

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-01218-COA

MATTHEW BURNHAM

APPELLANT

v.

DANA BURNHAM

APPELLEE

DATE OF JUDGMENT: 06/26/2012
TRIAL JUDGE: HON. DAVID SHOEMAKE
COURT FROM WHICH APPEALED: COVINGTON COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT: THOMAS T. BUCHANAN
JOHN D. SMALLWOOD
ATTORNEY FOR APPELLEE: DAVID ALAN PUMFORD
NATURE OF THE CASE: CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION: DIVORCE GRANTED, CHILD SUPPORT AWARDED, MARITAL ASSETS DIVIDED, APPEAL BOND DISMISSED
DISPOSITION: AFFIRMED IN PART, REVERSED AND REMANDED IN PART - 04/08/2014
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE IRVING, P.J., CARLTON, MAXWELL AND JAMES, JJ.

JAMES, J., FOR THE COURT:

¶1. This appeal follows a judgment of divorce rendered by the Covington County Chancery Court. Dana Burnham was awarded primary physical custody of the parties' two minor children, and \$283,226.87 in marital assets. Matthew Burnham was ordered to pay \$600 per month in child support. Matthew appeals, raising the following issues: (1) the trial court erred in its calculation of monthly child support; (2) the trial court erred in its equitable division of the marital assets and debts; and (3) the trial court erred its order discharging and

dismissing the supersedeas bond filed by Matthew. We find the trial court abused its discretion in setting the amount of monthly child support and in its division of the marital assets and debts. However, we find the trial court properly discharged and dismissed the supersedeas bond. Therefore, the judgment of the trial court is affirmed in part and reversed and remanded in part.

FACTS AND PROCEDURAL HISTORY

¶2. Dana and Matthew were married on July 3, 1999, in Covington County, Mississippi. During the marriage, the couple had two children, Audrey, born June 2, 2006, and Mattilyn, born October 30, 2008. Dana was a stay-at-home mom, and Matthew was a biology instructor at Jones County Junior College. On June 20, 2011, Dana filed a complaint for divorce on the grounds of habitual cruel and inhuman treatment and habitual drunkenness. Matthew subsequently filed an answer and counter-complaint for divorce on the ground of habitual cruel and inhuman treatment. Both parties sought an irreconcilable-differences divorce in the alternative.

¶3. A hearing was held on August 1, 2011, in the Covington County Chancery Court. The hearing was not transcribed. After hearing the testimony of both parties and witnesses, the trial court issued a temporary order on August 18, 2011. The trial court appointed a guardian ad litem for the minor children, and awarded Dana primary physical custody. Matthew was given supervised visitation.¹ The trial court prohibited both parties from consuming alcohol in the presence of the children. The court also ordered Matthew to surrender all firearms in

¹ The trial court ordered the visitation to take place on weekends within the hours of 9 a.m. and 6 p.m. under the supervision of Matthew's parents.

his possession to his attorney.

¶4. Dana was awarded exclusive use and possession of the marital home. However, the trial court permitted Matthew to access a barn adjacent to the marital home during daytime hours only. Matthew was ordered to have no contact with Dana. The trial court set child support at \$600 per month, to be paid by Matthew. In the temporary order, the trial court indicated that it based this figure on Matthew's net monthly income of \$2,618, plus additional income he receives from his farming operation.²

¶5. The court ordered that neither party was allowed to dispose of or encumber any of the marital assets. However, the court allowed Matthew to use income generated from the sale of his agricultural products to defray an FSA note he was responsible for paying. Matthew was ordered to give an accounting of any and all receipts and cash from his farming operation. The trial court further ordered Matthew to continue to pay all marital debts until further instructed by the court.

¶6. On February 9, 2012, the parties filed a joint motion for divorce on the ground of irreconcilable differences. In the motion, the parties agreed to withdraw their alleged grounds for divorce and consented to have the trial court decide the following issues on which they could not agree: "[I]dentity and division of all marital assets; identity and division of all debts; custody of the minor children; support for the minor children; alimony, if any; attorney fees and costs, if any; and any temporary matters."

¶7. A trial was held on February 14, 2012, and June 6, 2012. Prior to trial, the parties

² The amount of income Matthew receives from his farming operation was not specified in the temporary order.

agreed that Dana would maintain primary physical custody of the children. The parties also agreed upon a visitation schedule, which was entered into evidence. The issue of joint legal custody, which was initially reserved for the court to decide, was agreed upon by the parties during the course of trial.

