

**WALTERINE HAYES
APPELLANT**

V.

**ANDREW P. HAYES
APPELLEE**

**ON APPEAL FROM THE CHANCERY COURT
OF NEWTON COUNTY, MISSISSIPPI
CIVIL ACTION NO. 2005-N003
HONORABLE H. DAVID CLARK II**

***BRIEF OF APPELLANT
WALTERINE HAYES***

ORAL AGRUMENT NOT REQUESTED

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ANDREW P. HAYES

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

Pursuant to *Miss. R. App. P.* 28(a)(1), 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 disqualification or recusal.

1. Andrew P. Hayes, pro se (Defendant/Appellee);
2. Walterine Hayes (Plaintiff/Appellant);
3. Honorable Frances Smith Stephenson (former counsel for Andrew P. Hayes);
4. Honorable Edmund J. Phillips (former counsel for Walterine Hayes);
5. Honorable H. David Clark II, Chancellor, 2nd District, Newton County, Mississippi;
6. Honorable J. Max Kilpatrick, Chancellor, 6th District, Neshoba County, Mississippi (former counsel for Walterine Hayes);
7. Honorable John E. Howell (former counsel for Andrew P. Hayes); and
8. Robert M. Logan and Tanya L. Phillips of The Logan Law Firm, P.A. (counsel for Walterine Hayes).

RESPECTFULLY SUBMITTED,
WALTERINE HAYES

BY:



ROBERT M. LOGAN
TANYA L. PHILLIPS (

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- I. Walterine Hayes' interest in the Joint and 50% Surviving Spouse option provided through Andrew P. Hayes' pension plan was vested in her during the parties' marriage and she could not be alienated from her interest upon divorce.
- II. The lower court erred in ordering Walterine Hayes to waive her interest in the Joint and 50% Surviving Spouse option, since there was no factual determination of the personal property the parties actually owned at the time of the execution of the property settlement agreement.

STATEMENT OF THE CASE

A. Nature of the Case

Walterine Hayes (hereinafter "Walterine") seeks relief from a judgment entered against her on September 11, 2007, by the Chancery Court of Newton County, Mississippi, wherein the Court determined she had waived her rights in a Joint and 50% Surviving Spouse option as provided in her ex-husband's pension plan. The Court determined she had waived this right by virtue of Paragraph VI of the property settlement agreement incorporated into the parties' Judgment of Divorce entered on August 2, 2005.

B. Course of Proceedings and Disposition in the Lower Court

Walterine filed a *Complaint for Divorce* on January 5, 2005, against Andrew P. Hayes (hereinafter "Andrew") in the Chancery Court of Newton County, Mississippi. (Rec. P. 5). The parties entered into a *Consent to Divorce on the Grounds of Irreconcilable Differences* on July 11, 2005. (Rec. P. 14). The *Judgment of Divorce on Irreconcilable Differences* was entered August 2, 2005. (Rec. P. 37). The parties' *Property Settlement Agreement* was incorporated into

documents necessary to relinquish her claims to his pension. (Rec. P. 51-61). Walterine filed her *Motion to Find the Respondent in Contempt of Court* on June 30, 2006, against Andrew for his failure to pay alimony pursuant to the Property Settlement Agreement. (Rec. P. 62-64). Walterine filed her *Response to Motion For Contempt of Court* on July 14, 2006. (Rec. P. 65-68). Walterine filed an *Amended Response* on November 2, 2006. (Rec. P. 82-86). The parties filed a *Stipulation* on November 20, 2006, in regard to certain items that would be admitted into evidence at trial. (Rec. P. 90). Andrew filed an *Amended Motion for Declaratory Relief* on November 22, 2006. (Rec. P. 92-105). Andrew then filed a *Complaint for Declaratory Relief and/or Modification* on March 20, 2007. (Rec. P. 107-119). Walterine responded by filing an *Answer to Complaint* on June 21, 2007. (Rec. P. 120-124). The parties' Motions were set for trial on July 25, 2007, by an *Amended Time-Standards Order* entered by the Chancery Court on June 27, 2007. (Rec. P. 128-130). The parties filed a *Stipulation* on July 17, 2007, concerning certain items of evidence that the parties' deemed admissible for trial. (Rec. P. 131). Judgment was entered against Walterine on September 11, 2007, in regard to the parties' trial on July 25, 2007. (Rec. P. 132). Walterine filed her *Notice of Appeal* on October 8, 2007, to seek this Court's review and reversal of the Chancellor's decision. (Rec. P. 134).

