IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-00515-COA

TAMRA W. KING **APPELLANT**

v.

JOSEPH LYNN KING **APPELLEE**

DATE OF JUDGMENT:	02/29/2012
TRIAL JUDGE:	HON. JANACE H. GOREE
COURT FROM WHICH APPEALED:	YAZOO COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	RONALD HENRY PIERCE
ATTORNEY FOR APPELLEE:	CLIFFORD C. WHITNEY III
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	GRANTED IRRECONCILABLE-DIFFERENCES DIVORCE, EQUITABLY DIVIDED THE MARITAL ASSETS, AND RESOLVED ISSUES RELATING TO CHILD SUPPORT AND VISITATION
DISPOSITION:	AFFIRMED - 01/14/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

LEE, C.J., FOR THE COURT:

FACTS AND PROCEDURAL HISTORY

¶1. Tamra and Joseph King were married in 1990. The parties separated in March 2009, and Tamra filed for divorce in the Yazoo County Chancery Court in June 2009. Ultimately, the parties agreed to a divorce on the ground of irreconcilable differences. The parties further agreed Tamra would retain custody of the couple's two minor children and Joseph would pay $305 per month in child support.

¶2. After a trial, the chancellor distributed the marital estate, set the children's visitation with Joseph, and denied requests for alimony. Tamra now appeals, asserting the chancellor erred in: (1) dividing the marital estate; (2) failing to find Joseph committed fraud by filing an inaccurate Rule 8.05[1] financial statement; (3) attempting to equitably divide the couple's assets without requesting an accurate Rule 8.05 form from Joseph; (4) determining Joseph's earning capacity; (5) finding she owned several acres of land; and (6) finding she disposed of marital assets.

STANDARD OF REVIEW

¶3. We afford chancellors much discretion in our review of domestic-relations cases. *Steiner v. Steiner*, 788 So. 2d 771, 777 (¶18) (Miss. 2001). This Court will not disturb a chancellor's findings unless they are manifestly wrong or clearly erroneous, or the chancellor applied an erroneous legal standard. *Mizell v. Mizell*, 708 So. 2d 55, 59 (¶13) (Miss. 1998).

DISCUSSION

I. DIVISION OF MARITAL ESTATE

¶4. The central issue of Tamra's appeal is whether the chancellor erred in dividing the marital estate. Specifically, Tamra claims the chancellor erred in failing to award her a percentage of Joseph's pension from the United States Navy. Joseph's monthly income of $1,597 consisted of his $1,144 per month pension and his $453 per month in military disability benefits.[2] The chancellor ordered a valuation of Joseph's pension, which stated the

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[1] UCCR 8.05.

[2] Joseph's military disability benefits are not subject to equitable distribution. *Mallard v. Burkart*, 95 So. 3d 1264, 1273 (¶23) (Miss. 2012).

future income stream was valued between $405,238.05 and $474,707.78, depending upon the cost-of-living adjustment.

¶5. Upon review of the record, we can find no error by the chancellor. The chancellor made comprehensive findings in dividing the marital estate and followed the *Ferguson*[3] factors in doing so. The chancellor did not specifically state that the military pension was a marital asset. However, it is clear the chancellor viewed the pension as a marital asset, as the chancellor cited to case law recognizing that a chancery court has authority, where equity so demands, "to order a fair division of property accumulated through the joint contributions and efforts of the parties," including military pensions. *See Brown v. Brown*, 574 So. 2d 688, 690 (Miss. 1990). The separate opinion is correct that Tamra does have an interest in Joseph's military retirement for the years the couple was married. However, that does not mean Tamra is automatically entitled to a portion. As we previously stated, it is within the chancellor's discretion to determine whether equity demands such a division. In this instance, the chancellor determined that Joseph's military pension was his only source of income and that "Tamra's request for one-half of [Joseph's] future monthly retirement would leave [Joseph] with $572 per month. [Joseph] would not be able to pay his child support of $305 and live." The chancellor noted that Tamra's gross monthly income of approximately $4,100 was more than twice that of Joseph and that awarding her half of his pension would be inequitable. The chancellor ultimately awarded the majority of the assets to Tamra, finding this eliminated the need to award alimony. This issue is without merit.

