2006-CA-01287

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

DEBORAH WEEKS

VS.

ROLAND WEEKS

ON APPEAL FROM
THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT
OF HARRISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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ORAL ARGUMENT NOT REQUESTED

IN THE SUPREME COURT OF MISSISSIPPI

DEBORAH WEEKS — APPELLANT

V. — NO. 2006-CA-01287

ROLAND WEEKS — APPELLEE

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 disqualifications or recusal.

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STATEMENT OF THE ISSUES

1. The Chancellor correctly found that Roland Weeks was required only to pay health insurance premiums at a fixed rate and not commensurate with annual increases set by the insurer.

2. The Chancellor correctly found that Debby failed to prove Roland had not purchased a life insurance policy with Debby Weeks as an irrevocable beneficiary.

3. The Chancellor correctly found that Roland Weeks was in compliance with his Court-ordered child support obligations.

4. The Chancellor correctly refused to consider retroactive modification of child support.

5. The Chancellor correctly refused to modify the award of alimony.

6. The Chancellor correctly refused to award Debby Weeks' attorneys fees for the appeal and proceedings after remand.

STATEMENT OF THE CASE

Roland and Debby Weeks were divorced in April of 2001, and on May 10, 2001 Chancellor Shannon Clark entered final judgment which Debby appealed. The Court of Appeals remanded the case to determine various motions concerning periodic alimony, medical insurance, attorneys fees, and child support. *Weeks v. Weeks,* 832 So.2d 583 (Miss. App. 2002). (R.E. 1).

On April 23, 2004 Harrison County Chancellor Carter Bise, who had been assigned this case, entered Judgment After Remand (R. 00302; R.E. 2). The Chancellor correctly overruled every request for relief from Debby Weeks, including increased alimony, child support, and health insurance and Debby's request to hold Roland Weeks in contempt for failure to make repairs to the former family home and for failing to make child support payments in the amounts ordered.

The Judgment After Remand initially required Roland to pay $1,890.00 per month child support. For the college year 2004 to 2005, Roland was to make payments directly to Louisiana State University for tuition, books, room, board, sorority, and related expenses. Roland also was to pay the minor child's health insurance premium. If he paid less than $22,680.00 for these expenses, he was to pay the difference to Debby, which Roland did. (Judgment After Remand, R. 00319-00321; R.E. 2, pp. 18-20). The amounts he paid total $29,197.00, which exceeded the required court ordered amount of $22,680.00. (R. 01026)

After the 2004-2005 school year the Court required Roland not to pay college and college related expenses to the university but to pay Debby the same amount directly. (Order on Motion to Reconsider, R. 00399-00400).

Roland has made monthly payments in the amount of $516.00 for health insurance for Debby.

After a five day trial, the Chancellor entered his opinion from the bench on June 2, 2006, and thereafter on June 22, 2006 the Chancellor entered the order from which Debby Weeks now again appeals. (R. 00567; Tr. 1153-62; R.E. 3 and 4).

Roland has met and exceeded each requirement of the original divorce decree and Judgment After Remand.

SUMMARY OF THE ARGUMENT

In Brief of Appellant, Debby Weeks claims Roland Weeks was to pay not just $516.00 per month for health insurance for Debby, but whatever that health insurance premium would cost. The unambiguous judgment after remand required Roland pay only $516.00 per month.

Debby claims that Roland is in contempt of the Judgment After Remand for failing to obtain a life insurance policy naming Debby as an irrevocable beneficiary. She does not claim Roland failed to get the policy but only that it is not irrevocable. This was an issue on which neither side presented conclusive evidence at trial, therefore Debby failed to meet her burden of proof that Roland had not obtained a life insurance policy naming her as an irrevocable beneficiary. *Allen,* ____ So.2d ____, 2007 WL 900800 (Miss. App. 2007); *Saliba v. McClendon,* 753 So.2d 1095, 1098 (Miss. 2000); *Johnson v. Johnson,* 650 So.2d 1281, 1285 (Miss. 1994).

Debby claims the Judgment After Remand is ambiguous. It is not. *Stribling v. Stribling,* ____ So.2d ____, 2007 WL 3596 (Miss. App. 2007); *Estate of Stamper v. Edwards,* 607 So.2d 1141, 1145 (Miss. 1992).

Debby claims in petitions to modify and for contempt that Roland should have paid more child support. He should not have. Debby also claims that Roland should not get child support credit for college tuition he paid. Roland believes he should, but even if mistaken in that regard, he still paid more child support than required. *Lawrence v. Lawrence,* 574 So.2d 1376, 1382 (Miss. 1991); *Fancher v. Pell,* 831 So.2d 1137, 1142 (Miss. 2002) ; *Sumrall v. Munguia,* 757 So.2d 279, ____ (Miss. 2000).

