of the increase in value, if any, of Alfredo Sandoval's businesses during his marriage to Kimberly Sandoval instead of an equitable distribution of the total value of said businesses.



MICHAEL D. MITCHELL



JEANNENE T. PACIFIC

CERTIFICATE OF SERVICE

We, Michael D. Mitchell and Jeannene T. Pacific, do hereby certify we have, this date,
mailed, via US Mail, postage pre-paid, a true and correct copy of the above and foregoing

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So Certified on this the 10th day of March, 2011.



MICHAEL D. MITCHELL



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