

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TERESA DARLENE JONES

APPELLANT

VERSUS

NO. 2009-TS-01131

GEORGE HERBERT MAYO, III

APPELLEE

BRIEF OF APPELLEE

Robert R. Marshall MSB [REDACTED]
Attorney for Appellee
ERIK LOWREY, PA
525 Corinne Street
Hattiesburg, MS 39401
601.582.5015
601.582.5046 (Fax)

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TERESA DARLENE JONES

APPELLANT

VERSUS

NO 2009-TS-01131

GEORGE HERBERT MAYO

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee George Herbert Mayo 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:

George Herbert Mayo, appellee

Teresa Darlene Mayo (Jones), appellant

Robert D. "Robbie" Jones, Lauderdale County attorney and current husband of Teresa Darlene Mayo (Jones)

Robert R. Marshall, Hattiesburg, Mississippi, attorney for appellee

Henry Palmer, Lauderdale County, attorney for appellant

Robert J. Bresnahan, Lauderdale County attorney for appellant

Chancellor Frank McKenzie, 19th Chancery Court District

Respectfully submitted this the 15th day of April, 2010.

GEORGE HERBERT MAYO, III, by



Robert R. Marshall, his attorney

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE AND FACTS.....	2
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT.....	5
CONCLUSION.....	11
CERTIFICATE OF SERVICE.....	12

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Ferguson v. Ferguson, 639 So. 2d 921 (Miss)	9
Holmes v. Bates, 67 So. 2d 273 (Miss. 1983)	10
Phillips v. Phillips, 2008-CA-02019-COA (6 April, 2010)	10

STATEMENT OF THE ISSUES

Though the Appellant lists five Issues on Appeal, the sole issue which encompasses all the Appellants issues is whether or not the award to the appellant must be paid in cash or whether the award was to be paid by means of a Qualified Domestic Relations Order.

The Appellee Herbert Mayo insists that a QDRO is the proper way to pay the award, a position with which Chancellor Frank McKenzie agreed, resulting in this appeal.

The Appellant Teresa Jones insists she should be paid the full amount of the award in cash.

A corollary issue is whether interest continued to run on the award to the Appellant after she refused the tender of the full amount of the award in February of 2005.

STATEMENT OF THE CASE AND FACTS

On January 20, 2005, Special Chancellor Charles D. Thomas signed an OPINION AND FINAL JUDGMENT in the instant cause, which was filed in the office of the Chancery Clerk of Lauderdale County, Mississippi on January 24, 2005. See RECORD EXCERPTS OF APPELLANT, TERESA DARLENE JONES. The Court was called upon to determine an equitable division of assets(page 7) and considered the Ferguson factors in making a decision on equitable division.

Page 9 of the Judgment sets forth the assets of the parties, the combination of which totaled \$139, 637 and commented that an equal division of the personal property would result in an award of \$69, 818.50 to each party.

At page 10 of the Judgment the Court states:

“...Deducting \$33,330 in assets Mrs. Mayo is to receive from the agreed value of the personal property already divided would leave her with a deficit of \$36,488.50.

The Court awards Mrs. Mayo the sum of \$36,488.50 as an equitable division of the marital assets. This award is a judgment against Mr. Mayo and will bear interest at the rate of Six percent (6% per annum from the date of entry of this Opinion and Final Judgment until satisfied in full...”

As is clear from the listing of assets by the Court on page 9 of the judgment, there was NO cash and the only source of the “equitable distribution” was the Shell Providian Fund in the amount of \$23, 575.00 and Charles Schwab in the amount of \$58, 874.77.

The ONLY method of equally dividing the retirement funds in the amount specified by Chancellor Thomas is a QDRO, as paying cash would cost Herbert Mayo far in excess of the amount of one half and leave him with a deficit by reducing his \$69,818.50 by the

amount necessary to convert the funds to cash.