Since the divorce was entered in 2001, the only material changes in circumstances have been the diminution of Roland's estate, the increase of Debby's estate, and the deterioration of Roland's health. Roland is now 70 years of age. Debby is 58 years of age. *Allen,* ____ So.2d ____, 2007 WL 900800 (Miss. App. 2007)

In the end, the findings and holdings of the Chancellor should not be disturbed. He did not commit clear or manifest error, and instead, the Court correctly dismissed all of Debby's claims. *Stribling v. Stribling,* ____ So.2d ____, 2007 WL 3596 (Miss. App. 2007); *Estate of Stamper v. Edwards,* 607 So.2d 1141, 1145 (Miss. 1992).

On appeal this Court should affirm the Chancellor.

BRIEF OF THE ARGUMENT

I.

THE STANDARD OF REVIEW OF A CHANCELLOR'S FINDINGS OF FACT IS THE CLEARLY ERRONEOUS STANDARD.

The Chancellor was correct in his application of the law. Appellant Deborah Weeks does not seem to seriously argue this point. Instead she disagrees with the Chancellor's findings of fact.

The Supreme Court's scope of review in domestic relation cases is limited. This Court should not disturb a Chancellor's findings of fact unless they are manifestly wrong or clearly

erroneous. *Johnson v. Johnson,* 650 So.2d 1281, 1285 (Miss. 1994). More recently, the Supreme Court has held:

> The findings of fact of chancery court, particularly in the areas of divorce and child support, will generally not be overturned by this Court on appeal unless they are manifestly wrong. *Nichols v. Tedder,* 547 So.2d 766, 781 (Miss. 1989). This Court always reviews a chancellor's findings of fact, but we do not disturb the factual findings of a chancellor unless such findings are manifestly wrong or clearly erroneous. *Bowers Window & Door Co. v. Dearman,* 549 So.2d 1309, 1312-13 (Miss. 1989). Findings of chancellor will not be disturbed or set aside on appeal unless the decision of the trial court is manifestly wrong and not supported by substantial credible evidence, or unless an erroneous legal standard was applied. *Sarver v. Sarver,* 687 So.2d 749, 753 (Miss. 1997). For question of law, our standard of review is de novo. *Harrison County v. City of Gulfport,* 557 So.2d 780, 784 (Miss. 1990).

Saliba v. McClendon, 753 So.2d 1095, 1098 (Miss. 2000). See also *Allen,* ____ So.2d ____, 2007 WL 900800 (Miss. App. 2007).

II.

THE ONLY MATERIAL CHANGES IN CIRCUMSTANCES ARE THAT DEBORAH WEEKS IS RELATIVELY BETTER OFF FINANCIALLY SINCE THE DIVORCE AND HEARING ON REMAND AND ROLAND IS WORSE OFF. ROLAND IS NOW OLDER AND EXPERIENCING HEALTH PROBLEMS.

Debby must prove a material change in circumstances to be entitled to any greater alimony or child support. *Sumrall v. Munguia,* 757 So.2d 279, 282 (Miss. 2000); *Allen v. Allen,* _____ So.2d _____, 2007 WL 900800 (Miss. App. 2007). She has not done that.

Since their divorce on October 12, 2000, Debby's estate has increased while Roland's has decreased. The parties' testimony and Rule 8.05 Financial Disclosures show this. (Exhibits 1, 2 and 22; R. 00607).

In her June 2, 2003 financial disclosure, Debby claimed assets totaling $722,788.00 with liabilities totaling $326,372.00 for a net estate of $326,416.00 (Exhibit 2; S.R.E. 1).

In Deborah's financial disclosure dated March 14, 2006 (Exhibit 22; S.R.E. 2), she claims total assets of $1,425,884.00 with total liabilities totaling $957,727.00, or a net estate of $468,157.00. However, the Chancellor correctly found that Deborah's estate was even greater. Debby's testimony at trial was that she "received somewhere between $425,000.00 and $480,000.00 in Hurricane Katrina insurance proceeds on damage to the structure of the home alone". (June 22, 2006 Order, R.E. 4). On her March 14, 2006 Disclosure, Debby listed only $300,000.00 insurance proceeds on damage to the home and $50,000.00 damage to contents. By understating the amount of insurance she was paid, Debby underestimated her estate by a minimum of $125,000.00. Therefore, adding this amount to Debby's statement of assets, her present net estate totals at least $593,157.00.