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[3] *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994).

II. & III. RULE 8.05 FINANCIAL STATEMENT

¶6. Tamra contends the chancellor erred in failing to find Joseph committed fraud on the court by filing an erroneous Rule 8.05 financial statement. Tamra complains Joseph did not submit proof of his military retirement and other sources of income in his statement. Joseph's Rule 8.05 statement includes his monthly income from his pension and disability checks from the Navy. Joseph did admit he sold farm products such as eggs and chickens but testified he made no profit off the sale of these items. Joseph further testified he had $1,000 in cash, which he did not list on his Rule 8.05 statement. It is clear from the record that the chancellor was aware Joseph had $1,000 in cash not listed in his financial statement and was aware of Joseph's sources of income from his pension and disability checks. The chancellor also entered an order requiring a valuation of Joseph's Navy pension be performed and submitted for her review prior to her division of the marital assets. Tamra is correct that the intentional filing of a substantially false Rule 8.05 financial statement constitutes a fraud on the court. *See Trim v. Trim*, 33 So. 3d 471, 478 (¶17) (Miss. 2010). However, we find no evidence that Joseph intentionally filed a substantially false Rule 8.05 statement. These issues are without merit.

IV. JOSEPH'S EARNING CAPACITY

¶7. In her next issue, Tamra contends the chancellor erred in determining Joseph's earning capacity was $1,597, or the total of his pension and disability checks. However, from the evidence presented, we can find no error by the chancellor. In addition to his monthly pension, Joseph received disability benefits due to back and leg problems. Joseph testified he had certain skills and could perform work on his property, and he was not able to work

for an extended period of time. Tamra offered no definitive proof to the contrary. This issue is without merit.

V. LAND OWNERSHIP

¶8. Tamra claims the chancellor erred in finding she acquired three to four acres of land after the parties separated. Tamra contends she was renting the property, including the residence on the property. The chancellor determined the property to be nonmarital and noted there was no evidence offered as to the value of the land. The chancellor found the property was purchased after the parties separated; thus, the property was Tamra's separate property and not subject to equitable distribution. Even if the chancellor mischaracterized this piece of property, we find no error. The chancellor determined the property to be Tamra's separate property and did not consider it in equitably dividing the assets. This issue is without merit.

VI. DISSIPATION OF MARITAL ASSETS

¶9. Tamra contends the chancellor erred in finding she disposed of marital assets after the separation, specifically thirty goats. Tamra claims the goats belonged to her daughters. Tamra and her daughters took the goats when they moved out of the marital home. Regardless, the chancellor placed no value on the goats. This issue is without merit.

¶10. Tamra further claims the chancellor underestimated Joseph's dissipation of the marital assets. After the separation, Joseph cashed in his life-insurance policy, receiving approximately $22,269, and a mutual fund, receiving $6,740.70. However, as previously stated, the chancellor made detailed findings on the *Ferguson* factors and took into account Joseph's dissipation of his life-insurance policy and other relevant items in dividing the

marital estate. This issue is without merit.

¶11. **THE JUDGMENT OF THE YAZOO COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

IRVING AND GRIFFIS, P.JJ., ISHEE, ROBERTS AND MAXWELL, JJ., CONCUR. FAIR, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION, JOINED BY ROBERTS, J.; GRIFFIS, P.J., MAXWELL AND JAMES, JJ., JOIN IN PART. BARNES, J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. CARLTON, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED IN PART BY JAMES, J. JAMES, J., CONCURS IN PART AND DISSENTS IN PART WITHOUT SEPARATE WRITTEN OPINION.

FAIR, J., SPECIALLY CONCURRING:

¶12. The issue dividing the majority and dissent is whether there was a *Hemsley-Ferguson-Armstrong*[4] compliant treatment of military retirement benefits belonging to Joseph. Those benefits were being paid to him monthly, having matured from a dormant asset into a stream of income. For that reason I concur with the majority in recognizing that the treatment of such benefits by the chancellor was in accord with the intent of those three cases and their progeny.

