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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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JULIUS WILLIAMS, II

JUN 17 2008

APPELLANT

VERSUS

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SUPREME COURT
COURT OF APPEALS

BARBARA WILLIAMS

APPELLEE

SUPREME COURT DOCKET NO. 2007-TS-01736

APPEAL FROM THE

CHANCERY COURT OF HARRISON COUNTY

BRIEF OF APPELLANT
JULIUS WILLIAMS, II

ORAL ARGUMENT NOT REQUESTED

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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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

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Respectfully submitted,

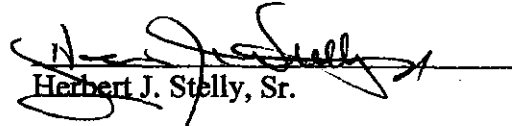

Herbert J. Stelly, Sr.

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Whether the trial court erred by modifying the Property Settlement by granting Wife survivor benefits with regard to husband's military pension.

I.

STATEMENT OF THE ISSUE

STATEMENT OF THE CASE

A. Course of the Proceedings Below

After initial proceedings in a contested divorce, the parties entered into a Stipulation of Divorce, wherein each party stipulated that a divorce may be granted on the grounds of irreconcilable differences. (R. E. p.23)¹. Each party and his/her respective attorney approved of this Stipulation. The parties submitted a Property Settlement Agreement (R.E. p.25). This Property Settlement Agreement was made an integral part of the Judgment of Divorce dated May 16, 2006. (R.E. p.23).

On November 14, 2006, Barbara Williams [Barbara] filed a Motion to Clarify Judgment and/or For Modification and Other Relief. (R.E. p.33). After a hearing, the trial court entered a Judgment directing Julius Williams, II, [Julius] to “do any and all things necessary for the Plaintiff, Barbara L. Williams, to receive survivor’s benefits and for the entry of the Qualified Domestic Relations Order.” Julius was also ordered to pay \$1,500 in attorney fees incurred by his former wife, plus court costs. (R.E. p.42).

From this Judgment a timely Notice of Appeal was filed. (R.E. p.44).

B. Statement of Relevant Facts

The contested portion of the Property Settlement stated:

“It is the agreement and contract of the parties that the Wife is to have all survivors’ benefits otherwise accorded to her by law including, but not limited to, fifty-five percent (55%) of Husband’s survivor annuity, upon his death from Civil Service Retirement System. A QDRO will be entered allowing Wife 50% of Husband’s Military Retirement based upon Husband’s years of military service during this marriage. A QDRO will be entered

¹ The following abbreviations are used: R.E. for Appellant’s Record Excerpts; T for Transcript.

allowing wife 55% of Husband's Survivor's Annuity upon his death from Civil Service Retirement System."

At the time of the divorce, Julius was in the military reserves. (T. p. 41). Subsequently, he was retired for medical reasons. (T. p. 41). Further, after his divorce from Barbara, he remarried. (T. p. 42) Also, during the marriage to Barbara, Julius was employed by in a Civil Service position. (T. p. 45).

The provision for spouses and former spouses of civil service employees is referred to as the Survivor's Annuity. (T. p. 47). Funding for the Survivor's Annuity for Barbara has routinely taken from Julius' check before he receives it. (T. p. 46). Her entitlement to this benefit is not questioned. Similarly, Barbara is to receive fifty percent of Julius' military retirement. (T. p. 46). Neither is Barbara's entitlement to this benefit questioned.

Military retirement has an entirely different plan for providing for a surviving spouse, the Survivor's Benefit Plan (SBP). (T. p. 46). Election under the SBP can be made only after retirement and then only one person may be listed to receive the full survivor's benefit. After his retirement from the military, Julius named his current wife as his survivor. (T. p. 50).

SUMMARY OF THE ARGUMENT

The Property Settlement Agreement made specific provision that Barbara would receive 50% of Julius' military pension. It also provided that she would receive 55% of the survivor annuity from his Civil Service Retirement. Thus, she would receive income while Julius lived and would also have benefits should he predecease her. No mention was made within the Property Settlement Agreement of providing Barbara with a Survivor Benefit Package from the military. To provide this added benefit, with its attendant extra cost, would strip Julius of his vested right to provide security for his current wife by making her his beneficiary.

