

IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2008-CA-01296

JUANITA (NORRIS) DAY

APPELLANT

VERSUS

RICHARD SCOTT DAY, JR.

APPELLEE

APPEAL FROM THE CHANCERY COURT OF
LAMAR COUNTY, MISSISSIPPI

APPELLEE'S BRIEF

ORAL ARGUMENT NOT REQUESTED

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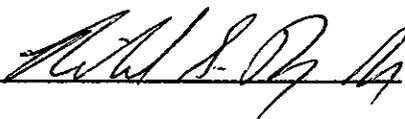
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CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that the following listed persons have an interest in the outcome of this case.

1. Richard Scott Day, Jr, Appellee, Pro Se
2. Thomas T. Buchanan, Esq. and John D. Smallwood, Esq. of Tucker Buchanan PA (Laurel, MS), attorneys for Appellant
3. Juanita (Norris) Day, Appellant
4. Honorable James H.C. Thomas, Jr., Chancery Court Judge of Lamar County, Mississippi



Richard S. Day, Jr

Appellee, Pro Se

STATEMENT OF ISSUES

- I. THE CHANCERY COURT RULED CORRECTLY AS A MATTER OF LAW AND DID NOT ABUSE ITS DISCRETION WHEN IT DIVIDED THE FORMER MARITAL HOME AS DEFINED IN THE PARTIES' PROPERTY SETTLEMENT AGREEMENT. THE CHANCERY COURT UNDERSTOOD AND PROPERLY DISBURSED FUNDS AS DEFINED IN THE PARTIES' PROPERTY SETTLEMENT AGREEMENT.**

- II. THE CHANCERY COURT RULED CORRECTLY AS A MATTER OF LAW AND DID NOT ABUSE ITS DISCRETION WHEN IT RULED ON THE PARTIES ISSUE OF RV SETTLEMENT AS DEFINED IN THE PARTIES' PROPERTY SETTLEMENT AGREEMENT.**

- III. THE CHANCERY COURT RULED CORRECTLY AS A MATTER OF LAW WITH THE DECISION THAT EACH PARTY SHALL PAY THEIR RESPECTIVE ATTORNEY'S FEES, AS THE COURT FOUND THAT THIS PROTRACTIVE LITIGATION HAD RESULTED FROM SOME FAILURE ON THE PART OF EACH TO IMPLEMENT THE AGREEMENT IN ACCORDANCE WITH ITS TERMS.**

STATEMENT OF THE CASE

The basis of this brief is in response to the appeal of Case No. 2008-CA-01296 dated July 25, 2008 [RE-77] filed by Juanita (Norris) Day (hereinafter "Juanita"). The issues at trial were focused upon the terms of the Amended Child Custody, Child Support and Property Settlement Agreement and Juanita's failure to comply therewith and enforcement of said terms.

STATEMENT OF THE FACTS

The parties filed a Joint Complaint for Divorce [RE-15] on May 8, 2003 and thereafter entered into an Amended Child Custody, Child Support and Property Settlement Agreement (hereinafter "Property Settlement Agreement") [RE-18]. On July 10, 2003, a Final Judgment of Divorce based upon irreconcilable differences was entered and ratified the parties Amended Property Settlement and Child Custody Agreement [RE-18]. At all times leading up to the Final Judgment of Divorce, Juanita was represented by Carol Ann Bustin, Esq. and Richard Scott Day, Jr. (hereinafter "Richard") represented himself [Tr. At 5-6; 178]. The above mentioned Property Settlement Agreement [RE-18] was entirely written by Juanita and Carol Ann Bustin, Esq. Richard in good faith agreed to the terms and signed said agreement.

Two years after the Divorce was final, Juanita was still residing in the former marital residence and a resident of Lamar County, Mississippi. Richard had been transferred by his employer and was a resident of the state of Ohio. Juanita filed her Complaint for Contempt, Modification and Related Relief [RE-32] on July 6, 2005. Contrary to page 3, paragraph 2 of Juanita's Statement of Facts, Richard was NOT married at time of Juanita's filing. Richard filed his Petition for Contempt, Modification and Clarification [RE-42] on December 1, 2005.