¶13. The Supreme Court of Mississippi handed down *Hemsley* and *Ferguson* in July 1994, providing factors for consideration by chancellors in establishing and equitably dividing marital assets. In 1993, *Armstrong* had set out similar factor guidance for determining alimony. Later rulings have emphasized that these three cases govern financial relations – past, present, and future – of divorcing spouses, and should be considered together, with one

[4] *Hemsley v. Hemsley,* 639 So. 2d 909, 912-13 (Miss. 1994); *Ferguson v. Ferguson*, 639 So. 2d 921, 926 (Miss. 1994); *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993).

receding in effect when another increases.

¶14. The first case recognizing the interdependency of those three "factor discussion" cases was handed down five months after *Hemsley* and *Ferguson*. In *Johnson v. Johnson*, 650 So. 2d 1281 (Miss. 1994), the supreme court introduced the concept of remedying, through alimony, a "deficit" in income and lifestyles between parties after equitable division of their marital property and evaluation of their separate property, if any. A chancellor is required to first determine income from employment *and* from marital property and separate property. Then, if a deficit results, then the chancellor should award alimony in one or more of its three common forms (lump sum, rehabilitative, and periodic) to address the deficit. Overall fairness, equity, and especially finality undergird such treatment, with an emphasis in recent cases placed on avoidance, if at all possible, of continuing financial relationships between spouses (other than child support).

¶15. The Uniformed Services Former Spouses' Protection Act (USFSPA), cited in both the majority and the dissent, has been compared on occasion by the supreme court to the 1986 COBRA provisions under which a chancellor may divide marital ERISA qualified retirement plans (Tamra's 401(k), for instance) without tax consequence. However, Joseph's military retirement, like Tamra's PERS retirement, and all other government retirement programs, are exempt from the COBRA Act and its "Qualified Domestic Relations Orders" (QDRO). Military retirement has its own requirements for benefit distribution in divorce cases.

¶16. USFSPA allows only income streams from military retirement benefits to be awarded, prohibiting lump sum apportionment and limiting the total of all alimony and child support to 50% of the service member's regular retirement income stream. Thus, the maximum

benefit possible for Tamra under those restrictions is $267 monthly, which is half of Joseph's $1,144 less $305 in agreed child support. Apportioning that amount to Tamra as payment, in installments, for her share of a property interest in Joseph's retirement would raise her gross $4,100 per month to $4,367 and reduce Joseph's to $1,330, further increasing the deficit that favors an award of alimony to Joseph.

¶17. We should formally recognize the difference between an ERISA plan and military retirement plans, and perhaps all retirement accounts actively paying monthly benefits which cannot be altered. For example, PERS contributions on early termination of employment, and 401(k) and IRA contributions at any time, may be withdrawn by a spouse at the time of divorce and are therefore still divisible, some through a QDRO without loss of tax-deferred status. On the other hand, a vested income stream that has commenced in a government plan is not, as the majority recognizes, divisible or payable in lump sum, and should be considered under the *Armstrong* alimony prong only.

¶18. Such treatment of an existing retirement income stream would be in accord with the view our supreme court takes of "good will" in business valuations,[5] likewise not a divisible asset readily convertible to cash but rather a source of monthly income to be considered in alimony determination only.

ROBERTS, J., JOINS THIS OPINION. GRIFFIS, P.J., MAXWELL AND JAMES, JJ., JOIN THIS OPINION IN PART.

CARLTON, J., CONCURRING IN PART AND DISSENTING IN PART:

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[5] *See Lewis v. Lewis*, 54 So. 3d 216, 218 (¶¶3-4) (Miss. 2011); *Singley v. Singley,* 846 So. 2d 1004, 1010-11 (¶¶17-18) (Miss. 2002).

