2009-CA-00679COAR+

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INTRODUCTION

On August 12, 2008, the Chancery Court of Lowndes County, Mississippi entered a Judgement of Divorce, granting Melissa Weeks Wood ("Melissa") and Kelly Drew Wood ("Kelly") a divorce from the bounds of matrimony. Record ("R.") 7-10, Appellant's Record Excerpts ("REM") 00005-00008.[1] Within the Judgment of Divorce, the chancellor approved and ratified the Agreement Concerning the Custody, Support of and Visitation with Minor Children and Settlement of Property Rights Made in Contemplation of Obtaining a Divorce on the Ground of Irreconcilable Differences (the "Agreement") of Melissa and Kelly, which was attached to the Judgment of Divorce as Exhibit "A." R.9, R 11-26; REM00007, REM00009-REM00024.

Following the entry of the Judgment of Divorce, Kelly refused to abide by certain terms of the Agreement. Therefore, Melissa filed a Motion for Contempt on January 12, 2009. R. 3-6, REM 00078-00081. Kelly responded, filing a Motion for Clarification of Section VIII. (b) of the Agreement. R. 27-29. The court held a hearing on the Motion for Contempt on March 9, 2009. R. 1. On March 25, 2009, the chancery court entered its Opinion and Final Judgment ("Order"). R. 31-33, REM00025-REM00027. On April 3, 2009, Melissa filed a Motion for New Trial, or Alternatively, to Amend Judgment. R. 34-37, REM00072-00075. The chancery court denied the requested relief by Order dated April 9, 2009. R. 38, REM00028.

Aggrieved by the lower court's decision as to the distribution of the GCM savings account, Melissa filed a Notice of Appeal on April 23, 2009. R. 39. On August 21, 2009, Melissa filed Brief

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[1] The Appellant's Record Excerpts were filed pursuant to Rule 30 of the Mississippi Rules of Appellate Procedure at the time of the filing of Appellant's Brief.

of Appellant, and Kelly filed Brief of Appellee on October 15, 2009. Melissa now replies to the arguments raised by Kelly in his Brief.

STANDARD OF REVIEW

"[A] divorce property settlement agreement is 'no different from any other contract, and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character." *Davis v. Davis*, 983 So. 2d 358, 362 (Miss. Ct. App. 2008) (citing *Ivison v. Ivison*, 762 So. 2d 329, 334 (Miss. 2000) (quoting *East v. East*, 493 So. 2d 927, 931-32 (Miss. 1986)). Thus, "property settlement agreements must be interpreted according to contract principles." *D'Avignon v. D'Avignon*, 945 So. 2d 401, 409 (Miss. Ct. App. 2006) (citing *In re Estate of Hodges*, 807 So. 2d 438, 445 (Miss. 2002)). As with any other contract, a determination as to whether any ambiguity exists in a property settlement agreement is a question of law and is reviewed *de novo*. *Harris v. Harris*, 988 So. 2d 376, 378 (Miss. 2008) (citing *Tupelo Redevelopment Agency v. Abernathy*, 913 So. 2d 278, 283 (Miss. 2005)); *Crisler v. Crisler*, 963 So. 2d 1248, 1251 (Miss. Ct. App. 2007).

In the Brief of Appellee, Kelly asserts that the appropriate standard of review in this matter is a clearly erroneous or abuse of discretion standard. Though the clearly erroneous standard of review applies to the chancellor's findings of fact, "[t]he familiar manifest error/substantial evidence standard have no application to . . . questions of law" such as the legal meaning and enforceability of a property settlement agreement. *Rogers v. Rogers*, 919 So. 2d 184, 187 (Miss. Ct. App. 2005). Thus, the review of such matters is *de novo*. *Rogers*, 919 So. 2d at 187; see also *Dix v. Dix*, 941 So. 2d 913, 915 (Miss. Ct. App. 2006) ("[I]f we determine that the chancellor applied an incorrect legal standard, we must reverse."). Therefore, the question of whether the property settlement agreement

of Melissa and Kelly Wood was ambiguous and subject to the chancellor's interpretations based upon the cannons of contract construction is a question of law to be reviewed *de novo*.