C. Statement of Facts

Walterine Hayes and Andrew P. Hayes were married to each other for the second time in February 1991. They finally separated in March 2004 and were divorced on July 29, 2005. On or about June 20, 1996, while they were married, Andrew executed an election of the Joint and 50% Surviving Spouse Option for his wife, which was provided through his employer's pension plan funded by Central States Southeast and Southwest Areas Pension Plan. (Rec. P. 86 and Rec.

filed in the lower court. (Rec. P. 18-26). Walterine was retired at the time of the separation and divorce. (Rec. P. 27-35). According to the Plan, upon the death of Andrew, Walterine would receive 50% of his retirement for the remainder of her life. (Rec. P. 46). Andrew's pension was paid to him at a reduced rate, because he elected to provide Walterine the Joint and 50% Surviving Spouse benefit. (Rec. P. 46). When the parties entered into their Property Settlement Agreement, they agreed in Paragraph VI to certain terms concerning their personal property as follows:

Each party shall receive use, possession and ownership of all other items of personal property currently in their possession, including but not limited to all checking accounts, savings accounts, retirement accounts, pension accounts, investment accounts, or any other item of personal property. Each party hereto hereby waives any and all claims the other may have to any and all items of personal property of the other as set forth herein. (emphasis added).

(Rec. P. 40). In addition, the parties acknowledged the totality and finality of their agreement in Paragraph VIII as follows:

The parties acknowledge that this agreement constitutes the total agreement between them and each hereby releases the other of any and all claims they may have against the other or his estate which may exist now or arise in the future.

(Rec. P. 40). Andrew filed his contempt actions against Walterine beginning in June 2006 to seek restoration of his entire monthly pension in the amount of \$1,500. (Rec. P. 52). Walterine's basis for refusing to execute waivers was that her rights in the surviving spouse option had vested in her prior to the divorce and were her separate property at the time of the Judgment of Divorce. (Rec. P. 65.) Therefore, those rights were "hers" as she was entitled to retain them under Paragraph VI of the Agreement. The Court, in hearing the matter on July 25, 2007, found that the parties' agreement was not ambiguous, and

SUMMARY OF THE ARGUMENTS

Walterine Hayes already owned a certain benefit in Andrew P. Hayes' pension at the time she and Andrew executed their Property Settlement Agreement in anticipation of divorce. Walterine and Andrew were married for the second time in 1991. In 1996, Andrew voluntarily executed an option with Central States Southeast and Southwest Areas Pension Plan to provide Walterine a Joint and 50% Surviving Spouse Annuity. The pension plan is governed by the *Employment Retirement Income Security Act*. Sometime between 1996 and 2004, Andrew retired. His pension was vested and he began drawing monthly retirement income. At the time Andrew retired, Walterine's interest in the Annuity was vested in her. Walterine filed her Complaint for Divorce in January 2005 with the parties subsequently agreeing to divorce on the grounds of irreconcilable differences. As part of their property settlement agreement, the parties agreed to split personal property in their possession, which was expressed in Paragraph VI of the Agreement and included their banking accounts and retirement and pension accounts. They further agreed to a general waiver of any and all claims they would each have to any other items of personal property.

Andrew began pursuing contempt, modification and declaratory actions in 2006 seeking to have Walterine court-ordered to waive her interest in the Annuity. Walterine refused to waive her interest since she had not intended to relinquish any benefits vested in her during the marriage. At the time the parties appeared at trial on Andrew's action for declaratory judgment, the trial court was not aware that the Annuity had vested in Walterine during the marriage.

Walterine and Andrew had in the pension and Annuity, the Court would have seen that the Annuity belongs to Walterine pursuant to the Agreement. Walterine's interest in the Annuity was as much hers as the pension was Andrew's. If the parties had come before the trial court to determine the allocation of other property, such as a car, the court would have determined ownership before deciding how to enforce the parties' agreement. Walterine Hayes cannot be divested from an ERISA benefit that accrued to her during the marriage, and it was error for the trial court to determine that she had waived her interest in the Annuity when no evidence was received on who owned it at the time the Agreement was entered. Walterine is entitled to a reversal of the trial court's decision to alienate her from her vested interest in the Joint and 50% Surviving Spouse Annuity.

ARGUMENTS AND AUTHORITIES

I. Walterine Hayes' interest in the Joint and 50% Surviving Spouse Annuity vested in her during the marriage and she could not be alienated from her benefit upon divorce.

Andrew Hayes' pension through Central States Southeast and Southwest Areas Pension Plan is governed by the *Employment Retirement Income Security Act* (ERISA). Walterine's Joint and 50% Surviving Spouse annuity is a qualified joint and survivor annuity governed by ERISA. 29 U.S.C. § 1055(a). Section (1) states that for each pension plan which this section applies shall provide that:

In the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity.