Subsequent to the entry of the Judgment of Divorce in this cause on January 25, 2005, Herbert Mayo attempted to comply with the Judgment by tendering in February of 2005 to Darlene her portion of the equitable distribution by way of a QDRO, which Darlene refused to accept and she demanded cash.

Realizing a problem existed in the interpretation of the provisions of the judgment, Herbert filed on May 16, 2005, a motion to determine a single question: Could Herbert Mayo satisfy his obligation to Darlene by means of a QDRO which has been tendered, offered and rejected, or did he have to pay cash, which would require him to withdraw funds far in excess of the amount awarded to Darlene and diminish the funds remaining to him.

This matter came on for trial before Special Chancellor Frank McKenzie on May 1, 2009.

SEE TRANSCRIPT OF PROCEEDINGS MAY 1, 2009. (referenced as 'T')

On June 8, 2009, a JUDGMENT was filed with the office of the Chancery Clerk of Lauderdale County, Mississippi, by Chancellor McKenzie. This Judgment ordered that Herbert's obligation to Darlene could be satisfied by means of a QDRO and set forth why.

SEE RECORD EXCERPTS OF APPELLANT, TERESA DARLENE

JONES.

SUMMARY OF THE ARGUMENT

On January , 2005, Darlene and Herb were awarded an equal share of the marital estate, or \$69,818.50 a piece. The marital estate included two ERISA retirement accounts but no cash. Darlene was awarded the sum of \$36,488.50 as an equitable distribution of the marital estate. This award is a judgment against Mr. Mayo and will bear interest at the rate of six percent (6%) per annum from the date of entry of this opinion and Final Judgment until satisfied in full.

In February of 2005 Herb tendered to Darlene by means of QDRO paperwork the full amount of the award to her of \$36, 488.50.

Darlene rejected the tender and demanded cash in the full amount.

To withdraw this sum in cash would cost Herb \$15, 690.00 and result in his portion of the award being worth only \$20, 798.50.

The only equitable method of dividing the marital estate is in kind, that is, dividing what's there by means of a QDRO.

The special Chancellor agreed and ordered Darlene to accept her portion of the award by means of a QDRO. He also refused to allow interest on the award after February of 2005 when Darlene refused the tender of the full amount of her award.

George Herbert Mayo, III urges the Court to accept the ruling of the special Chancellor and affirm the Judgment of the lower Court.

ARGUMENT

In spite of the protestations of the appellant, the sole issue in this case is a question of fact, not law; and the criteria for appellate review is not *de novo*, as the appellant would have us believe, a proposition that will be discussed later in this brief.

The portion of the OPINION AND FINAL JUDGMENT over which the dispute arose is listed as number 5 on page 4 of the Judgment: "5. The equitable distribution of assets, including retirement funds...."

Chancellor Thomas determined an equitable division of assets on page 10 of the Judgment as follows:

"The total value of the assets, excluding the house is \$139, 637.00 Dividing this amount equally would mean each party should receive \$69, 818.50 Deducting the \$33,330.00 in assets Mrs. Mayo is to receive from the agreed value of the personal property already divided would leave her with a deficit of \$36, 288.50.

"The Court awards Mrs. Mayo the sum of \$36,488.50 as an equitable distribution of the marital assets. This award is a judgment against Mr. Mayo and will bear interest at the rate of Six percent (6%) per annum from the date of entry of this Opinion and Final Judgment until satisfied in full."

On Page 9 of his Opinion and Final Judgment, Chancellor Thomas listed the marital assets to be divided, among which were two retirement funds: Charles Schwab in the amount of \$58,874.77, and Shell Providian Fund in the amount of \$23,575.

THERE WAS NO CASH TO BE DIVIDED, ONLY RETIREMENT FUNDS.

Shortly after the entry of the Opinion and Final Judgment, Herb tendered to Darlene the sum of \$36, 488.50 by way of a Qualified Domestic Relations Order.

Darlene refused to accept the tender and demanded cash.

Herb refused, resulting in a deadlock.