ARGUMENT

The key issue on appeal is whether a particular term of the Agreement between Kelly and Melissa is ambiguous. Section VIII of the Agreement provided for the division of the parties' bank accounts, savings accounts and retirement plans, providing in subsection (b) for the division of the couple's GGC savings account:

> b. ***Husband and Wife acknowledge, contract and agree that Wife shall receive the sum of Two Hundred Three Thousand Two Hundred and no/100 Dollars ($203,200.00) from the GGC savings account which has an estimated balance of Three Hundred Seventy Six Thousand and no/100 ($376,000.00). Husband shall receive the sum of One Hundred Seventy Two Thousand Eight Hundred and no/100 Dollars ($172,800.00).***

R. 21-23, REM00019-REM00021 (emphasis added). Despite the unambiguous, clear language of the Agreement, Kelly contends that the parties' intention related to the transfer pursuant to Section VIII. (b) was that Melissa receive fifty-four percent (54%) of the GGC savings account and that he receive the remaining forty-six percent (46%). Transcript ("Tr.") 10, REM00038.

When looking to the "four corners" of the document, "***[t]he general rule is the intention of the parties must be drawn from the words of the whole contract. . . .***" *HeartSouth, PLLC v. Boyd*, 865 So. 2d 1095, 1105 (Miss. 2003) (citing *Jones v. Mississippi Farms Co.*, 76 So. 880, 884 (Miss. 1917)) (emphasis added). "A 'court is obligated to enforce a contract executed by legally competent parties where the terms of the contract are clear and unambiguous.'" *Ivison*, 762 So. 2d at 335 (citing *Merchants & Farmers Bank v. State ex rel. Moore*, 651 So. 2d 1060, 1061 (Miss. 1995)). Despite this long-standing rule related to contract interpretation, the chancellor did consider the parties' intent, and ultimately rewrote the contract between them.

In response to Melissa's arguments on appeal, Kelly makes several assertions. First, he argues that the doctrine of impossibility of performance applies and is a defense to Kelly's performance of Section VIII. (b) of the Agreement because of the "global economic crisis." Second, Kelly attempts to liken his breach of the Agreement to a modification of a divorce decree pursuant to Mississippi Code Annotated Section 93-5-2. Finally, Kelly relies upon the case of *Rogers v. Rogers*, misapplying this Court's holding in that case to the facts of the instant case.

I. The doctrine of impossibility is inapplicable to the case at bar.

In his Brief, Kelly states that "[t]his Court has recognized the doctrine of impossibility of performance of a contract . . ." citing *Piaggio v. Summerville*, 80 So. 342 (Miss. 1919). *See* Brief of Appellee at 10. *Piaggio* and subsequent cases set forth three situations to which the doctrine of impossibility applies to excuses one's performance of a contract:

> 1. A subsequent change in the law, whereby performance becomes unlawful. 2. The destruction, from no fault of either party of the specified thing, the continued existence of which is essential to the performance of the contract. 3. The death or incapacitating illness of the promisor in a contract which has for its objective the rendering of personal services.

Hendrick v. Green, 618 So. 2d 76, 78-79 (Miss. 1993) (citing *Piaggio*, 80 So. at 344). None of these situations are applicable to the instant case as is made clear by a review of *Hendrick*.

In *Hendrick*, Hendrick and Green entered into a contract pursuant to which Green was to purchase from Hendrick 45,000 corporate shares in a bank. *Hendrick*, 618 So. 2d at 76. Green was a major shareholder and member of the board of directors of the bank, and the purpose of his acquiring Hendrick's shares was so that Green could become a majority shareholder in the bank. *Hendrick* at 77. At the time the two entered into the contract, Green was aware that he needed approval from state and federal regulatory agencies in order to become a majority shareholder and

have control of the bank. *Id.* Ultimately, the federal regulatory board withdrew the application based on certain omissions, pursuant to which the application was deemed materially incomplete under federal regulations. *Id.*