Section 1055(d) defines "qualified joint and survivor annuity" as an annuity

the life of the participant. Such term also includes any annuity in a form having the effect of an annuity described in the preceding sentence.

Provisions of the survivor's annuity may not be waived by the participant, absent certain limited circumstances, unless the spouse consents in writing to the designation of another beneficiary, which designation also cannot be changed without further spousal consent, witnessed by a plan representative or a notary public. *Boggs v. Boggs, et al*, 520 U.S. 833, 842 (1997); 29 U.S.C. § 1055(c)(2). ERISA defines the term "beneficiary" as a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder. *Id.* at 1002(8). A qualified domestic relations order ("QDRO") is a type of domestic relations order that creates or recognizes an alternate payee's right to, or assigns to an alternate payee the right to a portion of the benefits payable with respect to a participant under a plan. 520 U.S. at 846; § 1056(d)(3)(B)(i). A domestic relations order is any judgment, decree or order that concerns "the provision of child support, alimony payments or marital property rights to a spouse, former spouse, child or other dependent of a participant". *Id.*; 1056(d)(3)(B)(ii). The QDRO was created by the Retirement Equity Act ("REA") of 1984, which amended ERISA. The REA enhanced ERISA's protection to spouses and dependent children, particularly in the event of divorce or separation, and in the event of the death of the surviving spouse. 520 U.S. at 847. QDRO provisions protect those persons who, often as a result of divorce, might not receive the benefits they otherwise would have had available during their retirement as a means of income. *Id.* at 854. In the absence of a QDRO or valid election by the participant with the consent of the spouse, ERISA benefits provided through a pension plan "may not be assigned or alienated". 29 U.S.C. § 1056(d)(1).

have addressed whether a beneficiary has validly and effectively waived his/her benefits under certain circumstances, including those negotiated in documents outside of the benefit plan. *Walsh v. Woods*, 371 S.C. 319, 327 (Ct.App. 2006)(citations omitted). The majority view among the federal circuit courts is that the parties must intend to relinquish all interests in the pension plan of the other. *Id.* at 328 (citing *Est. of Altobelli v. IBM Corp.*, 77 F.3d 78 (4th Cir. 1996)). *Walsh* involved the claims of the first wife to certain surviving spouse benefits designated for her benefit while they were still married. *Id.* at 320. Husband retired, and the parties subsequently entered into a divorce and incorporated an agreement wherein each retained their retirement plans, pension plans, etc., that he or she had in his or her possession. Husband attempted on two occasions to effect a change in the wife's benefits, which had no legal effect. *Id.* at 321-322. Husband remarried, then died several years later. *Id.* at 322. Husband's second wife challenged the first wife's right to receive the surviving spouse benefit. The South Carolina Court of Appeals found that at the time the Husband retired, the surviving spouse benefit had vested in the first wife because they were still married. *Id.* at 329. The Court found that the first wife's purported waiver in the divorce decree was ineffective because ERISA did not allow a beneficiary to waive a surviving spouse benefit after a plan participant retired. *Id.* at 330. The second wife's argument also failed because ERISA does not provide benefits to a spouse who marries a participant after retirement. *Id.* (citing 29 U.S.C. § 1055(f)). The Court found that, because the first wife's rights vested upon husband's retirement, those benefits belonged to her, not the husband. *Id.* The terms of their property settlement agreement permitted the parties to retain any pension plan in his or her possession. *Id.*

Joint and 50% Surviving Spouse Annuity, Andrew was afforded an “election period” which began 90 days prior to his retirement date and terminated on the 90th day after he received his first pension payment. (Rec. P. 48). The annuity plan also included a term that Andrew could not restore his full benefits after the election period, even if he were to divorce. Just as in *Walsh*, the annuity was only applicable to Walterine as she was his spouse to whom he was legally married *at the time his benefits began*. The annuity was not available to a subsequent spouse if Andrew remarried after retirement. *Id.* Walterine would remain eligible to collect her benefit upon remarriage. *Id.* Just as the first wife in *Walsh* was found to have been vested in her former husband’s surviving spouse benefit, Walterine’s interest in the Joint and 50% Surviving Spouse Annuity belonged to her at the time she entered into the property settlement agreement in 2005, as it vested in Andrew’s retirement *prior to the divorce*. ERISA protects Walterine from being divested or alienated from her interest in the annuity, since it vested in her prior to the property settlement agreement, and further, entry of a QDRO at the time of the divorce was unnecessary as the benefit had vested in her during the marriage, therefore, leaving no interest for the trial court to divide and award between the parties.

