

ATTORNEY FOR PENNY WILSON

COURT OF APPEAL
STATE OF MISSISSIPPI

RT

PENNY WILSON

VS

NO. 2011-~~TS~~-00619

COA

GREGORY WILSON

CA

CERTIFICATE OF INTERESTED PARTIES

The undersigned Counsel of Record certifies that the following persons have an interest and outcome of this case. These representations are made in order for the Justices of the Supreme Court and Judges of the Court of Appeals to evaluate possible disqualification or recusal.

1. PENNY WILSON, Plaintiffs- Appellants
2. Joyce Funches
Post Office Box 24623
Jackson, MS 39234
3. Honorable Judge Denise Sweet Owens
c/o Eddie Carr
Chancery Clerk of Hinds County
P O Box 686
Jackson, MS 39205
4. Honorable Kathy Gillis
Supreme Court Clerk
P O Box 249
Jackson, MS 39205

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I. INTRODUCTION

The Appellant is requesting a review of the Chancellor's finding in regards to the equitable distribution of marital property. "This Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Bell v. Parker*, 563 So.2d 594, 596-97 (Miss.1990).

The Plaintiff's appeal is based on what it perceives to be the Court's oversight in utilizing the Ferguson factors in its analysis. The Supreme Court identified eight factors for chancery courts to consider in equitable distribution analysis: (1) substantial contribution to the accumulation of the property; (2) disposal of marital property; (3) prior distribution of assets; (4) market and emotional value of the assets; (5) the value of property brought into the marriage; (6) tax consequences; (7) eliminating friction between the parties; and (8) the needs of the parties to financial security regarding the combination of assets, income, and earning capacity. *Ferguson v. Ferguson*, 639 So.2d 921, 928 (Miss.1994). The Supreme Court has also stated that "Besides just stating findings of fact for each applicable factor, the chancellor failed to provide any conclusion of law for our review on appeal. In *Ferguson*, this Court held that chancellors are required to consider the applicable factors and support their decisions with findings of fact and conclusions of law for appellate review." *Ferguson*, 639 So.2d at 928.

It is the Appellant's belief that the Court did not provide any conclusion of law or to support the decision with findings of facts are conclusion of law and therefore request this review and remand to the Trial Court so that an appropriate finding of fact and conclusion of law be provided.

II. STATEMENT OF THE FACTS

The following facts are undisputable and supported by testimony and evidence. The Plaintiff and the Defendant married on April 13, 2000. Of the marriage, one child was born. Both parties were gainfully employed; the Plaintiff with Packard Electric and the Defendant with Entergy. Each party made approximately the same salary. The Plaintiff was living in a home which she had obtained approximately a year and a half prior to the marriage. The Plaintiff had savings when she entered into the marriage. The parties split everyday expenses which included the mortgage, the insurance, food and the utilities. The parties did not establish any joint checking or savings and all expendable income after the expenses were paid were never placed into question by either party. Each party allowed the other to have control of any excess and this continued throughout the marriage.

The Court heard credible testimony at the hearing for divorce and granted the Appellant a divorce on the grounds of habitual cruel and inhuman treatment. There has been no challenge of the Court's grant of the divorce.

During the course of the marriage, both parties attempted solo ventures to augment their status. The Appellee went into business with a family member and the Appellant began purchasing property, renovating it and renting it. The Appellee, in written letters, expressed his admiration of the Plaintiff's efforts and in various letters to the Plaintiff expresses that the property in any true respect was hers and that he made no claim to it.

It should be noted that the Appellant's severance and the income from the rental property

equates to her retirement and her only resources to live on until such time as she secures employment. At a minimum, the Appellant must be able to pay her mortgage, her utilities, health insurance, auto insurance and upkeep of the home.

The Appellee's statement of facts is in direct contradiction to the transcript, testimony and/or evidence includes the statement that the Appellee had primary responsibility for cooking, helping the minor child with her homework, ironing clothes and putting the minor child to bed. The Appellee testified that the minor child was two (2) years old when he and the Appellant were married and he moved into the home with the Appellant. (TT. P. 26). He further testified that he was gone for approximately four (4) and ½ years when he worked in St. Louis. (TT. P. 27). The marriage only lasted for ten years. The Appellee paints a picture that the mother was an absentee parent (TT. P. 48). The minor child's recollection is that the father would not arrive until approximately 8 or 9 o'clock at night. (TT. P. 57). The Appellee's contention that he was responsible for the primary care of the child should be reviewed with a jaundice eye.

III. ARGUMENTS

The first factor to be considered is a substantial contribution to the accumulation of the property. The Court has determined that under this factor the Chancellor should consider (a) the parties' direct or indirect economic contribution to the acquisition of the property, (b) the parties' contribution to the stability and harmony of the marital and family relationship as measured by quality, quantity of time spent on family duties and duration of the marriage; (c) the contribution to the education, training or accomplishments by the other spouse bearing on the earning power of the spouse accumulating the assets.

