IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LIONEL BARNES **APPELLANT**

VERSUS **No. 2009-CA-1985**

BETTY R. HOLDEN (BARNES) **APPELLEE**

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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Lionel Barnes, Appellant
2. Betty R. Holden (Barnes), Appellee
3. William Carl Miller, Attorney for Appellant
4. David Morrison, Attorney for Appellee

By: _____
William Carl Miller
Attorney of Record for
Lionel Barnes, Appellant

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STATEMENT OF THE ISSUES

1. Did the Chancellor err in including the first marriage of the twice-married parties as creditable months of marriage which overlapped Mr. Barnes' military service in calculating the percentage of Mr. Barnes' military retirement pension due Ms. Barnes?

II.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

This case is on appeal from the Chancery Court of Harrison County, Second Judicial District, Mississippi. For clerical purposes this appeal has been consolidated with Case#2009-TS-01985; thus, there exists two certified docket sheets and two volumes of Clerk's Papers. For ease of reference those papers from Case #2009-TS-01985 shall be designated "C.P. Vol. I," while those from this case will be designated "C.P. Vol. II."

On February 4, 2009, Betty R. Holden (Barnes), Appellee herein (hereinafter Ms. Barnes) filed a Petition for a Clarifying Order (C.P. Vol. I at 10-13) wherein she sought clarification of the Judgment of Divorce granted on June 18, 2004 (C.P. Vol I at 1-9). Specifically, Ms. Barnes sought a clarification of that certain provision contained with Paragraph VI of the Property Settlement Agreement wherein the parties agreed that "each would be entitled to fifty percent of the other's retirement as of the date of the divorce".

A hearing was held on May 8, 2009 and the Court issued its Clarifying Order on June 10, 2009 (C.P. Vol. I at 25-28) holding that Ms. Barnes was entitled to 46.26% of Mr. Barnes' military retirement. A Notice of Appeal of that Judgment was filed on June 23, 2009 (C.P. Vol. I at 31-34) but that appeal was subsequently dismissed as not being a final, appealable judgment by Order of the Supreme Court on October 13, 2009. The trial court subsequently calculated the amount of arrearage deemed due to Ms. Barnes and entered its Judgment to that effect on November 17, 2009. (C.P. Vol. II at 26-30). From that Judgment Mr. Barnes timely filed his appeal on December 13, 2009. (C.P. Vol. II at 31-34).

B. STATEMENT OF RELEVANT FACTS

This is a tale involving the two marriages of Lionel Barnes and Betty R. Holden (Barnes). The parties first entered into marriage in July of 1976. Mr. Barnes then enlisted in the United States Air Force in that August, 1976. (Tr. 21). Unfortunately, the parties chose to divorce and a Final Judgment of Divorce was entered in State of Louisiana on March 19, 1998, ending their nearly twenty-two year marriage. (Tr. 13, R.E. 5). An Amended Judgment entered previously in that cause, after litigation of the matter, resolved child custody, child support, and property issues. Ms. Barnes was not awarded a portion of Mr. Barnes' military retirement benefits, nor, for that matter, was Mr. Barnes awarded a portion Ms. Barnes' federal civil service pension benefits or thrift savings plan. Alimony was not awarded to either party. (R.E 6.).

The parties re-united in marriage in January of 2000 but that marriage failed as well, the parties separating in January, 2004 and finally divorcing in the State of Mississippi on June 18, 2004. (R.E. 10). Mr. Barnes retired from the military in September, 2006. (Tr. 18).

The parties' first marriage, from date of marriage to date of final separation (July, 1976 to March, 1997) overlapped Mr. Barnes military service for a period of 248 months, while Mr. Barnes had 54 months of military service from the date of the second marriage until date of divorce (January, 2000 to June, 2004). Mr. Barnes retired from the military in September, 2006, giving him a total of 361 months of creditable military service.

In the Property Settlement Agreement incorporated into the Final Judgment of Divorce granted in Mississippi on June 18, 2004, the parties agreed that each was entitled to 50% of the other's retirement as of the date of the divorce. The Defense Finance Accounting Service will not accept such broad statements; rather, DFAS demands a numerator comprised of the number of months of marriage overlapping military service and then DFAS supplies the denominator of

months of creditable military service in order to arrive at the correct percentage of military retirement pension to which the ex-spouse is entitled. (R.E. 19).

