IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BRYAN KENT HAWKINS	APPELLANT
VERSUS	NO. 2008-CA-01774
SUZANNE A. HAWKINS	APPELLEE

APPEAL FROM THE CHANCERY COURT
OF LAMAR COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

Oral Argument Not Requested

Attorney for Appellee
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MSB No. [redacted]

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STATEMENT REGARDING ORAL ARGUMENT

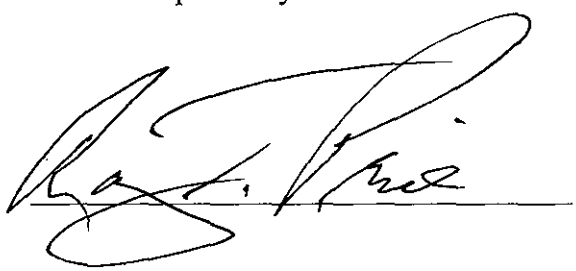
Appellee does not request oral argument in this matter.

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 disqualification or recusal.

1. Bryan Kent Hawkins
2. Suzanne A. Hawkins
3. Hon. Sebe Dale, Jr.
4. Ray T. Price
5. Timothy Farris

Respectfully submitted on this the 15th day of May, A. D., 2009.



RAY T. PRICE
Attorney for Appellee

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BRIEF OF APPELLEE

STATEMENT OF THE FACTS

The Hawkins' eighteen year marriage ended in 1984. They had two children, who were ages and at that time. Suzanne had filed for divorce on the grounds of adultery, but after a protracted battle, they ultimately agreed to a divorce on the grounds of irreconcilable differences.

Both Suzanne and Bryan were represented by able counsel, and they entered into an arms-length Property Settlement and Custody Agreement. Suzanne, who had been a stay-home mother during the entirety of the marriage, received alimony, child support and use and possession of the marital residence with no provision for termination whatsoever. This provision is the subject of this litigation. Mr. Hawkins filed to modify the judgment of divorce, asking the Chancery Court to eliminate his obligation to make the agreed upon payments on the marital residence and partite the property.

STATEMENT OF THE CASE

Suzanne Hawkins is in agreement with Mr. Hawkins' Statement of the Case, as well as the statement as to the appropriate standard of review.

ARGUMENT

THE COURT DID NOT ERR IN ITS RULING THAT THE AGREEMENT IS CLEAR AND UNAMBIGUOUS AND THAT BRYAN KENT HAWKINS HAD CONTRACTED AWAY ANY RIGHTS TO PARTITE THE FORMER MARITAL RESIDENCE.

At the time Bryan and Suzanne Hawkins divorced, it was extremely uncommon for a Chancery Court to divest a party in a divorce proceeding of title to real property. In fact, the general rule was that "the Chancery Court cannot divest a spouse of title to property, forcing that spouse to deed it to the other spouse by judicial decree." McRaney v. McRaney, 208 Miss. 105, 43 So.2d 872 (Miss. 1950) (quoted in Watts v. Watts, 466 So.2d 889, 890). Four exceptions to that general rule were listed, only one of which is really applicable to the facts of this case. The Hawkins' were each represented by separate, able counsel at the time of the entry of their irreconcilable differences divorce in 1988 and surely their counsel were aware of the relevant case law at the time.

The exception noted by the Court "is where there is a consent decree wherein the parties agree to such a division of realty and it is incorporated into the divorce decree itself." Watts, *supra*, at 890, citing Ray v. Langston, 380 So.2d 1262 (Miss. 1980). The Court went on to cite the "Chancery Bible", Griffith's Chancery Practice §618 at 664, Second Edition (1950), to the effect that a "consent possesses the attributes of a contract and when duly authenticated,

and especially after being filed, it is binding on consenting parties, if competent to contract, and cannot be set aside or reviewed, except on a clear showing that it was obtained by fraud or the substantial equivalent thereof or was based on mutual mistake."

Clearly, at the time of the divorce, the parties were aware of the effect of their agreement. As it stands, Suzanne and Bryan Hawkins jointly own the property as joint tenants, and whichever of them survives the other shall in the end own the property. As noted by the learned Chancellor, certain other support provisions were restricted for definite periods of time, including payment of child support, dental insurance, vehicles for minor children, medical insurance, and alimony to terminate on death or remarriage.

The Chancellor correctly found that there was absolutely no ambiguity in the agreement between Bryan and Suzanne Hawkins. The failure to include a limiting provision was clearly agreed to by the parties, as it placed possible risks and benefits for both. For example, should Suzanne have died immediately after the execution of the agreement, Bryan would have been free to sell the house as the surviving co-tenant without regard to Suzanne's estate or her children. The Chancellor correctly then determined that the plain language of the agreement failed to include any reason whatsoever for the termination of Bryan's obligation to pay the house note and that he was therefore bound to pay the house note as long as Suzanne lived.

The Chancellor did not find, as claimed by Bryan through counsel, that an implied contract existed not to partite the property. (Appellant's Brief at page 6.) Instead, the trial court stated:

> Bryan, by his contract, granted to Suzanne 'use and occupancy of the homestead' without limitation, though his right to impose limitations on grants to her was

> obviously known to him inasmuch as other provisions of the settlement agreement undisputedly utilized such rights and powers. He chose, and it must be held to have been deliberately, when viewed in the light of all his actions it must be inescapably concluded that the agreement not to partition is implied, and he is estopped to assert otherwise.

By stating the provision was implied, the Honorable Chancellor Dale was not stating that the matter was implied as a matter of contract due to an ambiguity, but merely stating that the absence of a termination provision meant, as a matter of contract, the contract being unambiguous, that no termination clause was intended. In other words, the absence of limiting language reflects that the intent of the parties was to have no limiting language.

CONCLUSION

For the above and foregoing reasons, Suzanne Hawkins respectfully requests that the decision of the Chancellor below be affirmed, and that she be awarded costs and attorneys fees for bringing this appeal.

Respectfully submitted on this the 15th day of May, A. D., 2009.

RAY T. PRICE

CERTIFICATE OF SERVICE AS TO FILING

I, Ray T. Price, of counsel for Appellee, certify that I have this date mailed, postage prepaid, the original and three copies of the foregoing Brief of the Appellee to the Clerk of the Supreme Court, Court of Appeals of Mississippi, P. O. Box 249, Jackson, MS 39205.

This the 15th day of May, A. D., 2009.

RAY T. PRICE

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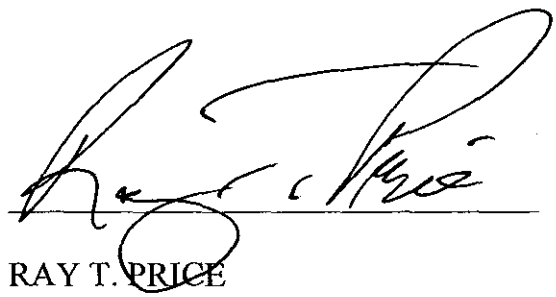
MSB No [redacted]

CERTIFICATE

I, Ray T. Price, certify that I have this date mailed, postage prepaid, a true copy of the foregoing to Hon. Sebe Dale, Jr., P. O. Box 1248, Columbia, MS 39429-1248, and to Timothy Farris, 22 Millbranch Road, Suite 100, Hattiesburg, MS 39402.

This the 15th day of May, A. D., 2009.



RAY T. PRICE