Richard's filed Petition resulted in the Order Allowing Sale of Home dated August 30, 2006 [doc A] ordering Juanita to vacate the former marital home by September 6, 2006. Juanita did move with the two minor children into the home of her brother in the State of Ohio. Six months later on February 28, 2007 the Trial Court issued Amended Order Allowing Sale of Home [doc B] requiring Juanita to cooperate in sale of former marital residence.

There were numerous issues raised by the parties at trial and ruled upon by the trial court. Ruling of the trial court was accurate in its ruling including the following issues: (1) The equity from sale of former marital residence was determined by Juanita and her attorney, Carol Ann Bustin, Esq and the trial court followed that determination correctly. (2) Per the Property Settlement Agreement [RE-18], Juanita is not entitled to any equity in the RV. (3) Richard was not found responsible for Juanita's attorney fees because both parties were found to be equally at fault for delay of said transfers.

The terms of the Property Settlement Agreement are clear and unambiguous. The terms were agreed upon by both parties, yet written by Juanita and her attorney Carol Ann Bustin, Esq. As to the marital residence, the Property Settlement Agreement provides, in pertinent part,

The parties agree that prior to entry of Final Judgment of Divorce in the matter Richard Scott Day Jr shall refinance the house in his name only and shall pay \$40,000 to Juanita Norris Day. The parties further agree that the real property shall be placed on the market for sale upon Juanita Norris Day's vacation of the premises and that, upon sale of the home and pay off of the mortgage, \$30,000 of the proceeds shall be disbursed to Richard Scott Day Jr. and \$10,000 shall be disbursed to Juanita Norris Day. Any remaining proceeds of the sale of the home shall be evenly divided between the parties.

The debt/payoff of the mortgage at time of sale was \$155,773.42. The sale price of the home as determined by the trial court appointed realtor, DeLois Smith was \$225,000.00. After all realtor & other fees incurred, the court shows proceeds of former marital residence of \$36,000. Based upon the formula in the Property Settlement Agreement, Richard should have received \$30,000 of proceeds and Juanita should have received the remainder of proceeds. The ruling was correct and calculations made according to the Property Settlement Agreement as written by Juanita and her attorney, Carol Ann Bustin, Esq.

The court ruled based on the sale proceeds of former marital residence because a mutually agreed upon appraisal was never completed.

As to the parties Coachman RV, the Property Settlement Agreement provides in pertinent part,

The parties agree that the 2000 Coachman RV will be listed for sale, and that after payoff of the loan amount on said vehicle, that all proceeds will be equally divided between the parties. While said Coachman RV is awaiting sale, neither party shall loan or rent or lease the RV to anyone without prior written consent from the other. [R. at 24].

RV was purchased in 2002 in Mississippi for \$37,800. In October 2004, Richard refinanced RV for same amount plus extended warranty coverage to keep RV in good condition for mutual party benefit. In January 2007, payoff amount was 38,362.53. Current value of RV was listed by NADA guides between \$27,470 and \$33,100. This is not in contradiction with Property Settlement Agreement. The RV has not been sold or paid off and title is currently held with Fifth Third Bank. Per the Property Settlement Agreement, Juanita is not entitled to any

equity of RV. She is entitled to half of any proceeds of sale of which there are none as the RV has not sold.

While Richard was found in contempt of court regarding 401K transfer, he was not ordered responsibility of Juanita's attorney fees because Juanita's attorney played a part in delay of 401K filings. Richard submitted completed paperwork for transfer to Juanita's attorney within the 30 day period of the judgment. Carol Ann Bustin, attorney for Juanita, filed paperwork incorrectly then refused to discuss incorrect filing with Richard, therefore amends could not be made. Richard was also found in contempt for not transferring Delta Sky Miles to Juanita, he was not ordered responsibility of Juanita's attorney fees because Juanita did not have a Sky Miles account for said miles to transfer to. Richard sent multiple correspondence to Juanita ensuring her the Sky Miles would be available to her at any time until her account was active and Delta allowed transfer of miles.

