

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KAY SHERMAN TYRONE

APPELLANT

VERSUS

CASE NO. 2007-TS-01933

JIMMIE TYRONE

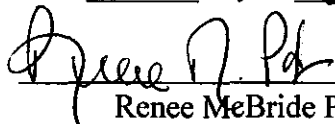
APPELLEE


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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible conflicts, disqualifications or recusal:

- | | | |
|----|---|--------------------------|
| 1. | KAY SHERMAN TYRONE | Appellant |
| 2. | JIMMIE TYRONE | Appellee |
| 3. | Renee McBride Porter
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915 Main Street
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Appellee |
| 4. | John H. Anderson
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Appellee |
| 5. | Honorable Judge J. Larry Buffington
P. O. Box 924
Collins, MS 39423 | Lower Court
Judge |

Respectfully submitted, on this the 15th day of December, 2008.



Renee McBride Porter


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JIMMIE TYRONE

APPELLEE

STATEMENT OF THE ISSUES

1. Whether the Court erred in entering a divorce on the grounds of irreconcilable differences when irreconcilable differences had not been plead as a ground for divorce.

2. Whether the ruling of the Chancellor is not supported by the evidence adduced in this case.

STATEMENT OF CASE

Jimmie L. Tyrone, Appellee, filed a Complaint for Separate Maintenance November 7, 2003 and on February 23, 2004 Kay Tyrone, Appellant, filed Defendant's Notice of Filing Defendant's First Set of Interrogatories Propounded to Plaintiff; Defendant's Request for Production and Inspection of Documents Propounded to Plaintiff and Defendant's Request for Admissions Propounded to Plaintiff Cross Defendant. Kay Tyrone also filed on February 23, 2004 a Motion to Dismiss or in the Alternative for a Change of Venue; Response to Complaint for Separate Maintenance, **Defendant's Cross Complaint for Divorce**, and Motion for Temporary Relief. (emphasis added) Appellant, Kay Tyrone, asserted that the parties were lawfully and legally married each to the other on or about the 2nd day of April, 1966 in Covington County, Mississippi and were separated on or about the 13th day of May, 2003 and that Appellant was entitled to a divorce on the grounds of Irreconcilable Differences as contemplated by *Miss. Code Ann. Sec. 93-5-2(1972)*. The Appellant, in part, averred that she was entitled to the use, possession and occupation of the home purchased by the parties in Lawrence County, Mississippi with Appellee to pay the remaining mortgage thereon and an equitable division of the property moved from Humphreys County to the home in Lawrence County; or in the alternative that said home should be appraised with Appellant being awarded fifty percent of the equity in said home in exclusive of any second mortgages which may be unknown to Appellant.

On April 21, 2005, the parties appeared in Court and reached an agreement which was filed on May 9, 2005. The Court asked the parties to sign an agreement before they left the court room so that a divorce could be granted upon the basis of their agreement. The agreement by and between the

parties provided "that the parties are granted a divorce on the grounds of irreconcilable differences as set forth in Section 93-5-2 and the Court further adopts the agreement of the parties as set forth below: . . ."

The parties executed the Agreed Order which provided in detail the procedure they would follow regarding the home and land owned by the parties. The parties' agreement gave Jimmie Tyrone exclusive use and possession of the parties' home and the land upon which it is situated. The parties agreed to have the home appraised by an appraiser selected by the court and equity to be calculated in the home giving credit of 15% off the top and credit for principle paid by Mr. Tyrone since the separation and that Mrs. Tyrone shall be paid her equity to be done within 90 days of this Judgment.

On June 27, 2005, an Order For Appraisal was filed which stated "This Cause having come on to be heard as per the Judgment of Divorce . . ." which appointed Jimmy W. Tyrone of Monticello, Mississippi, (no relation to the Plaintiff) (see transcript 4, lines 28-29 and p. 5, lines 1-4) to conduct an appraisal on said home at the parties joint expense. (see transcript p. 4, lines 21-28). Jimmy W. Tyrone conducted the appraisal. On December 12, 2005, Plaintiff filed a Complaint to Cite Kay Sherman for Contempt of Court for failure to execute a Quitclaim Deed that was forwarded to Honorable John Anderson for signature on October 26, 2005. Said Motion was Noticed for Hearing on December 12, 2005. Appellant responded on February 15, 2006 stating, in part, that the Quit Claim was not timely and no funds accompanied the quit claim deed.