¶8. The trial court identified various assets accumulated during the course of the marriage, which consisted of real estate, automobiles, and retirement accounts. The couple's marital assets had a total value of \$521,130.48. The marital debt identified by the trial court consisted of a Regions Bank mortgage, a Regions Bank farm loan, and a student loan held by Matthew. The marital debt totaled \$225,472.79.

¶9. The trial court rendered its final judgment of divorce on April 20, 2012. Dana was awarded \$283,226.87 in marital assets, which included the parties' marital home and acreage valued at \$255,000, an automobile valued at \$27,000, and a retirement account held by Dana, valued at \$1,226.87. Dana was also awarded one-half of Matthew's Mississippi Employee Deferred Compensation Plan, which was valued at \$66,658.54, in addition to one-half of his Public Employees' Retirement System (PERS) account, which was valued at \$41,164.40. Thus, Dana was awarded \$53,911.47 of Matthew's retirement accounts. Altogether, Dana was awarded \$337,138.34 in assets. The trial court did not assess any of the marital debt to Dana.

¶10. Matthew was awarded \$130,080.67 in marital assets. This included a Roth IRA account held by Matthew valued at \$730.67; 51.09 acres of land located at King Place valued at \$94,350; 9.62 acres of land located at Highway 84 valued at \$10,000; a mobile home and acreage valued at \$15,000; and two automobiles valued at \$5,000 each. In addition, Matthew

was allowed to retain one-half of his PERS and deferred-compensation retirement accounts, which totaled \$53,911.47. Altogether, Matthew was awarded \$183,992.14 in assets.³ The trial court also assessed the parties' \$225,472.79 in marital debt to Matthew.

¶11. The trial court ordered all real property to be sold when Mattilyn turns twenty-one years of age. Of the sale proceeds from the marital home and acreage, the court ordered that Dana receive seventy-five percent, and Matthew receive twenty-five percent. Of the sale proceeds from the land located at King Place and Highway 84, as well as the mobile home, the court ordered that Matthew receive seventy-five percent and Dana receive twenty-five percent. Also, the trial court ordered that Matthew be responsible for the mortgage, property taxes, and insurance for each property, including the marital home awarded to Dana. The trial court further ordered that Matthew continue to pay \$600 per month in child support.

¶12. Matthew filed a motion for a new trial and a motion to alter or amend the judgment. A hearing on the post-trial motion was held on June 5, 2012. The court denied in part and granted in part Matthew's motion. The court entered an amended final judgment of divorce. The judgment was amended to delete a prohibition on the dischargibility of the financial obligations in bankruptcy set out in the judgment.

¶13. Matthew filed his notice of appeal on July 20, 2012, and on July 23, 2012, he filed a supersedeas bond with the Supreme Court of Mississippi. On August 1, 2012, Dana filed an

³ In its final order, the trial court listed \$237,903.61 as the total amount of marital assets awarded to Matthew. This figure included the full values of Matthew's PERS and deferred-compensation retirement accounts. However, the court awarded Dana \$53,911.47 from those accounts (to be paid immediately upon eligibility for distribution), which left Matthew with a total award of \$183,992.14 in marital assets.

objection to the supersedeas bond. The trial court held a hearing on Dana's objection on October 16, 2012, and gave both parties an additional seven days to present case law and/or statutory law to the court. However, on October 18, 2012, the trial court entered a judgment discharging and dismissing the supersedeas bond. The judgment was amended on October 22, 2012.

¶14. On November 5, 2012, Matthew filed a Motion for Stay Pending Appeal after Trial Court Discharge of Supersedeas Bond. The trial court denied the motion on November 19, 2012. On December 14, 2012, Matthew filed another Motion for Stay Pending Appeal, and the trial court denied the motion again on January 3, 2013. Matthew now appeals raising the following issues: (1) the court erred in setting child support; (2) the court erred in the equitable distribution of marital property; and (3) the court erred in discharging and dismissing the appeal bond with supersedeas.

STANDARD OF REVIEW

¶15. Usually, the scope of review of a chancellor's findings is limited in domestic-relations cases. "The chancellor's determinations will only be reversed when they were manifestly wrong [or] clearly erroneous, or when the chancellor applie[d] an incorrect legal standard." *Greenwood v. Young*, 80 So. 3d 140, 145 (¶12) (Miss. Ct. App. 2012). "Questions of law are reviewed de novo." *Marin v. Stewart*, 122 So. 3d 153, 156 (¶8) (Miss. Ct. App. 2013).