SUMMARY OF THE ARGUMENT

The Chancery Court of Lamar County, Mississippi ruled responsibly and accurately in the Judgment and Judgment on Reconsideration entered on May 9, 2008 and July 3, 2008 respectively. The terms of the Property Settlement Agreement are clear and the court made appropriate rulings.

ARGUMENT

- I. **THE CHANCERY COURT RULED CORRECTLY AS A MATTER OF LAW AND DID NOT ABUSE ITS DISCRETION WHEN IT DIVIDED THE FORMER MARITAL HOME AS DEFINED IN THE PARTIES' PROPERTY SETTLEMENT AGREEMENT. THE CHANCERY COURT UNDERSTOOD AND PROPERLY DISBURSED FUNDS AS DEFINED IN THE PARTIES' PROPERTY SETTLEMENT AGREEMENT.**

The terms of the Property Settlement Agreement are clear and unambiguous. The terms were agreed upon by both parties, yet written by Juanita and her attorney Carol Ann Bustin, Esq. As to the marital residence, the Property Settlement Agreement provides, in pertinent part,

The parties agree that prior to entry of Final Judgment of Divorce in the matter Richard Scott Day Jr shall refinance the house in his name only and shall pay \$40,000 to Juanita Norris Day. The parties further agree that the real property shall be placed on the market for sale upon Juanita Norris Day's vacation of the premises and that, upon sale of the home and pay off of the mortgage, \$30,000 of the proceeds shall be disbursed to Richard Scott Day Jr. and \$10,000 shall be disbursed to Juanita Norris Day. Any remaining proceeds of the sale of the home shall be evenly divided between the parties.

The debt/payoff of the mortgage at time of sale was \$155,773.42. The sale price of the home as determined by the trial court appointed realtor, DeLois Smith was \$225,000.00. After all realtor & other fees incurred, the court shows proceeds of former marital residence of \$36,000. Based upon the formula in the Property Settlement Agreement, Richard should have received \$30,000 of proceeds and Juanita should have received the remainder of proceeds. The ruling was correct and calculations made according to the Property Settlement Agreement as written by Juanita and her attorney, Carol Ann Bustin, Esq.

The court ruled based on the sale proceeds of former marital residence because a mutually agreed upon appraisal was never completed. Richard entered an appraisal valuing the residence at \$230,000 performed by Mike Gates of Gates & Dickinson Appraisal services dated January 12, 2006. Juanita entered an appraisal valuing the residence at \$260,000 performed by Nace Appraisal Service. Nace Appraisal Service was a subcontracted appraiser of Bob Neill Homes, the housing development builder. This appraisal was in conflict of interest as Bob Neill also lived three houses away from former marital address. Neither appraisal was mutually agreed to as ordered by Property Settlement Agreement. Therefore equity was never assessed and cannot be used in the calculations. In addition, Juanita's appraisal was performed shortly after Hurricane Katrina and property values were greatly inflated at that time. Richard

continued to make mortgage payments on former marital residence as Juanita continued to hold up the sale of the home by not cooperating with Richard or following terms in the Property Settlement Agreement. The trial court ordered Juanita's cooperation in February 2007 and the residence was finally sold by a court ordered realtor in March 2007.

II. THE CHANCERY COURT RULED CORRECTLY AS A MATTER OF LAW AND DID NOT ABUSE ITS DISCRETION WHEN IT RULED ON THE PARTIES ISSUE OF RV SETTLEMENT AS DEFINED IN THE PARTIES' PROPERTY SETTLEMENT AGREEMENT.

As to the parties Coachman RV, the Property Settlement Agreement provides in pertinent part,

The parties agree that the 2000 Coachman RV will be listed for sale, and that after payoff of the loan amount on said vehicle, that all proceeds will be equally divided between the parties. While said Coachman RV is awaiting sale, neither party shall loan or rent or lease the RV to anyone without prior written consent from the other. [R. at 24].

RV was purchased in 2002 in Mississippi for \$37,800. In October 2004, Richard refinanced RV for same amount plus extended warranty coverage to keep RV in good condition for mutual party benefit. In January 2007, payoff amount was 38,362.53. Current value of RV was listed by NADA guides between \$27,470 and \$33,100. This is not in contradiction with Property Settlement Agreement. The RV has not been sold or paid off and title is currently held with Fifth Third Bank. Per the Property Settlement Agreement, Juanita is NOT entitled to any equity of RV.