III.

SUMMARY OF ARGUMENT

The principles of res judicata, which apply in divorce cases as elsewhere, preclude the Chancellor from considering the months of the parties' first marriage which overlapped Mr. Barnes' military service in arriving at a clarification of the correct percentage of his military retirement pension to which Ms. Barnes is entitled as a result of the parties' property settlement agreement in which the parties agreed that each should have 50% of the other's retirement pensions.

Ms. Barnes either chose to not litigate the issue of the apportionment of her husband's military retirement pension in the divorce action which ended the first marriage of the parties, or was denied any such apportionment. In either instance, res judicata works its preclusive effect, and the Chancellor was in error in including the months of the first marriage in his calculation of the percentage of Mr. Barnes' military retirement pension due Ms. Barnes under the parties' agreement. The Chancellor should have limited Ms. Barnes to the months of the parties' second marriage which overlapped Mr. Barnes' military service.

IV.

ARGUMENT

STANDARD OF REVIEW

The familiar standard of review in domestic relations case is that "(t)his Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard

was applied. Duncan v. Duncan, 774 So2d 418, 419 (Miss. 2000) (citation omitted).

A. The chancellor erred in considering the months of the first marriage in arriving at his calculation of retirement pension, as the principles of res judicata prohibited re-litigation of Ms. Barnes' claim for any portion of Mr. Barnes military retirement pension accrued from the parties' first marriage.

At issue before the chancellor was how to clarify the parties' agreement that "each shall be entitled to 50% of the other's retirement as of the date of the divorce." Clarification was necessary because the Defense Finance Accounting System cannot proceed to divide pensions without a specific finding of how many months of marriage overlapped the months of creditable military service. Once provided that information, DFAS can then calculate the correct proportion to pay the ex-spouse claiming benefits. Additionally, DFAS must ascertain whether the ex-spouse meets the minimum of ten years of marriage overlapping creditable military service so that direct pay from DFAS can be utilized.

The chancellor found that the parties' agreement was unambiguous and then turned to a calculation based on the DFAS formula to determine the percentage of Mr. Barnes' retirement to which Ms. Barnes should have been entitled. The chancellor first counted all of the months of the first marriage which overlapped Mr. Barnes' military service and arrived at 313 months, which Mr. Barnes asserts is an incorrect calculation as will be set forth *infra*. The chancellor then compounded the mathematical error by using the total months that Mr. Barnes had been in the military at the time of the last divorce (334), according to the Chancellor's calculations, as the numerator, i.e., his judgment reads that Ms. Barnes is entitled to one half of 334/361 of Mr. Barnes' retirement each month, rather than using the 313 month figure at which he had arrived..

A timeline will be helpful:

1. Date of parties first marriage: July, 1976.

2. Military service commences: August, 1976.

3. Date of first separation: March, 1997.

Thus we see that Mr. Barnes served for 248 months during the first marriage of the parties.

4. Date of parties second marriage: January, 2000

5. Date of divorce: June, 2004.

The parties were married for 54 months during the term of the second marriage. The date of divorce is used vice the date of final separation here because the parties' agreement specifically called for using the date of divorce.

Assuming for the moment that the Chancellor should have delved back into the first marriage, the correct calculation would be one half of 302/361 of Mr. Barnes' monthly retirement income, or .418282%, where 302 months represents the total number of overlapping marriage months and 361 represents the total length of Mr. Barnes' military service. The Chancellor erred in calculating the figure as 46.2%, and it follows that the judgment for arrearages based on this erroneous calculation is wrong.

More important is that the Chancellor failed to recognize that the parties had already litigated property issues in the first divorce and that Ms. Barnes was not awarded any portion of Mr. Barnes military retirement. As stated in Bowe v. Bowe, 557 So.2d 793, 794 (Miss. 1990): "We begin with the principles of res judicata which command that a final judgment precludes thereafter all claims that were or reasonably may have been brought in the first action." (citations omitted). Those principles apply in divorce actions as in others. Bowe at 795 (citing Bias v. Bias, 493 So.2d 342, 345 (Miss. 1986).