On the other hand, Roland's financial disclosure statement introduced at the hearing in 2003 shows assets totaling $1,636,000.00 and liabilities totaling $465,000.00, or a net estate of $1,171,000.00. Bt by the time of the hearing in May 2006 leading to the appeal, Roland's financial disclosure showed that his assets had declined to $1,432,310.00, and his liabilities had risen to $485,000.00, which means his estate is worth $947,310.00. (Exhibit 1; S.R.E. 3; R. 00607; S.R.E. 4). Therefore Debby's estate has increased $125,000.00 and Roland's has decreased $223,690.00 since the 2003 divorce modification hearing.

Roland is now retired. His only income is $883.00/month from investments in addition to $6,928.00/month retirement and $1,557.00/month Social Security. (R. 00607; S.R.E. 1). At the time of the divorce in 2000, Roland's income was $335,245.00 a year. (Judgment After Remand R. 00309, R.E. 2, p. 8)(R. 00607; S.R.E. 4).

Roland is now 70 years old and suffers from peripheral neuropathy, which is painful and causes sleeplessness. He also suffers from prostatitis and arthritis. (Tr. 01054-55). While Debby

complains of poor health too, the Social Security Administration has determined that Debby is not totally and permanently disabled. (Ex. 24).

On her March 14, 2006 financial disclosure, Debby lists monthly income of $3,959.00, of which $3,516.00 per month is alimony from Roland, leaving her remaining income per month of $443.00 from her QDRO "Pensions and Retirement" she received in the original divorce proceeding.

On the one hand, Debby complains about the need for more money from Roland, yet on the other hand, after the divorce in 2001, instead of electing a $5,000.00 per month income in QDRO benefits, she elected an annuity of $442.00 per month. This was, Debby says, without consulting a tax attorney or other expert. (R. 00942-00944). And, while Debby complains about the need for more money from Roland, just before the May 2006 hearing in these matters, she purchased a new BMW automobile valued at $80,000.00 for herself and another new BMW automobile at the same time for Roland and Debby's daughter, Alex, valued at $35,000.00. (Exhibit 2; S.R.E. 1).

For these reasons, Debby has failed to prove the requisite material change in circumstances entitling her to a modification of alimony or child support.

III.

THE CHANCELLOR'S OPINION AND ORDER ARE UNAMBIGUOUS.

On June 2, 2006, after a five day hearing, the Chancellor rendered his Opinion from the bench. (R.E. 3). Thereafter on June 22, 2006 the Chancellor entered the Order from which Debby appeals in this case. There is no room for construction of what the Chancellor meant. The Opinion and Order are clear and free from any doubt.

On appeal, this Court should decline interpreting or construing the Chancellor's order since its language is unambiguous. *Estate of Stamper v. Edwards,* 607 So.2d 1141, 1145 (Miss. 1992). Very recently the Court of Appeals affirmed this holding with specific references to the Chancellor's decision in domestic relations case. *Stribling v. Stribling,* ____ So.2d ____, 2007 WL 3596 (Miss. App. 2007) "In determining whether an order is ambiguous, we focus on the intent of the chancery court and read the judgment as a whole. ... however, we decline interpreting or construing an order if the language of a judgment is unambiguous." *Id.*

Debby has appealed the Chancellor's order, in large part, on the basis and without real explanation, that the June 22, 2006 Order is ambiguous. Calling it so does not make it so. We believe when this Court reviews Judge Bise's order as a whole, there is nothing left to doubt. The Order's meaning is clear and should be affirmed.

IV.

WHEN THE CHANCELLOR REQUIRED ROLAND TO PAY $516.00 PER MONTH FOR DEBBY'S HEALTH INSURANCE POLICY, THE CHANCELLOR MEANT ROLAND SHOULD PAY $516.00 PER MONTH AND NO MORE.

At the hearing after remand from this Court, the Chancellor modified the Judgment and ruled:

> Debby currently has enrolled in the Mississippi Insurance Risk Pool at a monthly premium of $516.00. Roland will pay this for Debby as a part of his alimony obligation in addition to those sums previously designated as periodic alimony.

(R. 00302; R.E. 2, p. 17).

There is no confusion or ambiguity here. The Chancellor has required Roland to pay $516.00 per month for a health insurance policy as part of alimony to Debby. Roland has done that faithfully, as admitted by Debby at the hearing. Since the Chancellor's requirement that Roland pay $516.00 per month for the purchase of a health insurance policy for Debby is

unambiguous and Roland has complied with that requirement, the Chancellor should be affirmed on this issue.