The Chancellor, in her analysis of the parties' direct or indirect economic contribution to the acquisition of the property simply stated that the factor weighs in favor of both parties without providing support for the decision with findings of fact and conclusion of law. In Ferguson v. Ferguson, the Court has held that besides just findings of fact for each applicable factor, the chancellor failed to provide any conclusion of law for [our] review on appeal. The Court further held that chancellors are required to consider the applicable factors and support their decisions with findings of fact and conclusion of law for appellate review.

The Appellant believes that a review of the facts would indeed show that the Appellee did not substantially contribute to the accumulation of the property. The Court further in its analysis admitted that this was not a marriage where the parties shared finances except for the payment of expenses. Testimony showed that although the Appellee had been provided with the opportunity to assist the Appellant in the accumulation of property, he decided to invest any funds that were not used in the marital estate to support a joint venture with his brother. The Appellee made no payments of taxes, insurance and performed limited electrical work on some of the properties in question.

The Court in Jones v Jones, 995 So. 2d 706, found that the Chancellor reached a conclusion that the husband had made very limited contribution to the acquisition of property based on the fact that the contributed very little to the accumulation of assets. The Appellant was not responsible for any of the assets accumulated and gave the Appellant very little money with the exception of funds to cover the expenses.

The Chancellor, in her analysis of the parties' contribution to the stability and harmony of the marital and family relationship as measured by quality, quantity of time spent on family

duties and duration of the marriage provides a proper analysis and finds this factor to be in favor of Ms. Wilson. The Appellee, however, alleges that Ms. Wilson was responsible for the disharmony in the marriage. The Court should note that the divorce was granted to the Appellant on the grounds of habitual cruel and inhuman treatment. The Appellee did not challenge the Court's ruling. However, the Appellee attempted to present himself to the Court as the party having major responsibility with the home and the minor child. The minor child was born in 1998. The parties were married in April of 2000. The Appellee testified that he did not move in with the Appellant and the minor child until the child was 2 years old (TT. P 26). The Appellee also testified that he live in St. Louis off and on for about four years (TT. P 27). The Appellee asserted that he did come home on weekends. The Appellee states that he returned to Jackson on a permanent basis in 2001. The Appellee testified that the Appellant's work schedule changed but she was mostly working from 8 to 3. (TT. P. 33). The minor child testified that her mother would come home first and her father would come in at about 8 or 9 (P. 57, line 20).

The Court's analysis of the contribution to the education, training or accomplishments by the other spouse bearing on the earning power of the spouse accumulating the assets was weighed in favor of neither of the parties although the Court provided no facts or analysis to support this determination.

The Court found in its analysis of the disposal of marital property found this factor to weigh in favor of the Appellee. The Appellant did not dispose of the property but utilized the funds for her day-to-day living expenses which was the intent of the severance from Delphi Packard Electric. The Appellant was unemployed and needed to utilize severance funds to support her living expenses until she could become gainfully employed.

Further, even though the question was before the Court, the Court never directly answered which portion of the Member's exchange account was marital property. The Appellant provided testimony and evidence that she had savings prior to the marriage that had not been commingled and therefore constituted her separate estate. Testimony was that the Appellant was frugal and saved money. The Appellee stated that he did not give the Appellee any monies other than occasionally when she went on vacation. There was testimony that the Appellant had accumulated savings and was the recipient of funds from her mother and from the death of her father. The record clearly shows that the Appellant had \$62,278.00 in savings prior to the marriage and that the funds were never commingled or used for family purposes with the exception of funds that the Appellant used to increase the value of the home by adding a garage. The Supreme Court, in *Tillman v Tillman*, 716 So. 2d 1090, 1095, has held that separate property become marital if it is placed in a joint account. The parties throughout the marriage did not have a joint account.

The Court found that there was no testimony offered as to the emotional value attributed to personal items. The Appellant would find that there was clear testimony about the emotional value attributed to other assets, including the rental properties and the savings account at Member's Exchange. The Appellant was visibly upset and the Appellee testified that he was the author of letters denouncing any claims to the assets. The Court correctly stated that the parties were in possession of their personal items and that the factor weighs in neither party's favor. The Court also stated that there was no emotional value attributable to the personal property. The Court, however, did not weigh the emotional value associated with the rental property, the savings accumulated by the Appellant or the severance paid to the Appellant by Delphi Packard

Electric.

The Appellant testified that she had been responsible for not only purchasing the property but supervising the repairs on the property. Testimony was presented that would show that the Appellee was not even aware that she had purchased some of the property, provided no financial resources and made very limited contributions in regard to the maintenance and upkeep of the property. Testimony further established that the Appellee acknowledge that he did not contribute substantially to the accumulation of those assets.

The Appellant worked the night shift a Delphi Packard Electric and did so at great expense to her family and herself. The Appellant could have declined to remain at Delphi Packard Electric upon learning that the plant would be closing but chose to stay and undergo the emotional distress of continuing to work. To state that the Appellant had no emotional attachment to her severance would be an understatement. The Appellant was so emotionally attached she had no fear of declining to inform the Court of where the funds were placed. The Appellant testified that she was afraid because her husband was telling people that she had a lot of money and she was afraid for her safety.