¶19. I respectfully dissent in part due to the chancellor's erroneous application of the law when identifying marital property and separate property for purposes of equitable distribution. The chancellor did not identify Tamra's marital-personal-property interest in the portion of Joseph's military retirement that was earned during the marriage wherein she supported the marriage and materially contributed to the accumulation of the marital property.[6] In *Ferguson v Ferguson*, 639 So. 2d 921, 928 (Miss. 1994), the Mississippi Supreme Court directed chancellors to support their holdings with findings of fact and conclusions of law when equitably dividing property. I respectfully submit that since Tamra's interest in Joseph's military retirement was not included in the consideration of marital property, then the chancellor's findings of fact and conclusions of law are erroneous.[7] Also, in dissenting, I acknowledge that even though the chancellor considered the propriety of alimony, the chancellor's consideration of equitable division of property is separate and distinct from her consideration of alimony. I raise no dispute with the majority's acknowledgment that Tamra is not automatically entitled to a portion of Joseph's military retirement, but she is entitled to a fair consideration of her property interest when the chancellor equitably divides the marital property. The failure to identify her marital-property interest in Joseph's retirement precluded such a fair consideration. Additionally, the equitable division of marital property occurs prior to any consideration of alimony. *See*

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[6] The record reflects that Tamra supported the marriage and Joseph's military service. Further, Tamra's testimony showed that she was unable to establish her own career and retirement because of the couple's relocations from state to state due to Joseph's military service.

[7] *See* Deborah Bell, *Bell on Mississippi Family Law* § 7.07 (2005).

Hemsley v. Hemsley, 639 So. 2d 909, 914 (Miss. 1994).

¶20. Equitable distribution of property of a marriage requires as a first step that the property be properly identified as marital or separate in accordance with *Ferguson*, 639 So. 2d 928. Since in this case Tamra's marital-property interest in Joseph's retirement was not identified or considered in the equitable distribution of the property of the marriage, I would reverse and remand this case to the chancellor for consideration. In this case, Joseph's military-retirement benefits that he earned during the marriage are marital property and are subject to equitable distribution under our state's jurisprudence because of Tamra's contribution to the marriage during Joseph's military service. Therefore, since the chancellor failed to consider Tamra's interest in the military retirement, I would reverse and remand this case for reconsideration of the equitable distribution by the chancellor.

¶21. "Military retirement benefits are considered personal property and as such are subject to equitable division in a divorce proceeding." *Rennie v. Rennie*, 718 So. 2d 1091, 1095 (¶13) (Miss. 1998) (citing *Hemsley*, 639 So. 2d at 914). As explained in *Hemsley*, "[t]he federal government has vested state courts with the power to allocate military retirement pay pursuant to a divorce decree." *Hemsley*, 639 So. 2d at 913 (citing 10 U.S.C. § 1408(c)(1) (Supp. 1992)).[8] The Mississippi Supreme Court has applied this rule to state courts in

[8] The Uniformed Services Former Spouses' Protection Act (USFSPA), which authorizes state courts to divide military retirement pay as a marital asset, is codified at 10 United States Code section 1408 (2006). This section also provides former spouses a means to enforce a chancellor's property award by direct payments through the service member's retirement payments. While the USFSPA gives states the authority to determine whether military benefits are separate, marital, or community property, the terms of the USFSPA must still be followed with regard to the amount of retirement benefits awarded to the former spouse. "The total amount of the disposable retired pay of a member payable under all court

Mississippi. *Powers v. Powers*, 465 So. 2d 1036, 1037 (Miss. 1985). "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' separate estates prior to the marriage or outside the marriage." *Hemsley*, 639 So. 2d at 914. The supreme court in *Hemsley* also recognized that "[t]here is a distinction between alimony and retirement benefits." *Id.* "In reference to a spouse's equitable right to a share of the other spouse's military retirement pay, [the supreme court has] reiterated that a chancery court has authority, where equity so demands, to order a fair division of property accumulated through the joint contributions and efforts of the parties." *Id.* In general, "[a] spouse who has made a material contribution toward the acquisition of property which is titled in the name of the other may claim an equitable interest in such jointly accumulated property incident to a divorce proceeding." *Ferguson*, 639 So. 2d at 935 (quoting *Jones v. Jones*, 532 So. 2d 574, 580 (Miss. 1988)). Further, "[t]he non-monetary contributions of a traditional housewife have been acknowledged by [the supreme court], and to some extent, case law has helped lessen the unfairness to a traditional housewife in the division of marital property." *Id.* at 926.