Herb then filed a post trial motion on the 16th day of May, 2005, well within the time period of Rule 60(b) and within the portion of Rule 60(a) concerning errors arising from oversight or omission. This was not a motion to alter or amend the judgment under Rule 59, which would require a filing within ten days as appellant has pointed out; but to clarify the judgment to interpret the portion of the judgment in question based on the criteria of Rule 60 of the Mississippi Rules of Civil Procedure.

I WANT TO CITE THE PORTIONS OF RULE 60 HERE.

On Friday, May 1, 2009, a hearing was held on the appellee's motion, Special Chancellor Frank McKenzie presiding.

The following references to "T" indicate a reference to the transcript of that hearing and the page reference is to the page numbers of the transcript assigned by the Court reporter

"BY MR. MARSHALL: "...There was a Judgment of Divorce entered in this cause on January the 25th of 2005; that judgment provided, in Paragraph 10, that there was a deficit to Mrs. Mayo of the equitable distribution in the amount of \$36, 488.50.

"Shortly after January the 25th, 2005, we got into an argument over whether or not the \$36,488.50 that Darlene was supposed to receive should be in the form of a QDRO or should be in the form of cash.

"And on May the 16th of 2005 I filed a post trial motion under Rule 60b for the Court to make that determination: Can we transfer these funds to hereby virtue of a QDRO, because that would be equitable because there was no cash there.

"...And Darlene through her counsel, refused to accept the QDRO, and demanded cash."(T page 4)

"...since the divorce Herb has repeatedly attempted to transfer Darlene her share of equitable distribution by a QDRO....And we, again, ask that Darlene be required to accept that QDRO ...as her portion of the equitable distribution..."(T, PAGE 6)

BY THE COURT: "All right. Let's shoot to the heart of this matter. It looks to me like what the Court is called upon to do is to somehow or other interpret Judge Thomas' order...That's the way I see it. What did he mean, what did he intend...given the information that he had at the time he made the decision. And I think the Court can do that....because we're here to enforce this very judgment, right?" (T, page 15)

TESTIMONY OF HENRY LEE HARRIS

Direct examination by Mr. Marshall

My Name is Henry Lee Harris. I am a CPA and have practiced that profession for thirty three years. I prepared Herb Mayo's tax returns for the year 2005.(T, page 16)

I have been provided the information concerning the Charles Schwab and the Shell Providian Fund accounts(T, pages 16, 17)

To withdraw \$36, 488.00 would cost Herb a total of 43% or \$15,690.00 to withdraw the \$36,488.(T, page 17)

If he transferred these funds (\$36,488.00) by way of a QDRO there would be zero tax consequences at the time of the transfer.

CROSS EXAMINATION OF MR. HARRIS

If Darlene had been in the same tax bracket, received \$36,488.50 and cashed in the QDRO by taking an early withdrawal she could have received \$20,799.00(T, page 19)

BY THE COURT: Did Mr. Mayo have available to him, on or about the 20th of January 2005 in any account that you're aware of or in any asset form that you're aware of, that he could have obtained the sum of \$36,488.50 without incurring any kind of tax consequences?

"No sir, I don't know of any...."(T, page22, 23)

BY THE COURT: It's the Judgment included as a part of the record in part of the Court file, and it's also an exhibit...

By Mr. Marshall; We would just like to point out, at this time, that there's no cash listed in the assets that Judge Thomas used; it's all stock...."

TESTIMONY OF GEORGE HERBERT MAYO III

DIRECT EXAMINATION BY MR. MARSHALL

My name is George Herbert Mayo, III(T page 27)

After the judgment was entered I attempted to transfer the sum of \$36,488.50 to my former wife, Darlene.(T28)

Darlene wanted cash and wouldn't take the QDRO.

The QDRO papers were dated February 8, 2005 (T29) [NOTE; THE JUDGMENT WAS FILED IN THIS CAUSE ON JANUARY 25, 2005 AND THE TENDER WAS MADE BY MR. MAYO LESS THAN 30 DAYS AFTER ENTRY OF THE JUDGMENT.]