The Judgment entered by the trial court was not a clarification of the Property Settlement Agreement. It was a modification of the Agreement, in that it stripped Julius of a valuable property right and transferred it to Barbara. This was an impermissible modification of the Property Settlement Agreements by the trial court.

If omission of the military Survivor Benefit Package was through error, it was by an error in contracting. No evidence was introduced to show that a drafting error occurred. The trial court could not properly modify the Agreement if the error, if any, was an error in making the contract.

The Property Settlement Agreement did not award a Survivor Benefit Package to Barbara. It was error by the trial court to modify the Agreement under the guise of interpreting it.

ARGUMENT

Whether the trial court erred by modifying the Property Settlement by granting Wife survivor benefits with regard to husband's military pension.

A. Standard of review.

Questions concerning the construction and interpretation of contracts are questions of law. *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748 2001-CA-01574-SCT (¶4) (Miss. 2003). Questions of law are reviewed *de novo*. *Id.*.

B. Nature of the military's Survivor Benefit Plan.

In re Marriage of Smith, 148 Cal. App. 4th 1115 (2007) provides a useful description of the military's Survivor Benefit Plan. The cost of participation is withheld from the member's monthly retirement pay. *Id.* at 1125. Although a retired service member may make an election designating a former spouse as beneficiary, such an election prevents the member from designating a new wife or any other former spouses as additional beneficiaries. *Id.*

Thus, a retired service member would receive reduced retirement benefits and be precluded from providing survivor benefits to his widow. Those are factors of such significance as to expect specific mention of the Survivor Benefit Plan if such were to be included in a property settlement.

C. Property settlements are not ordinarily subject to modification.

Property settlement agreements are contractual obligations whose provisions. must be interpreted by courts as any other contract. *West v. West*, 2002-IA-01158-SCT (¶13)(Miss. 2004). When the parties have reached agreement and the chancery court has

approved it, courts ought to enforce it and take a dim view of efforts to modify it, just as courts ordinarily do when persons seek relief from their improvident contracts. *Id.* at ¶15. The Mississippi Supreme Court has historically recognized that parties may, upon dissolution of their marriage, have a property settlement incorporated in the divorce decree and that such property settlement is not subject to modification. *Dalton v. Dalton*, 874 So. 2d 967, 2001-CT-00824-SCT(¶10) (Miss. 2004).

This is not to suggest that a court may not modify the form of relief to conform to the intent of the parties. A court may make equitable modification in the form of relief granted where to do otherwise would result in undue hardship or injustice. *Id.* at ¶10. However, the modification before the court is not simply one of relief. It is the adding of a significant financial benefit to Barbara at substantial expense to Julius and to the detriment of his current wife. As modified, Barbara will receive all of Julius' survivor benefit, since only one survivor may be named.

D. A change in a vested right is a modification of a property settlement agreement.

The Mississippi Supreme Court has held that a change in a vested right is an impermissible modification of a property settlement. In *Mount v. Mount*, 624 So. 2d 1001, 1002 (Miss. 1993) a property settlement had granted the wife the marital home with the husband making the monthly mortgage payment thereon. When the wife sold the home, the husband ceased making any further payments. *Id.* The trial court reasoned that the purpose of the payment was to assure a home for his children and that when the home was sold the husband's obligation to make the payment ceased. *Id.* at 1003. The Mississippi Supreme Court noted that whether the award was determined to be a property settlement or lump sum alimony, it could not be modified absent fraud or a contractual provision allowing

modification. *Id.* at 1005. The Court found that the chancellor impermissibly modified the property settlement agreement by reducing the wife's vested rights under the agreement. *Id.*

E. If omission of a provision to have benefit of the military Survivor Benefit Plan was through an error in making of the contract, the court may not modify the agreement.