¶22. Joseph served in the United States Navy from 1982 until 2002. He and Tamra married in 1990 and separated in 2009. Thus, Joseph's military service from 1990 until his retirement in 2002 overlapped with his marriage to Tamra. The record reflects that Tamra materially

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orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay." 10 U.S.C. § 1408(e). Also, the benefits may not be awarded as a lump sum, as state courts "have not been granted the authority to treat total retired pay as community property." *Mansell v. Mansell*, 490 U.S. 581, 589 (1989). For definitions relevant to the USFSPA, see 5 United States Code section 8331 (2006) and 10 United States Code section 1408.

contributed to the accumulation of Joseph's military retirement during these twelve years by her support of his military service and their marriage. Consistent with this state's precedent, Tamra therefore possesses a property interest in Joseph's military retirement earned during the years of marriage that overlapped with Joseph's military service. *See Hemsley*, 639 So. 2d at 913; *Ferguson*, 639 So. 2d at 928.

¶23. As previously acknowledged, in *Ferguson*, the Mississippi Supreme Court provided the following guidelines for chancellors to follow in the equitable division of marital property:

> 1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:
>
>   a. Direct or indirect economic contribution to the acquisition of the property;
>
>   b. Contribution to the stability and harmony of the marital and family relationships as measured by quality [and] quantity of time spent on family duties and duration of the marriage; and
>
>   c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.
>
> 2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.
>
> 3. The market value and the emotional value of the assets subject to distribution.
>
> 4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;

5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution;

6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;

7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and,

8. Any other factor which in equity should be considered.

Ferguson, 639 So. 2d at 928.

¶24. In the chancellor's order, under the heading "Application of the *Ferguson* Factors," the chancellor identified the marital property in a chart entitled "Assets and Liabilities of the Parties." The chancellor identified the following retirement accounts in this chart: (1) "Independent Solution 401K (Wife)"; (2) "PERS State Retirement (Wife)"; (3) "Franklin Templeton IRA"; and (4) "Vanguard Mutual Fund." The order shows that the chancellor did not include any marital interest in Joseph's military retirement in her identification of marital property. On appeal, Tamra argues that it is apparent from this chart that the chancellor "fail[ed] to place any value on [Joseph's] military pension, which future income stream was valued, at . . . the chancellor's own order, at between $405,238.05 and $474,707.78, which was not disputed by [Joseph]." The chart included in the chancellor's order shows that when the chancellor divided the marital property, she awarded Tamra $18,181.20 and awarded Joseph $11,194.02. However, as Tamra asserts in her appellate brief, when considering Joseph's military retirement, Tamra's award still amounts to $18,181.20, but Joseph's award increases to an amount between $416,432.07 and $485,901.80, depending on the cost-of-

living adjustment placed on the military retirement.[9] At the final hearing in this matter, Joseph testified that he would receive $1,144 per month in military-retirement benefits for the remainder of his life.[10]

¶25. Based upon the foregoing, I respectfully dissent as I find in this particular case that the chancellor's failure to consider the military-retirement benefits in the equitable distribution of the property was an erroneous application of our law that lacks factual support.

JAMES, J., JOINS THIS OPINION IN PART.

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[9] According to the chancellor's final judgment, Michelle Mabry, the financial advisor who performed the valuation of Joseph's military-retirement benefits, determined that "Joseph's future income stream is $474,707.78 at 4% cost of living adjustment (COLA) and $405,238.05 at 3% COLA."

[10] Joseph also receives military disability benefits of $453 a month. In *Mansell*, the United State Supreme Court found that the USFSPA fails to grant state courts the power to treat as divisible military retirement pay that has been waived in order to receive military disability pay. *Mansell*, 490 U.S. at 594-95. The chancellor here did not consider Joseph's disability benefits in the division of property. However, in *Steiner v. Steiner*, 788 So. 2d 771, 777-78 (¶21) (Miss. 2001), the Mississippi Supreme Court acknowledged that some state courts have applied the narrower finding in *Rose v. Rose*, 481 U.S. 619 (1987), to hold that disability payments may be considered as a factor in determining a veteran's ability to pay spousal maintenance and child support.