The parties had a hearing on the question of contempt. Subsequent to the hearing an Order was issued on April 25, 2007 in which the Chancellor stated in part that "there were appraisals

prepared by Mr. Jimmy Tyrone pursuant to the Court order, as well as appraisals by Mr. Hill, together with estimates on repairing the foundations damage. The Court further, because of the discrepancies in the appraisals as far as size, personally viewed the property with the attorneys.” [The Chancellor himself, and the court appointed appraiser inspected the home once again] The Court asked for an adjustment from Jimmy Tyrone as to the appraisal because of a part of the home being partially converted into living space. The adjustment was received by the Court making his appraisal for \$76,500.00 and the Court was satisfied that this appraisal was proper. The April 25, 2007, Order was filed rendering Judgment to Kay Tyrone against Jimmy Tyrone in the amount of \$12,500.00 representing those sums due for the equity in the house and the payoff of the car. On September 24, 2007 the court denied Appellant’s Motion for Rehearing/Reconsideration and a Notice of Appeal was filed by Appellant, Kay Sherman Tyrone.

SUMMARY OF THE ARGUMENT

The Court was correct in its decision. The first issue argued by the Appellant was never raised at the trial level. The issue was not timely or properly filed and should be dismissed.

The second issue asserts that the Chancellor was not correct in following an appraisal that was court ordered. The parties had agreed to the procedure to follow regarding the appraisal of the marital home. After following the procedure as set forth by the Court, the Court itself viewed the property and asked the court appointed appraiser to adjust his appraisal. The appraisal was adjusted. The Court then issued its Judgment. The Court not only followed the procedure set forth and agreed by the parties, but even went a step further in investigating the property personally and adjusting the appraisal. For the Appellant now to complain again should not be well taken, and this decision should be affirmed.

ARGUMENT

1. Whether the Court erred in entering a divorce on the grounds of irreconcilable differences when irreconcilable differences had not been plead as a ground for divorce.

The Court was correct in entering a divorce on the grounds of irreconcilable differences as irreconcilable differences were, in fact, plead in the Defendant's (Kay Tyrone) Cross Complaint for Divorce filed February 23, 2004 and the Agreed Order was filed May 9, 2005. No appeal was taken from the May 9, 2005 Order.

The Appellant, Kay Tyrone, appeals, stating as the first issue that the Court erred in entering a divorce on the grounds of irreconcilable differences when irreconcilable differences had not been plead as a ground for divorce and, in the Argument of the Appellant's Brief states that the pleading was not on file for the required period of sixty days.

On February 23, 2004, Irreconcilable Differences was plead as a ground of the Divorce in "Defendant's Motion to Dismiss or in the Alternative For a Change of Venue; Response to Complaint for Separate Maintenance, Defendant's Cross Complaint for Divorce, and Motion for Temporary Relief." The Cross Complaint provided in part that Defendant/Cross-Plaintiff, Kay Sherman Tyrone, is entitled to a divorce on the grounds of Irreconcilable Differences as contemplated by *Miss Code Ann. Sec. 93-5-2 (1972)* as amended.

On May 9, 2005, (more than 90 days later) the Agreed Order was filed Ordering, Adjudging and Decreeing that "the parties are granted a divorce on the grounds of irreconcilable differences as set forth in *Miss. Code Ann. Sec. 93-5-2(1972)*" and the Court further adopted the

agreement of the parties as set forth.

Thus, the parties followed the procedure set forth in *Mississippi Code Annotated Section 93-5-2* which provides “(1) Divorce from the bonds of matrimony may be granted on the ground of irreconcilable differences, but only upon the joint complaint of the husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process. (2) If the parties provide by written agreement for the custody and maintenance of any children of that marriage and for the settlement of any property rights between the parties and the court finds that such provisions are adequate and sufficient, the agreement may be incorporated in the judgment, and such judgment may be modified as other judgments for divorce.”

In this case the Appellee was served with a Cross-Complaint filed on February 23, 2004, by Appellant which provided in part that Appellant is “entitled to a divorce on the grounds of Irreconcilable Differences as contemplated by *Miss Code Ann. Sec. 93-5-2 (1972)* as amended. The Agreed Order was filed May 9, 2005 granting the parties a divorce on the grounds of irreconcilable differences as set forth in *Section 93-5-2* and the Court adopted the agreement of the parties. The parties executed a written agreement. No appeal or post judgement motions were filed.

Therefore, the Appellant pled for a divorce upon irreconcilable differences, and the parties agreed to a divorce upon said grounds and executed a written agreement. The Appellant never complained about the divorce until she filed this appeal some months later. The parties complied with *Mississippi Code Annotated Section 93-5-2* provides, and they should be divorced.

Further, the Appellant never raised the issue of the divorce being challenged until this appeal. The issue of the divorce is res judicata. Webb v Jackson, 174 Miss 808, 165 So 809 (1936), an old case provides "If there has been a conclusive adjudication of the subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced." 174 Miss. at 813, 165 So. at 810. Res judicata is not only a bar to further litigation concerning the exact issues of the former lawsuit, but goes further as set out by this Court in the case of Pray v. Hewitt, 254 Miss. 20, 179 So.2d 842 (1965), wherein the Court said: ". . . [T]he rule is often broadly stated in general terms that a judgment is conclusive not only on the questions actually contested and determined, but on all matters which might have been litigated and decided in that suit." The case of Hudson v. Palmer, 977 So. 2d 369 (2007) provides "It has long been held that issues not raised at the trial court level cannot be raised on appeal." Southern v. Miss. State Hosp., 853 So.2d 1212 (¶ 5) (Miss. 2003) (citing Parker v. Mississippi Game & Fish Comm'n., 555 So.2d 725, 730 (Miss. 1989)).