¶16. In the case at hand, the trial court essentially adopted the proposed findings of fact and conclusions of law submitted by Dana. We have previously held that "[w]here the chancellor adopts, verbatim, findings of fact and conclusions of law prepared by a party to the litigation, this Court analyzes such findings with greater care[.]" *Brooks v. Brooks*, 652 So. 2d 1113,

1118 (Miss. 1995) (citing *OmniBank of Mantee v. United S. Bank*, 607 So. 2d 76, 83 (Miss. 1992)). Further, “the deference normally afforded a chancellor's findings of fact is lessened.” *Id.* This does not mean that the appellate court is the fact-finder, nor does it change our standard of review. This means that the Court will take a closer look to make sure that our law is followed as interpreted by our courts. Chancellors are charged with the duty of being independent fact-finders, and the adoption of an opinion written by one of the attorneys is not the finding of the chancellor based on his independent reasoning, even though the chancellor may have a similar opinion.

DISCUSSION

I. Whether the trial court erred in setting child support.

¶17. Matthew contends that the trial court erred in setting child support because it deviated from the child-support guidelines set forth in Mississippi Code Annotated section 43-19-101 (Supp. 2013). According to the statute:

(1) The following child support award guidelines shall be a rebuttable presumption in all judicial or administrative proceedings regarding the awarding or modifying of child support awards in this state:

| Number of Children Due Support | Percentage of Adjusted Gross Income That Should Be Awarded for Support |
|-----------------------------------|--|
| 1 | 14% |
| 2 | 20% |
| 3 | 22% |
| 4 | 24% |
| 5 or more | 26% |

(2) The guidelines provided for in subsection (1) of this section apply unless the judicial or administrative body awarding or modifying the child support award makes a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case as determined under the criteria specified in Section 43-19-103.

Miss. Code Ann. § 43-19-101.

¶18. The record indicates that Matthew's adjusted gross income from Jones County Junior College is \$2,618.04 per month. The trial court found that Matthew receives additional income from farming operations. However, there is no documentation that provides for the amount per month he receives from farming. It is also unclear whether Matthew still receives this supplemental income from farming.

¶19. Matthew argues that the appropriate amount for his child-support obligation for the two minor children is \$523.61; which is twenty percent of his net income. The trial court ordered Matthew to pay \$600 per month. The trial court based the child-support award on the net income Matthew receives from Jones County Junior College and cash received from the farming operation. However, there is nothing in the record to establish the amount of income received from the farming operation. The trial court imputed an undetermined amount of income to Matthew.

¶20. Matthew argues that a deviation from the child-support guidelines requires a written finding on the record explaining the need for such deviation. Miss. Code Ann. § 3-19-101 (Supp. 2013). The criteria for finding an appropriate deviation are as follows:

- (a) Extraordinary medical, psychological, educational or dental expenses.
- (b) Independent income of the child.
- (c) The payment of both child support and spousal support to the obligee.

- (d) Seasonal variations in one or both parents' incomes or expenses.
- (e) The age of the child, taking into account the greater needs of older children.
- (f) Special needs that have traditionally been met within the family budget even though the fulfilling of those needs will cause the support to exceed the proposed guidelines.
- (g) The particular shared parental arrangement, such as where the noncustodial parent spends a great deal of time with the children thereby reducing the financial expenditures incurred by the custodial parent, or the refusal of the noncustodial parent to become involved in the activities of the child, or giving due consideration to the custodial parent's homemaking services.
- (h) Total available assets of the obligee, obligor and the child.
- (i) Payment by the obligee of child care expenses in order that the obligee may seek or retain employment, or because of the disability of the obligee.
- (j) Any other adjustment which is needed to achieve an equitable result which may include, but not be limited to, a reasonable and necessary existing expense or debt.

Miss. Code Ann. § 43-19-103 (Supp. 2013).

¶21. “The child support award guidelines are ‘ rebuttable presumption in all judicial or administrative proceedings regarding the awarding or modifying of child support awards in this state.’” *Grove v. Agnew*, 14 So. 3d 790, 793 (¶7) (Miss. Ct. App. 2009) (quoting Miss. Code Ann. § 43-19-103 (Rev. 2004)). Thus, “[i]n the absence of specific findings of fact to support a deviation from the child support guidelines, the chancellor's award is not entitled to the presumption of correctness under the statute.” *Osborn v. Osborn*, 724 So. 2d 1121, 1125 (¶20) (Miss. Ct. App. 1998).