V.

DEBBY DID NOT MEET HER BURDEN OF PROOF THAT ROLAND FAILED TO SECURE AN IRREVOCABLE LIFE INSURANCE BENEFIT FOR DEBBY.

Beginning at page 20 of her brief, Debby argues "the evidence presented at the May, 2006, hearing, however, was insufficient to establish that Roland maintained a policy naming Debby as an *irrevocable beneficiary*." The burden is not on Roland to prove that he maintained that policy but is instead on Debby to prove that he did not.

Debby *does* admit Roland has obtained a life insurance policy on her. Her quarrel is that it is not irrevocable, yet she offered no proof to support her argument. The record is silent on whether the policy for Debby is irrevocable.

Since Debby failed in her proof, the Chancellor should be affirmed on the issue of life insurance benefit.

VI.

ROLAND'S CHILD SUPPORT REQUIREMENTS ARE UNAMBIGUOUS, AND HE HAS FULLY MET AND EXCEEDED THOSE REQUIREMENTS.

Beginning at page 25 her brief, Debby agrees that Roland was responsible for child support in the amount of $1,890.00 per month. (Brief of Appellant, p. 25). The argument that this child support requirement is ambiguous should be disregarded.

Beginning at page 30 of her brief, Debby argues "there is a genuine question as to the expenses Roland was required to pay, the expenses he could credit against child support obligation, and the effect of Debby's assumption of some of the obligations originally assigned by the Chancellor's Order to Roland." (Brief of Appellant, p. 30). This argument is irrelevant.

At page 29 of her brief, Debbie cites *Fancher v. Pell,* 831 So.2d 1137, 1142 (Miss. 2002) and *Lawrence v. Lawrence,* 574 So.2d 1376, 1382 (Miss. 1991) for the proposition that the LSU tuition Roland paid for Alexandra, the child of the marriage, should not be considered child support. Assuming *arguendo* Roland should not be credited for this payment of Alexandra's college tuition, Roland nonetheless not only paid a fair and reasonable amount of child support, he has far exceeded what the judgment of divorce required. The final judgment required that:

> Roland shall be responsible for 100% of the college expenses for his child, **based upon her attending an in-state institution** including sorority dues and fees, as well as her motor vehicle and insurance, health insurance, meal plan, and books.

(R. 00321). (Emphasis added.)

For the relevant time period the tuition for an in-state college was $2,150.00 per semester, or $4,300.00 per year. (Tr. 815).

Roland was originally ordered to pay college tuition and related college expenses directly to LSU for the 2004-2005 school year. Then he was ordered to make child support payments directly to Debby after that one year period. From June 2004 to June 2005, Roland paid Louisiana State University $12,667.00 and also paid $5,166.00 for off campus housing for Alexandra. For that same time period, he paid $1,132.00 for sorority dues, $1,200.00 for books, $2,840.00 for automobile insurance, $6,192.00 for health insurance, all for a total of $29,197.00. (R. 01026).

On February 7, 2005 the Chancellor ordered Roland as of that date to pay $1,890.00/month ($22,680.00/year) child support "in two equal semi-annual payments of $11,340.00 less the cost of Alex's car insurance". The court specifically found that "Roland Weeks will make said payments directly to Debby Weeks rather than the educational institution,

and Debby (and Alex) will be responsible for all other tuition fees, and expenses". (Judgment After Remand, R. 00399-00400, R.E. pp. 18-20).

Therefore Roland only paid the LSU tuition in the amount of $4,300.00 for the one school year 2004-2005. Subtracting the $4,300.00 from the $29,197.00 he paid that year, Roland still paid more than the required $22,680.00.[1]

In conclusion of this point, Roland's child support obligations were clear. It is also clear that Roland exceeded those obligations, even if he is given no credit for paying college tuition for the 2004-2005 school year.

VII.

THE CHANCELLOR DID NOT ABUSE HIS DISCRETION IN REFUSING TO AWARD ATTORNEYS FEES TO DEBBY.

On appeal this Court should not disturb the Chancellor's finding Debby was not entitled to attorneys fees.

Beginning at page 44 of her brief, Debby tells this Court that her monthly income "was limited to $3,000.00 in alimony and the $442.95 annuity she received as a distribution from the Knight-Ridder, Inc. 401(k) plan". As we set forth in Section II of this brief, it was Debby's decision without seeking advice of an expert to obtain an annuity from her QDRO benefits totaling only $442.00 per month rather than a monthly benefit of $5,000.00 per month. She then argues that because of her dire straights, she needs the Court to award her attorneys fees in a case in which she lost every point of her argument.

