

IN THE SUPREME COURT OF MISSISSIPPI

2009-CA-00379

LINDA CURRY

APPELLANT

V.

CHARLES CURRY

APPELLEE

**APPEAL FROM THE CHANCERY COURT
OF PONTOTOC COUNTY, MISSISSIPPI**

APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT NOT REQUESTED

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APPELLANT, LINDA CURRY'S REPLY

I. In the Appellant's Brief, this Court was urged to find manifest error in the trial court's mathematical calculation of twenty percent (20%) of the equity in the marital home which was established at trial as \$150,000.00. Appellant Linda Curry's position regarding this error is simple. Twenty percent of the equity, or 20% of \$150,000.00, equals \$30,000.00. The Chancellor calculated 20% of the equity in the home as \$50,000.00. This mathematical error could be corrected quite simply by the recalculation of the mathematical figures as stated above.

Appellee Charles Curry's response to this contention of error is not as simple. His response would require this Court to second guess not only what the Chancellor meant when he used the term "equity" but also what the Chancellor's reasoning must have been in order to justify the mathematical error. Either the trial court intended to award Charles Curry twenty percent (20%) of the equity in the marital home or it didn't.

The Appellee would have this Court ignore the Chancellor's statement that Charles Curry was entitled to twenty percent (20%) of the equity in the marital residence, the 588 South Pontotoc Road property that was solely titled in Linda Curry's name. The market value of the property was accepted as \$250,000.00, and it was acknowledged by the court that Linda Curry had taken out loans totaling \$100,000.00 against the property which remain outstanding. (RE 94, TR 227). Since the calculation of *equity* in real property is derived by subtracting the outstanding liens from the market value of the property, the equity in this instance would be \$150,000.00. (market value-outstanding liens= equity; \$250,000.00- \$100,000.00 = \$150,000.00)

The Appellee's response also contains remarks which seem to question Linda Curry's motivation in "unilaterally encumber[ing]" the marital home by taking out loans against the property. Surely, Charles is not suggesting that a married party cannot, prior to a divorce,

encumber a marital residence that the party had built and paid for almost ten years prior to the marriage without any contribution at all from the non-encumbering spouse?

II. The second issue on appeal is whether the trial court erred in evaluating the reduction in retirement payments made to Charles Curry and in setting an arbitrary amount of \$75,000.00 as the value of that reduction despite the lack of mathematical calculation to establish same? In his response brief, Appellee Charles Curry went to great lengths to define the word “arbitrary” and to give an account of each use of the word “arbitrary” in Linda Curry’s appellate brief. In reply, Appellant would urge this Court to ignore her use of the word “arbitrary” when used to describe the trial court’s valuation of a potential reduction in Charles Curry’s retirement payments as \$75,000.00 despite the lack of mathematical calculation to establish that valuation. If the word “arbitrary” was inaccurate or connoted a “capricious”, “freakish” or “whimsical” lack of calculation by the trial court, then Appellant Linda Curry would simply ask this Court to ignore her use of that word entirely. The fact remains that the trial court did not perform a mathematical calculation to determine that the reduction in Charles Curry’s retirement payments totaled \$75,000.00.

Appellee Charles Curry would have this Court accept that the Calculation Worksheet which was introduced as Trial Exhibit 4 (RE 119-135, TE29-45) was irrelevant to the point that it really did not matter if the Chancellor used it or not. (Appellee’s Brief, p. 9) Appellee admits that “some speculation in determining the value of the reduction” was necessary. (Appellee’s Brief, p. 9). Linda Curry simply urges this Court to find that the level of “speculation” advanced

by the trial court was unnecessary as there was evidence to at least provide a starting place for a mathematical calculation to be performed which could have rendered a more precise determination than what was actually done. Specifically, the trial court was presented with evidence that Charles' pension amount is \$2,562.82 and that his election of the "66 2/3 % Joint and Survivor Pop-Up Option" reduced his monthly pension to \$2,314.23. (RE 125, TE 35). By simply subtracting \$2,314.23 from \$2,562.82 the sum of \$248.59 results. Therefore, Appellant Linda Curry submits that if the chancellor used \$248.59 to calculate an amount used to "offset" and make an equitable division of the property, it would take a minimum of 25 years of payment reductions to amount to \$75,000.00. Charles Curry testified on October 9, 2008, that he was 62 years old. (RE 49, TR 61). In other words, he would have to survive at least until age 87 (and more likely until age 101¹) to realize a \$75,000.00 reduction in his pension payments.

Again, Appellee Charles Curry would have this Court second guess the trial court's reasoning with regard to the award of the property worth \$75,000.00 to Charles Curry. Despite the Chancellor's opinion given from the bench on December 12, 2008, and the discussion of the applicability of *Hayes v. Hayes*, 994 So.2d 246 (Miss. Ct. App. 2008) as to the pension fund and the statement that the court 'tried to compensate' for Linda's interest in Charles' pension fund by awarding Charles the Highway 9 rental property, Appellee Charles Curry appears to desire this Court accept that the *real reason* for the award of the property valued at \$75,000.00 was because the trial court appreciated that the Linda Curry's separate estate was greater than the separate estate of Charles Curry. Of course, the Appellee's response failed to mention that Linda Curry's

¹ Charles Curry's 8.05 disclosure stated that his income from the pension was \$2,404.52 per month. (RE 106, TE 13). The result of subtracting \$2,404.52, the amount Charles actually receives, from \$2,562.82, the amount that the Calculation Worksheet stated would be his base monthly pension amount, the result is \$158.30. Therefore, if the chancellor used \$158.30 to calculate an amount used to "offset" and make an equitable division of the property, it would take 39 years of payment reductions to Charles Curry for him to realize \$75,000.00 reduction in pension payments. Charles Curry would be 101 years old by then.

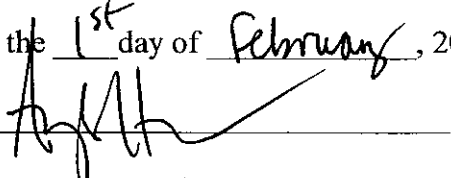


monthly income is approximately \$1,600.00 while Charles Curry draws approximately \$4,000.00. (TR 232, RE 99). Regardless of this oversight by Appellee, it should be noted that nowhere in the opinion did the Chancellor suggest that the award of the \$75,000.00 piece of property was for any reason *other* than to try to compensate Charles Curry for the reduction in his pension payments.

CONCLUSION

Therefore, based upon these two errors, Appellant Linda Curry respectfully requests this Court to reverse the Final Decree of Divorce entered by the Pontotoc County Chancery Court as to these two issues related to the equitable division of the marital property and to reduce the amount of Charles Curry's award of equity in the marital residence to \$30,000.00 and to award her possession of the Highway 9 rental property. For the foregoing reasons and authorities, and based upon the record, the decision of the Pontotoc County Chancery Court should be reversed. Appellant Linda Curry also respectfully requests any other such relief as she may be entitled.

RESPECTFULLY SUBMITTED, on this the 1st day of February, 2010,

By: _____


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CERTIFICATE OF SERVICE

I, AMY S. HARRIS, do hereby certify that I have this day served by United States mail,
postage prepaid, a true and correct copy of this document to the following:

J. Mark Shelton, Esq.
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Post Office Box 228
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Chancery Court Judge Talmadge D. Littlejohn
Post Office Box 869
New Albany, Mississippi 38652

This the 1st day of February, 2010.



AMY S. HARRIS