When Green failed to perform the terms of the contract and complete the sale, Hendrick filed suit seeking specific performance or alternatively, damages for breach of contract. *Id.* at 78. Following trial, the chancellor ruled that the contract was unenforceable because it was prohibited by law and dismissed the complaint. *Id.* On appeal, the Supreme Court disagreed, however, stating "[t]he ***mere fact that a contract becomes burdensome or even impossible to perform does not for that reason alone excuse performance***." *Id.* at 78 (emphasis added) (citing *Browne & Bryan Lumber Co. v. Toney*, 194 So. 296 (Miss. 1940)). In addition to discussing the three exceptions recognized *Piaggio*, the Court considered cases from other jurisdictions which addressed the issue of impossibility of performance:

> Impossibility of performance is determined by whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. *Littleton v. Employees Fire Ins. Co.*, 453 P.2d 810 (Col. 1969). ***A change in economic conditions does not provide a basis for recission of the contract.*** Competition, delay in ICC approval and ***changed economic circumstances are not situations which are so unforeseeable as to be outside the risks assumed under the contract. . . . The fact that the value of the bargain had decreased is not an excuse for non-performance.***

Id. at 79 (emphasis added) (citing *Ruff v. Yuma County Transportation Co.*, 690 P.2d 1296, 1298 (Colo. App. 1984)). The Court noted that Green could have made governmental approval a stipulation to his performance; however, there was nothing in the contract between Hendrick and Green which made the regulatory agencies' approval a condition precedent for Green's performance. *Id.* at 79. Therefore, the Court reversed and remanded to the lower court. *Id.*

Kelly argues that the second situation is applicable here. Particularly, Kelly suggests that when the divorce was final on August 12, 2008, there was not enough money in the GGC savings account to pay Melissa $203,200.00 as the parties previously agreed upon and as was clearly stated in the Agreement. *See* Brief of Appellee at 9. The reason Kelly contends the money was not there was due to the "global financial crisis" which caused a decrease in the value of the GGC savings account. *Id.* However, this argument fails for a couple of reasons.

First, the facts in the record clearly demonstrate Melissa's $203,200.00 share of the GGC savings account was in the account at the time of the lower court's entry of the Final Judgment of Divorce. At the hearing in April of 2009, documentary evidence was admitted into the record regarding the balance of the GGC savings account at dates relevant to the divorce. On May 1, 2008, a statement of the GGC savings account showed a balance of $376,319.64 as of May 1, 2008. R. 30 (P-2); REM00123. Thus, the parties' estimate of the total value of the account on May 2, 2008, as of the date of execution of the Agreement, was $376,000.00. R. 22, REM00020. Before the court's entry of the Judgment of Divorce on August 12, 2008, the account lost money, resulting in an ending balance on July 31, 2008 of $365,106.65. R. 30 (P-3), REM00126. Thus, as of the date of the entry of the Judgment of Divorce on August 12, 2008, fifty-four (54%) of the account would have been approximately $197,100.00, only $6,100.00 less than the amount specified in Section VIII. (b) of the Agreement. Tr. 37, REM00065. And, Kelly agreed that, as of August 12, 2008, Melissa's share of the account would have been ***at minimum*** $197,100.00. Tr. 39, REM00067. Kelly's performing his part of the contract and paying Melissa $203,200.00 on August 12, 2008, was certainly not impossible. Moreover, even if the Court agrees that the Agreement is ambiguous and that the parties' intent was to divide the GGC savings account based upon percentages, there was

certainly nothing rendering Kelly's performance impossible on August 12, 2008 because there was money in the account.

Second, as clearly stated in *Hendrick*, a change in economic circumstances and a resulting decrease in the value of the bargain does not render performance of the contract impossible. As the Supreme Court of Mississippi clearly noted, such economic changes cannot be said to be "so unforeseeable as to be outside the risks assumed under the contract." *Hendrick* at 79. Just as there was nothing to prevent Green from foreseeing the possibility of not receiving regulatory approval and thus conditioning his performance upon the receipt of governmental approval, there was absolutely nothing preventing Kelly from making the transfer of a particular dollar amount to Melissa contingent upon certain economic circumstances which were certainly foreseeable at any given time.