II. The Chancellor’s finding that ~~Walterine Hayes~~ waived her interest in the Annuity by virtue of the property settlement agreement was erroneous and a factual determination should have been made in order for the parties to comply with the terms of the agreement.

The hearing on Andrew Hayes’ *Complaint for Declaratory Relief and/or Modification* on July 25, 2007, focused specifically on Paragraph VI of the parties’ Property Settlement Agreement, wherein the parties agreed to divide items of personal property, particularly “pension accounts”. (Rec. Exc. P. 9). Settlement agreements entered into by divorcing spouses and

When the . . . Act has been complied with, the . . . property settlement agreement becomes a part

of the final decree for all intents and purposes. *Id.* (citing *Switzer v. Switzer*, 460 So.2d 843, 845 (Miss. 1984)). The provisions of a property settlement agreement executed prior to the

dissolution of marriage must be interpreted by courts as any other contract. *Id.* (citing *In re Est. of Hodges*, 807 So.2d 438, 445 (Miss. 2002)). Where ambiguities may be found, the agreement

should be construed much as it is done in the case of a contract, with the court seeking to gather the intent of the parties and render its clauses harmonious in the light of that intent. *Switzer*, 460

So. 2d at 846. The Court has opined that parties, who have reached an agreement that has been approved by the chancery court, should be held to their agreement and efforts to modify should

be frowned upon. *See Speed v. Speed*, 757 So.2d 221, 224 (Miss. 2000). However, this Court has found that deference should be given a chancellor in enforcing property agreements and

resolving disputes between parties concerning a property agreement. *Dalton v. Dalton*, 874 So.2d 967 (Miss. 2004).

In the present case, Andrew, in essence, was seeking specific performance from Valerie of the alleged waiver of her pension rights as he interpreted Paragraph VI of the

Agreement. "Before a court can order specific performance, the court must be able to look at the instrument and determine what performance is required." *Duke v. Whalley*, 580 So.2d 1267,

1274 (Miss. 1991)(citing *Crocker v. Merchants Bank*, 293 So.2d 438, 442 (Miss.1974)). Without knowledge of the parties' intent of an essential term, this Court, and any court, is unable to

determine what performance should be required. *Id.* "The elementary general rule . . . is that the contract must be specific and distinct in its terms, plain and definite in its meaning, and must

sufficiently definite if it contains matter which will enable the court under proper rules of construction to ascertain its terms, including consideration of the general circumstances of the parties and if necessary *relevant extrinsic evidence*.” *Id.* (emphasis added). Extrinsic evidence is usually admissible to identify, explain or define the subject matter of a writing, or to apply to the writing its subject matter. 32A C.J.S. *Evid.* § 1271 (Supp. 2008). In the case of marital settlement agreements, courts of equity have certain discretionary power in the matter of decreeing the specific performance of contracts and they may and should make equitable modifications in the form of relief granted where to do otherwise would result in undue hardship or injustice. *Dalton*, 874 So.2d at 971 (citing *Est. of Kennington v. Kennington*, 204 So.2d 444, 445 (Miss. 1967)). In *Dalton*, the chancellor found there was good faith misunderstanding on the part of the parties regarding the terms of their property settlement agreement wherein the parties were to complete certain real estate transactions within a certain period of time. *Id.* at 972. *Id.* The chancellor conducted a hearing on the Daltons’ claims. *Id.* at 970. The Supreme Court affirmed the chancellor’s authority to mold their agreement to conform to the intent of the parties.

Here, there was no determination of the Hayes’ intent concerning Walterine’s waiver, if any, of the surviving spouse portion of Andrew’s pension benefit. The ruling that Walterine should execute a waiver was not based on evidence or testimony. Andrew was not entitled to specific performance, because the record was not fully developed, and extrinsic evidence was not admitted into evidence despite being offered upon written stipulation of both parties. (Rec. Exc. P. 10). While the parties agreed with the trial court that the Agreement as a whole was not

have learned that the surviving spouse option had vested in Walterine prior to the parties' separation, and had extrinsic evidence been admitted, the Court would have found in the Central States Southeast and Southwest Areas Pension Plan documents that the surviving spouse option was to have remained vested in Walterine upon divorce. Further, testimony would have shown the Court that Walterine's interpretation of Paragraph VI of the Agreement was that any rights she already had vested in Andrew's retirement and in her own retirement would remain her property upon divorce and that retirement Andrew was already receiving would have remained his separate personal property. It is apparent that Paragraph VI does not comport with the components of contract law, in that there was no clear meaning; essential terms were missing, *i.e.* that the annuity was vested in Walterine; specificity and distinctness were lacking, *i.e.* the pension itself was not identified in the Agreement; and a clear understanding and mutuality between the parties was not evident. Had evidence been developed, an adequate remedy could have been fashioned by the Court to conform to the agreement of the parties. The Court erred in granting Andrew relief and posited undue hardship on Walterine Hayes.