The Court in its review of the value of property brought into the marriage did not consider the value of property brought into the marriage by the Appellee. The Appellee brought nothing into the marriage. He moved into the home of the Appellant and had use and enjoyment of the property for the duration of the marriage. The Court in its review only dealt with the marital home. The Court did not consider any of the assets at question and did not address the funds that were held by the Appellant prior to the marriage.

The Court provided a factual analysis in consideration of the elimination of alimony and

other frictional contract between the parties but provided no conclusion. The Appellant is unsure of the Court's legal conclusion in regards to this factor.

The Court in its analysis of the needs of the parties for financial security with due regard to the combination of assets, income and earning capacity did not appear to take into consideration the fact that the Appellant at the time of the hearing was unemployed and receiving unemployment of \$235.00 per week. The Appellee asserts that the Appellant was working with a company "Life Alert" and was therefore employed. The Appellant went to great lengths to explain to the Court that the "job" was a periodic and inconsistent low skill job that required her to go out and install monitors in the homes of the elderly. She received \$25.00 for each install. The Court did not take into consideration the fact that the severance provided was to support the Appellant through the transition to future employment- that the Appellant had no medical insurance. The Appellant was not highly educated and her work history was in manufacturing, which was in decline due to the economic slump.

The parties were divorced in January 15, 2012. The Appellant's job ended February 19, 2010. The Final Judgment of Equitable Distribution of Martial property was rendered on January 15, 2011. During the time after the end of the Appellant's job until March of 2011, the Appellant only received unemployment and limited income from the rental property that was occupied. The Court did not consider that the Appellant, in order to live, would have to expend funds for daily living that constituted her savings and the severance that she received from Delphi Packard Electric. The Plaintiff testified that her monthly expenses were \$2000 and that she was having to go into her savings to survive. (TT P. 119 &120). The Court should note that a funds were expended from February 19, 2010 until the date of the divorce on January 15, 2011

to cover the Appellant's portion of the marital expenses.

The Appellee, however, was working and making an average income of \$74,000 per year. The Appellee had medical insurance and would receive child support payments from the Appellant for the minor child.

If the marital assets, after equitable division, will adequately provide for both parties, then "no more need be done". Johnson v Johnson, 877 So. 2d 485, 501 (Miss. 2003) (citing Kilpatrick v Kilpatrick, 732 So. 2d 876 (Miss. 1999)).

The Court gave no consideration to any other factors which in equity should be considered. The Court did not make any declaration as to what constituted a substantial contribution to the accumulation of the rental property acquired by the Appellant, in the name of the Appellant. The Court did not take note of the fact that the Appellant's distribution from the severance lump sum was a net of \$30,997.52 due to the tax liability

The Appellant does not contend that the character of the marital home was not converted when she and the Appellee married. The Appellee came into the home and she did what a wife would do and that was to welcome him and attempt to make a home with the Appellee. The Appellant would however assets that the first year of mortgage payments and the initial down payment were made from her personal funds prior to the marriage. The Appellee did enjoy the use and enjoyment of the home. The Appellant believes that the Chancellor erred in not crediting her for the two years of mortgage payments and the initial down payment.

The Appellee admits that he made no financial contribution to the accumulation of the rental property acquired during the marriage. (TT.P 149-150 and TT. P. 165 -166). The Appellee states that he made electrical wiring and repairs to the properties but a review of the testimony

would show that he stated that he had not seen the homes since they were renovated. (TT. P. 151). There was no showing that there was a substantial increase to the value of the property.

The Chancellor committed reversible error in awarding the Appellee equity in rental property that the Appellee did not make “**substantial contributions**” to the acquisition of and made written representations to that fact.

The Appellee asserts that the funds were commingled. They were not in an account that he had knowledge of and there was no showing of disbursements from said account to cover any marital or familial expenses. It is true that there is a presumption that all assets accumulated during the marriage constitute marital property but there is a requirement that there be a “substantial contribution” to the accumulation of those funds. There is no evidence that the Appellee did anything to contribute to the accumulation of those funds.

CONCLUSION AND PRAYER

The Appellant prays that this Court will remand this case to the Chancellor for review and further consideration of the classification of the assets as marital property, the contribution of the Appellee to the acquisition of any marital assets and the review of the Ferguson factor in association with the financial well-being of the Appellant in lieu of the Court’s distribution of marital assets. The Appellant would further pray that the Chancellor provide the findings of facts and law utilized to support the determination. The Appellant further prays for any and all relief this Court determines to be applicable.

CERTIFICATE OF SERVICE

I, Earnestine Alexander, certify that I have this day delivered through postage paid mail or hand-delivered, a copy of the foregoing document to the parties below:

Joyce Funches
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Honorable Judge Denise Sweet Owens
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Honorable Kathy Gillis
Supreme Court Clerk
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This the 22nd day of October, 2012.

Earnestine Alexander
Earnestine Alexander