¶22. After careful review of the record, we find no specific finding of fact to support deviation. Instead there is merely an order for Matthew to pay a seemingly arbitrary amount

of \$600. The ordered amount of support is almost twenty-three percent of his net income. There is no mention of any extraordinary circumstances that would warrant a departure from the child-support guidelines. Although the children attend private school, the maternal grandparents agreed to pay the tuition. Accordingly, we find that the trial court erred in deviating from the child-support guidelines without specific on-the-record findings.

II. Whether the trial court erred in its division of marital assets and debts.

¶23. Matthew next asserts that the trial court erred in its division of marital assets and debts by awarding Dana the bulk of the marital assets and assigning Matthew all the marital debt. In the final judgment of divorce, the trial court prohibited either party from selling any of their real property until the youngest child turned twenty-one years of age. In the meantime, Matthew must continue to pay the mortgage, maintenance costs, and taxes on all three parcels of property, including the marital home. Matthew argues that this prohibition on selling the real property is inequitable, because the court did not take into consideration the amount of interest that Matthew would be paying over the course of the prohibition, which diminishes his portion of the award.

¶24. The following steps must be taken in the distribution of marital property: “(1) classify the parties' assets as marital or separate; (2) value those assets; and (3) equitably divide the marital assets pursuant to the *Ferguson* factors.” *Faerber v. Faerber*, 13 So. 3d 853, 858 (¶18) (Miss. Ct. App. 2009) (citing *Ferguson v Ferguson*, 639 So. 2d 921, 928 (Miss. 1994)). In *Ferguson*, the Mississippi Supreme Court identified multiple factors that should be taken into consideration when determining the equitable division of marital property. The factors

to be considered are:

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, 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.

¶25. Here the trial court awarded Dana \$283,226.87⁴ of the marital property. Matthew was awarded marital property totaling \$237,903.61. The trial court then awarded Dana half of Matthew's PERS account and deferred-compensation account, which was an additional \$53,911.47, bringing the total award for Dana to \$337,138.34 and Matthew's total award to \$183,992.14.

¶26. Further, the trial court ordered that all the real property be sold when the youngest child turns twenty-one years of age. At that time, Dana would receive seventy-five percent of the proceeds from the sale of the house, and Matthew would receive twenty-five percent of the proceeds. Likewise, when the real property awarded to Matthew is sold, Matthew would receive seventy-five percent of the proceeds from the sale and Dana would receive twenty-five percent. The taxes, insurance, and maintenance for all the real property would be Matthew's responsibility. In terms of marital debt, Matthew was ordered to pay the Regions bank loan of \$148,554.63, the Regions Bank farm loan of \$68,438.21, and the AES loan of \$8,479.95. The total amount of debt Matthew is ordered to pay is \$225,472.79, not including any interest on any of the loans. This leaves Matthew with a deficit of \$41,480.65.

¶27. The trial court reasoned that Matthew is in a better position to pay the debt than Dana, due to his level of education, current work schedule, and farm equipment. Matthew has a Ph.D. in biology and three other degrees, which greatly increases his earning capacity. In determining the ability of Dana to pay any of the marital debt, the trial court failed to consider that Dana has a college degree and is currently working, earning \$11 an hour. Dana

⁴ The value of the property, both real and personal, is the value at the time of the final judgment.

is capable of obtaining employment that pays more money and is equal to her level of education. Also, Dana spent part of the marriage as a wage-earning spouse and had only been out of the workforce since the birth of their youngest child in 2008.

¶28. Upon considering the *Ferguson* factors, “the chancellor should determine whether the equitable division of the marital property, considered in light of the non-marital assets, adequately provides for both parties.” *Jenkins v. Jenkins*, 67 So. 3d 5, 9 (¶11) (Miss. Ct. App. 2011). Matthew is not adequately provided for in the property division as set forth in the final judgment of the trial court. The amount of payments the trial court required Matthew to pay each month exceeds his \$2,618.04 salary each month. Our supreme court has stated that when determining property division, “[f]airness is the prevailing guideline[.]” *Lowrey v. Lowrey*, 25 So. 3d 274, 285 (¶26) (Miss. 2009).

¶29. After the equitable division of property is determined, the trial court must then determine whether or not alimony is appropriate. In *Ferguson*, the Court stated that “[a]ll property division, lump sum or periodic alimony payment, and mutual obligations for child support should be considered together.” *Ferguson* 639 So. 2d at 929.