The issue of the divorce was not raised at the lower level and can not now be raised on appeal.

Further, there was no appeal taken from the Agreed Order (May 9, 2005 order) within thirty days so the Order can not now be appealed from. "This Court lacks jurisdiction to hear an untimely appeal." Michael v. Michael, 650 So.2d 469, 471 (Miss. 1995); see also Smith v. Parkerson Lumber, Inc., 890 So.2d 832, 834-35 (¶¶ 12-14) (Miss. 2003).

Again, this issue was not raised at the trial level and now is raised on appeal and must

be dismissed. Further, the issue then determined by the Court on May 9, 2005, was not appealed therefrom, and an appeal now is moot.

2. Whether the ruling of the Chancellor is not supported by the evidence adduced in this case.

The Order entered in this matter on April 27, 2007, is valid and based on evidence presented to the court. Appellant complains that “the ruling of the Chancellor is based on an appraisal report which was never entered into evidence and the anticipated testimony of an appraiser which was never received.” In fact, the Property Settlement Agreement set forth procedures and ordered an appraisal which was accomplished and referred to at transcript p. 5, lines 5-13 where it is marked as Exhibit No. 1 (hereto attached in Record Excerpts p. 11).

The Chancellor ordered Jimmy Tyrone to conduct an appraisal. Jimmy Tyrone, did conduct the appraisal and submitted it to the Court. The Court then ordered Mr. Tyrone to adjust the appraisal, after a hearing. The appraised figure was adjusted. The Court then after reviewing the appraisal, the home, and the adjustment to the appraisal made it’s decision. The decision was supported by the facts and evidence and should be upheld.

The Supreme Court will always review chancellor's findings of fact, but Court will not disturb factual findings of chancellor when supported by substantial evidence unless Court can say with reasonable certainty that chancellor abused his discretion, was manifestly wrong, was clearly erroneous, or applied erroneous legal standard and where a trial court sits without a jury and makes findings of fact, these ordinarily are safe on appeal where the record includes substantial supporting evidence as is the situation in the instant case. Norris v. Norris, 498 So.2d 809, 814 (Miss. 1986).-Gilchrist

Machinery Co., Inc. v. Ross, 493 So.2d 1288, 1292 (Miss. 1986), Cotton v. McConnell, 435 So.2d 683, 685 (Miss. 1983), Culbreath v. Johnson, 427 So.2d 705, 707-709 (Miss. 1983). This is true whether the findings relate to matters of evidentiary fact or ultimate fact. Dudley v. Light, 586 So.2d 155, 159 (Miss. 1991); Norris, 498 So.2d 809 at 814, Gilchrist, 493 So.2d 1288, Spain v. Holland, 483 So.2d 155, 159 (Miss. 1991).

The parties agreed upon a procedure upon which Appellant would be paid her interest in and to the marital home. Appellee followed the proper procedure. When Appellant would not agree to an appraiser, Appellee filed a motion for the Court to appoint an appraiser. The Court appointed an appraiser. Then Appellant was not satisfied with the results of the appraisal. After the appraisal, the Court personally viewed the property with the appraiser. The Court, then entered an Order. The Appellee has abided by the parties agreement and the Court's order. This Court should affirm the Order as the same was based upon the parties agreement, testimony given in open court, and the Court's own inspection of the home.

The lower Court's decision is supported by the Chancellor's review of the appraisals, the Chancellor's viewing of the home, the hearing and other evidence. The decision was well supported by the facts and evidence and should be affirmed.

CONCLUSION

The Judgment in this case is valid and should remain in force. The divorce on irreconcilable differences grounds was pled February 23, 2004 and the Agreed Order was filed May 9, 2005. No appeal was taken. The property settlement agreement specified how the property was to be distributed and ordered an appraisal which was subsequently accomplished. The court itself inspected the property and made adjustments to Appellants favor in its Order. The Court's Order was based upon the parties agreement and the Court's own inspection and should be affirmed.

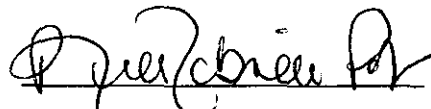
CERTIFICATES OF SERVICE

I, **RENEE MCBRIDE PORTER**, do hereby certify that I have caused this day a true and correct copy of the above and foregoing Appellant Brief to be forwarded via U.S. Mail postage prepaid to the following at their usual and last known mailing address:

Hon. J. Larry Buffington, Chancellor
Post Office Box 924
Collins, MS 39423

Hon. John Anderson
713 Arledge Street
Hattiesburg, MS 39401

Dated this the 15th day of December, 2008.



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