The Property Settlement Agreement *sub judice* makes no mention of the Survivor Benefit Plan. No evidence suggests that this was an error in the drafting of the Agreement. If an error existed from Barbara's point of view it was in the making of the Agreement. Now, looking back, she desires to be granted the additional benefit of survivor rights of the military pension, in addition to those she was granted in the Civil Service pension.

It is clear that a court may not modify a property settlement agreement to correct an error in the making of the contract. In *Kelley v. Kelley*, 953 So. 2d 1139 2005-CA-01678-COA (¶2)(Miss. App. 2007) a property settlement agreement required that the husband pay one-half of certain repairs to the marital home until the wife remarried or until the children were emancipated. Foundation problems developed and the chancellor ordered the husband to pay for those repairs. *Id.* at ¶¶ 3, 4. The Mississippi Court of Appeals found that the trial court was without authority to modify the property settlement agreement. *Id.* at ¶5. The court reasoned that if the parties could not assert that there was a drafting error in the agreement, any error was in the making of the contract. *Id.* at ¶12. Thus, the chancellor had no authority to reform the agreement. *Id.*

Similarly, the property settlement *sub judice* gives Julius one-half of his retirement. (R.E. p. 29) It makes no reference to any requirement that he purchase a Survivor Benefit Plan; or if he does so, who is to be the plan beneficiary. Reasonably, he might choose to

receive greater monthly benefits, or he might seek to provide for the security of his current wife. Since this valuable right was not specifically given to Barbara it was a right that Julius retained. The right did not even exist at the time of the divorce, since Julius had not yet retired from the military and could not have then applied for the program.

Nothing in the record suggests that the military Survivor Benefit Plan was discussed by the parties during the drafting of the Property Settlement Agreement. It did not become an issue until Julius retired sometime after the divorce. Its omission, if by error, was clearly an error in the making of the agreement. Thus, under the reasoning of *Kelley*, there was not basis to modify the Agreement.

F. The requirement that Barbara be given the Survivor Benefit Plan was a modification, not an interpretation, of the Property Settlement Agreement.

This raises the important question of whether the trial court's judgment awarding military survivor benefits was the interpretation of the property settlement agreement or whether it was a modification of the agreement. The Property Settlement Agreement makes specific reference to "Husband's survivor annuity, upon his death from Civil Service Retirement System. (R.E. p. 29). However it is silent with regard to any survivor benefit in connection with Husband's military retirement. The Property Settlement provision directs that a QDRO be entered awarding fifty percent of his military retirement, based on years of marriage and one allowing Wife fifty-five percent of Husband's Survivor Annuity upon his death from the Civil Service Retirement System. (R.E. p. 29). This language supports the view that the Property Settlement dealt with only two sources of income: (1) the Husband's military retirement and (2) survivor benefits from Civil Service. Entitlement to both of these sources of funds is not disputed.

The requirement that any judgment make specific reference to inclusion within the Survivor Benefit Plan for the Armed Services, if that is the intent, is demonstrated by *Davis v. Davis*, 626 So. 2d 111 (Miss. 1993). In *Davis* the Court noted that the need that the chancellor specifically include such an award is amplified by the provisions of Title 10, U.S.C.A. § 1408(d)(4) which provides that payment of military retired pay in compliance with court orders terminates upon the death of the service member. *Id.* at 113. Clearly, military retirement pay and the Survivor Benefit Plan are two distinct and separate benefits available to retired military personnel.

(1) The only general reference in the Property Settlement Agreement to survivor benefits must, by its terms, be limited to those benefits to which Barbara was entitled to receive by law.

Rather than making any specific reference, or for that matter any reference at all, to the military Survivor Benefit Plan, the Property Settlement Agreement between the parties made a general reference that “[i]t is the agreement and contract of the parties that the Wife is to have all survivors’ benefits otherwise accorded to her by law....” (R.E. p. 29). Arguably, this provision would be sufficient to constitute an award of survivor benefits if these are benefits “accorded by law.”