¶30. The trial court conducted a *Ferguson* analysis as well as an *Armstrong*⁵ analysis. The ultimate conclusion was that alimony was not needed because the trial court divided the marital assets and liabilities as previously discussed. The trial court, however, arrived at an inequitable result concerning the property division.

¶31. The trial court opined that Matthew may have acted in bad faith in terms of his financial situation and his dissipation of marital assets. Although the farming equipment was

⁵ *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993).

sold, Matthew reduced the marital debt by paying student-loan debt down aggressively. Matthew also testified that he acted under the advice of his former counsel. The trial court concluded that by selling farming equipment and securing a home-equity line of credit, Matthew increased the liabilities of the marriage, and that Matthew's actions constituted a dissipation of assets.

¶32. The trial court found, however, that the line of credit and sale of farm equipment were used to pay for vehicles, decrease debts, and further Matthew's farming operation. In the past, this Court has found that "[w]ith respect to the dissipation of marital assets, . . . ordinary and reasonable living expenses used during separation generally do not constitute a dissipation of marital assets." *Faerber*, 13 So. 3d at 862 (¶34). We are of the opinion that obtaining the home-equity line of credit and selling of farming equipment do not constitute dissipation of assets.

¶33. We find that the trial court erred in determining the division of marital assets and debts.

III. Whether the trial court erred in discharging and dismissing appeal bond with supersedeas.

¶34. Matthew filed an appeal bond to Supreme Court of Mississippi with supersedeas on July 23, 2012. On October 18, 2012, the trial court entered a judgment discharging and dismissing the supersedeas bond, and an amended judgment on October 22, 2012. Matthew argues that the signature of the principal and the signature of his guarantee should suffice as the two sureties required by the Mississippi Rules of Appellate Procedure.

¶35. Matthew also argues that there is not an insufficient calculation of security and he is

not seeking to disturb Dana’s use and possession of the marital home or the sale of that home once the youngest child is twenty-one years old. Further, Matthew asserts that he should be able to use the real estate awarded by the trial court as collateral because any sale or interest Dana has in the property should not vest for another seventeen years once the property is sold.

¶36. According to the Mississippi Rules of Appellate Procedure, “[t]he appellant shall be entitled to a stay of execution of a money judgment pending appeal if the appellant gives a supersedeas bond, payable to the opposite party, with two or more sufficient resident sureties, or one or more guaranty or surety companies authorized to do business in this state” M.R.A.P. 8(a).

¶37. The appeal bond filed by Matthew only contained one signature for the guarantee. In *City of Belzoni v. Johnson*, the supreme court held that “[t]he City cannot be considered a surety within this Court's interpretation of the rules governing supersedeas bonds, because the City was already principally liable for a portion of the judgment.” *City of Belzoni v. Johnson*, 121 So. 3d 216, 221 (¶12) (Miss. 2013). We apply the same rule here. Matthew is already primarily responsible for the monetary judgment; therefore he cannot sign as a surety for the appeal bond. The chancery clerk lacked authority to accept the bond because the bond was invalid. We affirm the trial court’s Judgment Discharging and Dismissing Supersedeas Bond.

CONCLUSION

¶38. The trial court reached an inequitable result in terms of establishing child support and dividing marital property. Matthew was ordered to pay almost twenty-three percent of his

income without an explanation from the trial court as to why a deviation from the child-support guidelines was necessary. The trial court erred in its calculation of child support by deviating from the child-support guidelines without a proper on-the-record finding. Matthew was ordered to pay all of the marital debt, while Dana was awarded all of her assets free and clear from debt. Matthew signed the appeal bond filed with the trial court. Matthew is the principal on the bond, so he cannot sign as a surety. As a result, the bond filed by Matthew is invalid because it lacked the requisite signatures required by Mississippi Rule of Appellate Procedure 8.

¶39. THE JUDGMENT OF THE COVINGTON COUNTY CHANCERY COURT IS AFFIRMED IN PART AND REVERSED AND REMANDED IN PART FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED EQUALLY BETWEEN THE APPELLANT AND THE APPELLEE.

LEE, C.J., IRVING, P.J., ISHEE AND ROBERTS, JJ., CONCUR. CARLTON AND MAXWELL, JJ., CONCUR IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. BARNES, J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. GRIFFIS, P.J., AND FAIR, J., CONCUR IN PART AND DISSENT IN PART WITHOUT SEPARATE WRITTEN OPINION.