Ms. Barnes either chose not to pursue a claim for Mr. Barnes' military retirement or

chose to assert the claim and was denied any portion of that retirement. The Louisiana record is silent, but in either instance res judicata precludes her from reviving a claim towards those years of the first marriage. Neither was she awarded any form of alimony. For all intents and purposes, the first marriage is now as if it never existed. The correct years of marriage overlapping military service calculation can rightfully only refer to the years of the second marriage, i.e., 54 months. Ms. Barnes is in no better position by virtue of the first marriage than if Mr. Barnes had chosen a completely different woman for his second marriage. Ms. Barnes or any other woman chosen would be limited to those years of marriage which overlapped Mr. Barnes military service during the present marriage.

Important to emphasize is that the vague "50% of the other's retirement" language will not pass muster with DFAS - the agency demands a clarifying order in each instance when confronted by this language, simply because the numerator information, months of overlapping marriage/military service must be supplied within the Judgment. (R.E. 19). In this instance, the Chancellor was confronted with an unusual twist in that the parties before him had previously been married; however, that twist does not invalidate the principles of res judicata which simply bury those claims which were, or reasonably could have been, litigated in the first action. By reviving Ms. Barnes' first marriage in his calculations, the Chancellor violated the dictates of our long standing jurisprudence which have grown up around the principles of res judicata.

V.

CONCLUSION

For the above and foregoing reasons, the Chancellor's decision should be reversed and remanded for a recalculation of the correct percentage of Mr. Barnes' military retirement pension to which Ms. Barnes should be entitled, with deference given to the principles of res judicata

which command that Ms. Barnes be limited to only that interest which arose during the course of the second marriage.

Respectfully submitted,

WILLIAM CARL MILLER
Attorney for Appellant

MILLER, FOWLKES,
& BARBER, PLLC
P.O. Drawer 8029
BILOXI, MISSISSIPPI 39535-8029
228.388.7111(voice)
228.388.0037(fax)
billy@millerfowlkes.com

CERTIFICATE OF SERVICE

I, William Carl Miller, do hereby certify that I have this date mailed a true and correct copy of the Brief of Appellant, postage prepaid, by means of United States mail, to David Morrison, counsel for Betty Holden (Barnes),, at his usual mailing address of P.O. Box 322, Biloxi, Mississippi and to Honorable Carter O. Bise, Chancellor, at his usual mailing address of Post Office Box 1542, Gulfport, Mississippi 39502.

This the 28th day of October, 2010.

WILLIAM CARL MILLER
MSB[redacted]

MILLER, FOWLKES,
& BARBER, PLLC
P.O. Drawer 8029
Biloxi, Mississippi 39535-8029
(228)388.7111(voice)
(228)388.0037(facsimile)
billy@millerfowlkes.com

IN THE SUPREME COURT OF MISSISSIPPI
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LIONEL BARNES	**APPELLANT**
VERSUS	**No. 2009-CA-1056**
BETTY R. HOLDEN (BARNES)	**APPELLEE**

CERTIFICATE OF MAILING
RULE 25(a) RULES OF APPELLANT PROCEDURE

I, William Carl Miller, Esq., attorney of record for the Appellant, Lionel Barnes, do hereby certify that I have this date mailed, first class mail, postage prepaid, to Betty Sephton, Clerk of the Supreme Court of Mississippi, Post Office Box 249, Jackson, Mississippi 39205-0249, the original and three true and correct copies of:

1. Brief of Appellant.

Further, this date a copy of this notice has been mailed to all counsel of record and the presiding judge.

SO CERTIFIED this the 28th day of October, 2010.

WILLIAM CARL MILLER
MSB[redacted]

MILLER, FOWLKES,
& BARBER, PLLC
P.O. Drawer 8029
Biloxi, Mississippi 39535-8029
(228)388.7111(voice)
(228)388.0037(facsimile)
billy@millerfowlkes.com