III. Walterine Hayes should be awarded her attorneys' fees on appeal.

Bringing forth this appeal was an unwelcomed necessity for Walterine Hayes, and she should be awarded her attorneys' fees. Generally, our appellate courts award attorney's fees on appeal in an amount of one-half of what was awarded in the lower court. *Lauro v. Lauro*, 924 So.2d 584 (Miss. 2006)(citing *Monroe v. Monroe*, 745 So.2d 249, 253 (Miss. 1999)). Attorney's fees are based upon necessity rather than entitlement. *Id.* Walterine receives a small monthly retirement check and social security check, (Rec. P. 28) and, since the divorce, she has been

upon Andrew's death. (Rec. P. 46). While Andrew would argue Walterine should not be entitled to attorneys' fees since she did not prevail at trial, Walterine would show that the trial court's ruling forced her to perfect her appeal to preserve her right to her benefit. Walterine has incurred estimated attorneys' fees and expenses (fee estimate attached hereto) in the amount of \$5,655 in preparation of this appeal, and she should be awarded an amount of attorneys' fees to make her whole, in addition to Andrew being assessed for costs of this appeal.

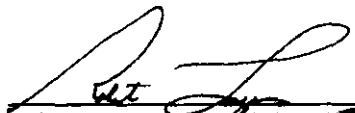
CONCLUSION

Walterine Hayes owns the Joint and 50% Surviving Spouse Annuity, which was voluntarily provided for her by Andrew Hayes as an election to his own benefits in 1996 through the Central States Southeast and Southwest Areas Pension Plan. The pension plan is governed by the *Employment Retirement Income Security Act*, which provides specific protection to spouses, including former spouses, to prevent alienation of vested benefits. Prior to the parties' divorce, Andrew retired and the pension vested in him, with simultaneous vestment of the Annuity in Walterine. They separated in 2004, and in negotiation of settlement terms, Walterine and Andrew executed a Property Settlement Agreement in 2005 to divide personal property already in their possession, including retirement and pension accounts. Paragraph VI of the agreement was silent as to the identity and nature of any pension or retirement plan owned by either party, and failed to show that both parties were retired prior to and at the time of the divorce and that Andrew's pension had vested in him with a simultaneous vestment of the Annuity in Walterine. In 2006, Andrew pursued Walterine through the trial court to have her waive the interest she owned so that he could be restored to a full pension. On July 25, 2007, the

trial court was not fully informed of the nature and ownership of the benefits, most importantly that the Annuity was vested in Walterine, and erroneously ordered Walterine to be alienated from her vested benefit. This alienation violated the safeguards provided to Walterine by ERISA. The trial court's order that Walterine should execute a waiver of her benefit should be reversed, and Walterine prays that this Honorable Court will recognize her ownership and will restore her interest in the Joint and 50% Surviving Spouse Annuity as her separate, personal property. Walterine also prays for an award of her attorneys' fees and expenses out of necessity.

**RESPECTFULLY SUBMITTED,
WALTERINE HAYES
APPELLANT**

BY:


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I do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of
the above and foregoing Appellate Brief to the following:

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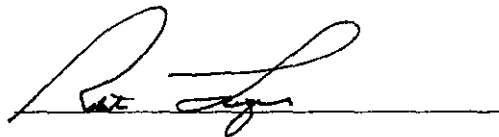
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SO CERTIFIED this the 13th day of March 2008.

A handwritten signature in black ink, appearing to be "R. L. [unclear]", is written over a horizontal line.

E-mail: rlogan@newtonmslaw.com

ESTIMATE OF FEES**HAYES V. HAYES
CASE NO. 2007-TS-01806****SERVICES RENDERED:**

Robert M. Logan	4.50 hours @ \$150/hour	\$ 675.00
Tanya L. Phillips	36.50 hours @ \$110/hour	<u>4,015.00</u>
Total Services		\$4,690.00

EXPENSES INCURRED:

Filing fee	\$ 100.00
Clerk's Cost	770.00
Photocopies	<u>95.00</u>
Total Expenses	\$ 965.00

TOTAL	\$5,655.00
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