The Property Settlement Agreement does not specify who will be responsible for selling the RV. Juanita has never made any attempt to sell RV and in fact has allowed her brother to borrow RV in the summer of 2004 without Richard's written permission. Juanita's brother also caused damage to said RV and Richard was left responsible for repairs and dealing with insurance. Richard has had RV listed for sale since time of divorce. His efforts include a For Sale sign on the RV, for sale listings on ebay.com, RVTrader.com, RVTraderOnline.com, and personal flyers distributed throughout Ohio and parts of Mississippi, Pennsylvania and New York. The RV remains listed for sale by Richard at RVT.com, ad number 3884999.

Juanita is only entitled to proceeds of sale of RV of which there have never been since RV has never sold. The ruling was correct and calculations made according to the Property Settlement Agreement as written by Juanita and her attorney, Carol Ann Bustin, Esq.

III. THE CHANCERY COURT RULED CORRECTLY AS A MATTER OF LAW WITH THE DECISION THAT EACH PARTY SHALL PAY THEIR RESPECTIVE ATTORNEY'S FEES, AS THE COURT FOUND THAT THIS PROTRACTIVE LITIGATION HAD RESULTED FROM SOME FAILURE ON THE PART OF EACH TO IMPLEMENT THE AGREEMENT IN ACCORDANCE WITH ITS TERMS.

While Richard was found in contempt of court regarding 401K transfer, he was not ordered responsibility of Juanita's attorney fees because Juanita's attorney played a part in delay of 401K filings. Richard submitted completed paperwork for transfer to Juanita's attorney within the 30 day period of the judgment. Carol Ann Bustin, attorney for Juanita, filed paperwork incorrectly then refused to discuss incorrect filing with Richard, therefore amends were not able to be made.

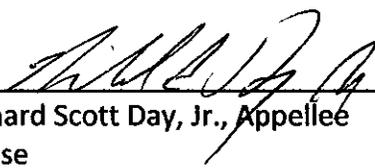
Richard was also found in contempt for not transferring Delta Sky Miles to Juanita, he was not ordered responsibility of Juanita's attorney fees because Juanita did not have a Sky Miles account for said miles to transfer to. Richard sent multiple correspondence to Juanita ensuring her the Sky Miles would be available to her at any time until her account was active and Delta permitted transfer of miles.

Richard has always tried in good faith to abide by terms in Property Settlement Agreement. This is shown as he paid the mortgage and utilities of former marital residence when Juanita was the sole resident with the two minor children for a period of over the ordered 24 months. Richard also paid for the van lease payments of which van was sole use by Juanita. Insurance, child support and other fees were also continuously paid by Richard once he was in fact notified of said expenses. The expenses ordered paid at time of trial court were mostly expenses that Richard was not aware of in a timely fashion and indeed some were over 2 years old and just made aware to Richard at time of filings. At present date, all medical bills and costs associated with two minor children that have been presented to Richard have been paid. Richard has never intentionally not paid or reimbursed for an expense covered under the Property Settlement Agreement. This is confirmed by the court's decision that Richard was NOT in contempt of any other said complaints as noted on page 13-15 in Appellants Brief.

CONCLUSION

Based on the foregoing the Judgment and Judgment on Reconsideration should be upheld as an accurate and fair judgment by trial court. Said decisions should not be reversed or remanded to the trial court.

Respectfully submitted,


Richard Scott Day, Jr., Appellee
Pro se

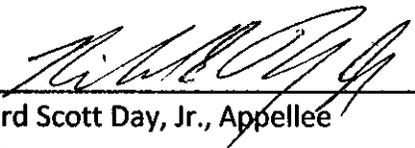
CERTIFICATION OF SERVICE

I do hereby certify that I served a copy of the foregoing Appellee's Brief on all parties to this matter first class mailing to the attorney and on date listed below:

Hon. James H.C. Thomas, Jr.
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This the 4th day of August 2009.


Richard Scott Day, Jr., Appellee
Pro se