II. The standard for modification of a divorce decree found in Mississippi Code Annotated Section 93-5-2 is inapplicable.

Next, Kelly argues that, because Mississippi Code Annotated Section 93-5-2(2) allows for modification of a judgment of divorce into which a property settlement agreement is incorporated, then the Agreement at issue should be modified. *See* Brief of Appellee at 11. Though the need for potential modification of divorce judgments is recognized by statute, Mississippi courts take a dim view of attempts to modify property settlement agreements between divorcing husband and wife. *See e.g., West v. West*, 891 So. 2d 837 (Miss. 2004). In fact, a chancellor may not "modify the [property settlement] agreement based upon its own imputed intent of the parties," and doing so is error on the part of the lower court. *Ivison*, 762 So. 2d 329, 335 (Miss. 2000). Further, modification is not justified, "simply because an agreement is not necessarily in one's best interest." *Williams*,

2007-CA-01736-COA, ¶9 (citing *In re Dissolution of the Marriage of De St. Germain*, 977 So. 2d 412, 420 (Miss.Ct. App. 2008)).

Based upon the foregoing, Kelly's argument pursuant to Mississippi Code Annotated Section 93-5-2(2) is without merit.

III. The Appellee misinterpreted the holding of *Rogers v. Rogers*.

Finally, Kelly argues that the holding of *Rogers v. Rogers*, 919 So. 2d 184 (Miss. Ct. App. 2005), supports his argument that the Agreement is ambiguous and should therefore be modified so that he and Melissa receive particular percentages of the GGC savings account as opposed to the specific dollar amounts which were previously agreed upon and memorialized in the Agreement. *See* Brief of Appellee at 11-12.

In *Rogers*, there was a discrepancy between the property settlement agreement entered into by divorcing husband and wife and the final judgment of divorce. *Rogers*, 919 So. 2d at 187. While the property settlement agreement stated that the wife was to receive one-half of the husband's 401(k) retirement plan, the final decree reflected that the wife was awarded the sum of $69,000.00. *Rogers* at 187. The husband filed a motion for clarification, and the chancellor entered an order directing that husband owed wife the amount of $69,000.00 from his 401(k). *Id.* The husband appealed the chancellor's decision. *Id.*

On appeal, this Court relied on long-standing law related to contract interpretation: "[w]here ambiguities may be found, the agreement should be construed much as is done in the case of a contract, with the court seeking to gather the intent of the parties. . . ." *Id.* at 188. Applying these principles to the facts before it, this Court held:

> This Court agrees that Mrs. Rogers was entitled to one-half of the value of the 401(k) ***as of the date of divorce***. However, the one-half of the 401(k) awarded to her must also share proportionately in any losses or gains caused by the ebb and flow of the stock market.

Id. (emphasis added). Based upon this holding, the Court remanded the matter to the chancellor with the following instructions:

> (1) ***determine the value of the 401(k) as of the date of divorce***, (2) determine whether there have been any increases or decreases in the value of that portion of the account which ***existed on the date of the divorce***, and (3) to share equally between Mr. and Mrs. Rogers any increases and decreases to that portion of the 401(k) account, which ***existed on the date of divorce.***

Id. (emphasis added).

The facts of the instant case are distinguishable from *Rogers* in that the language of the Agreement is unambiguous. The Agreement clearly and unambiguously states that Melissa is to receive a specific dollar amount, $203,200.00, from the GGC savings account with there being absolutely no mention in the Agreement of percentages. R. 21-23, REM00019-00021. According to long-standing Mississippi law related to contract interpretation, a court need look no further than the four corners of the document where no ambiguity exists, and intent of the parties should not be considered under those circumstances. *D'Avignon v. D'Avignon*, 945 So. 2d 401, 409 (citing *Beezley v. Beezley*, 917 So. 2d 803, 807 (Miss. Ct. App. 2006). Therefore, Kelly misinterprets the holding of Rogers to the extent that he argues it justifies modification of the unambiguous Agreement between him and Melissa.