I subsequently caused a Motion to be filed on May 16, 2005, and requested that this Court order the \$36,488.50 to be paid to Darlene in the form of a QDRO.(T, page 29)

I didn't pay her cash because I didn't have cash. All I had was savings with these

two accounts.(T, page 29)

**CROSS EXAMINATION OF TERESA DARLENE JONES
ADVERSE BY MR. MARSHALL**

BY THE COURT: "I'm satisfied she's answered and responded that she did refuse to accept the QDRO..." (T, page 71)

RULING BY THE COURT (T, pages 86 through 93)

In neither of the breakdowns (of assets) by Chancellor Thomas did he reflect that either party...had a cash asset..."(T, page 88,89)

"Mr. Mayo's side in the equation indicate ...what we now know were retirement accounts that existed at that time: One was a Shell Providian Fund, and it had \$58, 874.77 in it, and the Charles Schwab Fund-excuse me-the Shell Providian Fund has \$23, 575.00 and the Schwab Fund had \$58,1874.77....

"We now know, from the testimony of Mr. Lee Harris, a Certified Public Accountant, that in order for Mr. Mayo to transfer the \$36, 488.50 to Mrs. Mayo, utilizing either of those accounts, that it would have cost him the sum of \$15, 690.00 in taxes and penalties, in order for her to obtain that \$36,000....

"But what did the Judge say? He said that each party, Mr. Mayo and Ms. Mayo, should receive \$69, 818.50. But that cannot happen if Mr. Mayo is required to pay taxes and penalties in order to get the cash money to satisfy it. Hee wouldn't have an equal division. It would cost him \$15, 690.00 out of the \$69, 818.00 that the Judge found he should receive.

"So in keeping with the intent that I see that the Judge had here, Judge Thomas, that each party would receive \$69,818.50, the only way that can be accomplished is for Mrs. Mayo, now Ms. Jones, share to come in kind-that she take it in the same form that Mr. Mayo held it, which is in the form of a retirement account, that he not be required to incur the penalties that obviously Judge Thomas didn't anticipate in order to fund her equitable division of the marital assets.

"It is the order of the Court-this Court-that that may be satisfied by the execution of the QDRO, that would transfer an amount to Ms. Jones.

The Court does find that Herb, shortly after the judgment was rendered, made the offer to provide the money in the form of a Quallified Domestic Relations Order, and that Darlene refused to do so. And she took the position that she was (T, page 90) entitled to receive cash money.

" I did not hear any evidence that Mr. Mayo had the ability at the time to pay cash in the sum of \$36,488.50..."

BY MR. MARSHALL: "Is this amount, this \$24,187.62 that she gets is a firm amount and no interest?"

BY THE COURT: "That's the amount I have determined that she is owed, \$24,187.62, and she does not have to bear any of the prorata investment loss..."(T page 93)

On June 8, 2009, the JUDGMENT based on the Court's ruling was filed with the Clerk.

[SEE RECORD EXCERPTS OF APPELLANT, TERESA DARLENE JONES FOR THE JUDGMENT.]

The judgment provided, in pertinent part:

"1. Darlene Mayo was granted a judgment in the amount of \$36, 488.50 as her equal division of the assets of the party. The accounts from which this amount could be paid were retirement accounts. To satisfy this amount in cash from the retirement accounts according to the testimony of Mr. Mayo's accountant would cost him several thousand dollars in taxes and penalties which would result in less than an equal division of the retirement accounts. On the other hand, an equitable division by way of a Qualified Domestic Relations Order can be accomplished without tax consequences to Herbert Mayo, III and would result in an equal division of the marital assets of the parties.