[1] For the one year of June 2004 to June 2005, Roland paid $29,197.00 when he was only required to pay $22,680.00. The difference (and the amount he overpaid) is $29,197.00 minus $22,680.00, or $6,517.00, which exceeds the amount of one year's in-state college tuition, or $4,300.00. Thereafter he continued to comply with the Court order to pay $1,890.00/month directly to Debby.

The Chancellor found "Mrs. Weeks claimed that her medical condition kept her from working, yet she introduced no medical proof of her inability to work". (June 2006 Order, R. 00657; R.E. 4, p. 2).

Debby had received between $425,00.00 and $480,000.00 in Hurricane Katrina insurance proceeds for damage to her home, which had a value of $400,000.00. (June 22, 2006 Opinion, Tr. 1153-62; R.E. 3, p. 1155). The Chancellor also correctly found:

> The request for attorney fees for the appeal and the post appeal matters filed by Debby Weeks is denied. She has a pot full of money. She has chosen not to touch her funds, but she has the funds available.
>
> The thing that I found most interesting about her testimony was that she said that, I believe it was Wells Fargo Bank was holding the Katrina insurance proceeds and when I asked her why she had not paid the promissory note that is secured by 10 Rivers Bend and now those insurance proceeds, she said it was because the bank hadn't asked her to. Well, of course, the bank isn't going to ask her to because they're living off of the interest. But I find that Ms. Weeks' position is somewhat inconsistent with economic reality and economic and financial responsibility.

(June 22, 2006 Opinion, R.E. 3, pp. 1157-58).

This finding by the Chancellor as well as Debby having as much as $480,000.00 in the bank from Hurricane Katrina insurance proceeds for damage to her home clearly shows how meritless her argument is that she has "no immediate liquid assets" except the alimony she receives as the Court considers whether to award her attorneys fees.

The Chancellor's decision whether to award her attorneys fees must not be disturbed upon appeal unless his decision is manifestly wrong. *Mabus v. Mabus,* 910 So.2d 486, 488 (Miss. 2005); *Larue v. Larue,* ____ So.2d ____, 2007 WL 1413062 (Miss. App. 2007). The Chancellor's decision to deny Debby attorneys fees was not manifestly wrong.

CONCLUSION

Under any standard of review, the Chancellor correctly dismissed all of Debby Weeks' claims for relief. This is particularly so under the clearly erroneous standard.

Debby claims that provision for the child support and alimony and the amount Roland is to pay for health insurance are ambiguous. Debby is merely trying to convince the Court to misconstrue the plain language of the prior Court order in a way more favorable to her. Upon review of the specific alimony and child support decisions in question and upon review of the Judgment After Remand and June 22, 2006 order which initiate this appeal, the Court should find that since the terms of those orders are unambiguous, and that Roland has complied with those terms.

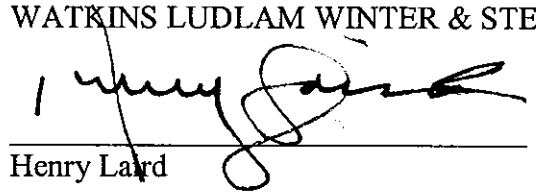
The only material changes in circumstances are those which indeed entitle Roland to a modification to pay Debby less rather than to a modification for Debby to receive more. Roland is now 70 years of age, in declining health, with his only income being from retirement and Social Security. Debby is 58 years old and is worth more now than she was in 2003 at the time of the modification hearing.

Since Debby has more than enough means to pay attorneys fees and since she lost each of her claims for relief, she should not be awarded attorneys fees.

In conclusion, the opinion and order of the Chancellor should not be disturbed. It should be affirmed in all respects.

Respectfully submitted,

WATKINS LUDLAM WINTER & STENNIS, P.A.



Henry Laird

CERTIFICATE OF SERVICE

I, Henry Laird, of the law firm of Watkins Ludlam Winter & Stennis, P.A., do hereby certify that I have this day provided via U. S. mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellee to the following at their usual and customary business address:

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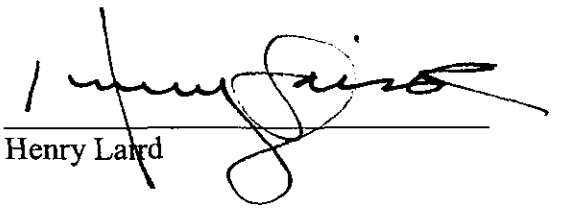
This the 25 day of May, 2007.



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