Even if this Court were to agree that there was an ambiguity in the language of the Agreement, which rendered it necessary to consider the intent of the parties, the *Rogers* holding makes clear that the **date of divorce** is the point at which the GGC savings account should be

valued. Kelly, however, conveniently overlooks this portion of the Rogers holding. In the Brief of Appellant, Melissa stated an alternative argument: even if the chancellor was correct in her findings that the Agreement was ambiguous and that the intent of the parties was to divide the GGC savings account based upon percentages rather than specific dollar amounts, the chancellor committed manifest error by valuing the GGC savings account as of April 1, 2009 as opposed to the date of divorce. *See* Brief of Appellant at 28-29 (citing *Heigle v. Heigle*, 771 So. 2d 341 (Miss. 2000). This Court's decision in *Rogers* clearly supports this contention. Thus, pursuant to *Rogers*, Melissa is entitled to at minimum, 197,100.00, which was fifty-four (54%) of the GGC savings account as of August 12, 2008.

CONCLUSION

The arguments raised by Kelly in the Brief of Appellee do nothing to support his argument that the Agreement is ambiguous as to the division of the GGC savings account. Based upon the reasons set forth in detail in the Brief of Appellant, the chancery court erred in considering the intent of Kelly and Melissa Wood based on extrinsic evidence rather than the clear, unambiguous language of the couple's property settlement agreement. A reading of all provisions of Section VIII. of the Agreement indicates that the intent of the parties was always to divide the couple's accounts based on specified dollar amounts set forth therein.

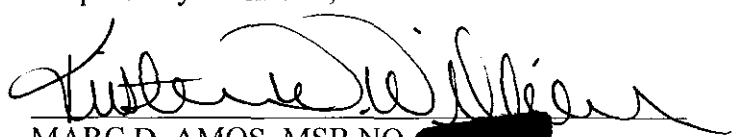
Alternatively, even if it was proper for the chancellor to consider the intent of the parties and allow parol evidence related to the same, the intent of the parties as of the date of the execution of the Agreement was clear - transfers of bank accounts, including the GGC savings account was based upon specified amounts set forth in the Agreement. Kelly only decided that the division of the GGC savings account should be based on percentages once he realized that he had done nothing to protect

Melissa's interest in the account and that the account ultimately lost close to $170,000.00 during downturns in the stock market.

Alternatively, even if this Court determines that the parties intended to divide the GGC savings account based upon Melissa receiving fifty-four percent (54%) of the account, Melissa is entitled to fifty-four percent (54%) as of the date of divorce. Valuing the account some nine months following divorce is clearly erroneous given applicable law related to date of valuation of marital property and also fails to consider the principles of fairness, which are the basis for chancery courts' equitable division of marital property.

Based upon the foregoing, Melissa respectfully requests that this Court enter an order reversing the chancellor's findings with regard to all issues raised herein and render its opinion based upon the same.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned attorneys of record for appellant Melissa Weeks Wood do hereby certify that they have this date mailed, via United States first class mail, postage prepaid, a true and correct copy of the foregoing **Reply Brief of Appellant** to the following:

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The Honorable Dorothy W. Colom
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Trial Court Judge

SO CERTIFIED, this the 2nd day of December, 2009.

KRISTEN WOOD WILLIAMS

CERTIFICATE OF MAILING

The undersigned, Vicki Ray, Legal Assistant for Marc D. Amos and Kristen Wood Williams, certifies that, pursuant to Rule 25(a) of the MISSISSIPPI RULES OF APPELLATE PROCEDURE, on the 2nd day of December, 2009, I mailed by United States first class mail, postage prepaid, the original and four (4) copies of the Reply Brief of Appellant to:

Betty W. Sephton
Mississippi Supreme Court Clerk
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Jackson, MS 39205-0249

and further certifies that a true and correct copy of the Reply Brief of Appellant was mailed by United States first class mail, postage prepaid, to the following:

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Vicki Ray

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