"2. Taking into consideration the payments made by Mr. Mayo and giving him credit for the monies received by Mrs. Mayo at the sale of the former marital domicile, Teresa Darlene Mayo (Jones) is awarded a judgment against George Herbert Mayo, III in the amount of Twenty-Four Thousand One Hundred Eighty Seven Dollars and sixty two cents(\$24, 187.62) This judgment can be satisfied by transferring this amount to Teresa Darlene Mayo (Jones) by way of a QUALIFIED DOMESTIC RELATIONS ORDER, which order shall be submitted to the Court for signature and approval within thirty (30) days of the date of this Judgment.

"3. The request of Theresa Darlene Mayo (Jones) for interest on this judgment granted here is denied...."

This Court must first recall that the first task of a chancellor is to determine what the marital assets are, which Chancellor Thomas did. He listed each marital assets in paragraph # 3 of his judgment, arriving at a total value of all marital assets as \$106,307.00. The Court conducted an analysis under Ferguson v. Ferguson, 639 So. 2d 921 (Miss) to determine all the marital assets and the value of the assets. (Record Excerpts, Pages 8, 9, and 10.)

Chancellor Thomas then determined that the assets should be equally divided. The record is clear that the only method of arriving at an equitable division is to divide the assets in kind,

which can be done only by way of a QDRO. Requiring Herb to pay the funds in cash would not result in an equal division. After the division if either Herb or Darlene took out money, then each would pay their own penalties. There was NO cash to divide.

The proper standard of review is not *de novo*, as the appellant would have us believe, because the question before the Court has absolutely nothing to do with a question of law. The question is a simple question of fact. This Court, then, must accept the decision of a Chancellor unless the Chancellor was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. Further, the Chancellor's findings of fact will not be reversed where there is substantial evidence supporting those facts Phillips v. Phillips, 2008 CA 02019 COA (6 April, 2010).

The chancellor was also correct in his determination that Darlene should not receive interest on her judgment. Darlene was tendered the full amount of the judgment by way of QDRO inside a month of the date of the entry of the judgment, which Darlene refused to accept and demanded cash, resulting in the instant litigation. Tender of the full amount due stops the running of interest "a tender of less than the full amount due will not stop the running of interest." Holmes v. Bates, 67 So. 2d 273 (Miss. 1953). Attorney's fees fall under the same category, as Darlene cannot claim she's entitled to attorney's fees where she caused the non-payment herself by refusing to accept a tender.

The argument that the relief requested should have been by way of a time barred Rule 59 Motion is specious. The relief requested was under Rule 60(b) and was timely filed. Interestingly, when the appellant quotes Rule 60(b) the appellant leave out paragraph (6) which states : "Any other relief justifying relief from the judgment.", which applies in the instant case as

do the provision of paragraph (2), because the judgment sought to be interpreted was clearly the result of an accident or mistake on the previous Chancellor's part. There was no request to alter or amend the judgment, but simply to determine what the terms meant.

CONCLUSION

Chancellor Thomas clearly meant to equitable divide the assets he determined were marital.

There was no cash to distribute and he split the existing assets 50/50. Chancellor McKenzie having heard the testimony properly decided the issue. This Court should affirm the decision of Chancellor McKenzie.

Respectfully submitted this the 15th day of April, 2010.

GEORGE HERBERT MAYO III, APPELLEE by


Robert R. Marshall

CERTIFICATE OF SERVICE

I, Robert R. Marshall, do hereby certify that I have this date mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to the Supreme Court Clerk, Kathy Gillis, at 450 High Street, Jackson, Mississippi 39205, her usual mailing address, Henry Palmer, at Post Office Box 1205, Meridian, MS 39302-1205, his usual mailing address, Robert J Bresnahan, at Post Office Box 826, Meridian, Mississippi 39302-0826, and Chancellor Franklin C. McKenzie, Jr, at Post Office Box 1961, Laurel, Mississippi 39441

THIS, the 15th day of April, 2010.


ROBERT R. MARSHALL

Prepared by:
ERIK M. LOWREY, P.A.
Attorneys at Law
Robert R. Marshall MSB #1880
525 Corinne Street
Hattiesburg, MS 39401
601.582.5015
601.582.5046 (Fax)