The question, then, is whether Military Survivor Plan benefits are “accorded by law.” Certainly, “accorded by law” does not mean “permitted by law.” Such a meaning would award Wife a wide array of annuities or insurance contracts that are permitted, but not required, by law. Thus, “accorded by law” is a much more restrictive modifier than “permitted by law” or “available under the law.” In fact, an appropriate synonym for the word “accorded” is “granted.” Thus, a proper reading of the Property Settlement Provision

is that wife is to have, in addition to the specified survivor annuity from Husband's Civil Service Retirement System, all survivor benefits which she is granted by law. Reasonably, this applies to such retirement benefits as Social Security that Barbara may be entitled to receive, not because of any type of election, but simply due to her former marriage to Julius.

No law grants Barbara an interest in the Military Survivor Plan. Certainly, the parties could have agreed that she would be made the beneficiary of such benefits. However, they did not. Instead, Barbara was given one-half of the military retirement benefits that were earned during the marriage. For her additional security, should Julius die before Barbara, she was also given 55% of Julius' survivor annuity from Civil Service.

(2) A contract may not be modified under the guise of interpreting it.

In *Travelers Indem. Co. v. Chappell*, 246 So. 2d 498, 510 (Miss. 1971), the Mississippi Supreme Court recognized that the courts do not rewrite contracts where they are not illegal, immoral or contrary to established public policy. Further, the Court recognized that a contract may not be rewritten under the guise of interpretation. The Court noted:

"It is a fundamental principle that a court may not make a new contract for the parties or rewrite their contract under the guise of construction. In other words, the interpretation or construction of a contract does not include its modification or the creation of a new or different one. It must be construed and enforced according to the terms employed, and a court has no right to interpret the agreement as meaning something different from what the parties intended as expressed by the language they saw fit to employ. A court is not at liberty to revise, modify, or distort an agreement while professing to construe it, and has no right to make a different contract from that actually entered into by the parties."

Travelers Indem. Co. v. Chappell, 246 So. 2d 498, 510 (Miss. 1971)(quoting 17 Am.Jur.2d *Contracts* section 242 (1964)).

II.

Whether Barbara Williams should have been awarded attorney fees.

A chancellor has wide discretion in the award of attorney fees. *R.K. v. J.K.*, 946 So. 2d 764, 2005-CA-01267-SCT (¶43) (Miss. 2007). However, research has revealed no cases wherein a litigant who has been completely unsuccessful in obtaining any requested relief has been awarded attorney fees by Mississippi courts. In what may be a matter of first impression, this Court is urged to adopt the rule that a litigant who is not successful on any claim is not entitled to attorney fees.

In the event that the Judgment of the Chancery Court is reversed with regard to the award of Survivor Benefit Plan to Barbara, she will have prevailed on none of her claims for modification and should not be awarded attorney fees.

CONCLUSION

For the reasons herein stated the Judgment of the Chancery Court should be reversed to the extent that it requires that Appellant provide Appellee with survivor benefits under the Survivor Benefit Plan of the Armed Forces and to the extent that it awards attorney fees to an unsuccessful litigant..

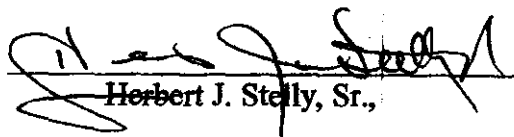
CERTIFICATE OF SERVICE

I, Herbert J. Stelly, Sr., do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to the following:

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Honorable Sandy Steckler
Chancery Court Judge
P O Box 486
Biloxi, MS 39533-0486


SO CERTIFIED, this the 17th day of June, 2008.


Herbert J. Stelly, Sr.,

CERTIFICATE OF FILING

I, Herbert J. Stelly, Sr., attorney for the Appellant, Julius Williams, II, do hereby certify that I have this date filed Brief of Appellant by depositing an original and three copies of Record Excerpts of Appellant with the United States Postal Service, first class postage prepaid, addressed to Betty W. Sephton, Clerk, Supreme Court and Court of Appeals, Post Office 249, Jackson, Mississippi 39205-0249.

This, the 17th day of June, 2008.


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