

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

OSCAR P. LESTRADE, JR.

APPELLANT

VERSUS

CAUSE NO. 2009-CA-01354

E

AUDREY A. LESTRADE

APPELLEE

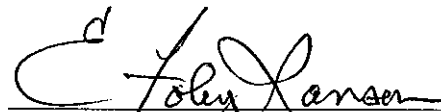
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representatives 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.

| | | |
|---------------------------|---|-----------------------|
| Oscar P. Lestrade, Jr. | - | Appellant |
| Patrick W. Kirby, Esquire | - | Counsel for Appellant |
| Audrey A. Lestrade | - | Appellee |
| E. Foley Ranson | - | Counsel for Appellee |
| Honorable Sandy Steckler | - | Chancellor |

DATED this the 12 day of May, 2010.

Respectfully submitted,



E. FOLEY RANSON
Attorney for Appellee

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

OSCAR P. LESTRADE, JR.

APPELLANT

VERSUS

CAUSE NO. 2009-CA-01354

AUDREY A. LESTRADE

APPELLEE

TABLE OF CONTENTS

| | PAGE NO. |
|--|----------|
| 1. Certificate of Interested Persons..... | i |
| 2. Table of Cases..... | iii |
| 3. Statement of the Case..... | 1 |
| 4. Summary of the Argument..... | 2 |
| 5. Appellee's Argument and Conclusion..... | 3, 8 |
| 6. Certificate of Service..... | 9 |

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

OSCAR P. LESTRADE, JR.

APPELLANT

VERSUS

CAUSE NO. 2009-CA-01354

AUDREY A. LESTRADE

APPELLEE

TABLE OF CASES

| | PAGE NO. |
|--|----------|
| 1. Carite v. Carite, 841 So.2d 1148 (Miss. App. 2002) | 3 |
| 2. Dalton v. Dalton, 874 So.2d 976 (Miss. 2004) | 4, 5, 7 |
| 3. D'Avignon v. D'Avignon, 945 So.2d 401 (Miss. App. 2006) | 2, 3 |
| 4. Holloman v. Holloman, 691 So.2d 897 (Miss. 1996) | 3 |
| 5. Morgan v. Morgan, 744 So.2d 321 (Miss. App. 1999) | 5, 6, 7 |

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

OSCAR P. LESTRADE, JR.

APPELLANT

VERSUS

CAUSE NO. 2009-CA-01354

AUDREY A. LESTRADE

APPELLEE

APPELLEE'S STATEMENT OF THE CASE

Appellee agrees with the Appellant's Statement of the Case except for the final two paragraphs found on Page 9 of Appellant's Brief.

Specifically, Appellant states: "The Court found that it was the parties' intent that Mr. Lestrade retire at age 65." This is not accurate.

The Chancellor's Order of Modification states in Paragraph VI:

The Court finds that the intent of the parties as expressed in the contract provision recited hereinabove was that the Plaintiff would begin to receive one-half of Defendant's Civil Service Retirement at a reasonable and customary time which the Court finds to be at Defendant's reaching age 65. To find otherwise would deprive Plaintiff of the benefit of her bargain and provide to Defendant as unexpected and inequitable windfall. (R.E.P. 38-39)

The Chancellor did not impute any specific intent to the parties as to when Mr. Lestrade should retire. Rather, the Trial Court made an equitable modification of the retirement provision based upon the Court's authority to avoid the imposition of undue

hardship or injustice.

The final paragraph of Appellant's Statement of the Facts states that Mrs. Lestrade was not entitled to any retirement benefits accumulated by Mr. Lestrade after their divorce based upon the premise that such benefits are not marital assets subject to equitable distribution.

This is more of an argumentative statement than a statement of fact.

Appellee would submit that this case is about interpretation of a contract and there is no issue of equitable distribution under consideration in any event.

SUMMARY OF THE ARGUMENT

Appellant essentially makes three arguments:

1. That the modification ordered by the Chancellor was barred by "the three year statute of limitations" - through no code section is cited.
2. That the Chancellor in the absence of a finding of fraud, duress or unconscionability, did not have the authority to modify a property settlement agreement.
3. That retirement benefits accumulated by Appellant after the parties' divorce are not marital assets and not subject to equitable distribution.

Section 15-1-49 of the Mississippi Code of 1972, Annotated, is the general three-year statute of limitations, Appellant cites D'Avignon v. D'Avignon, 945 So.2d 401 (Miss. App. 2006) for the proposition that the three-year statute of limitations applies to property

settlement agreements.

In D'Avignon, the Wife filed a Complaint for Modification more than eighteen (18) years after entry of the divorce judgment and property settlement agreement. There was no argument or finding that the trial court was limited by a three-year statute of limitation in granting relief to the Wife.

Other cases in which the appellate court allowed the modification of a property settlement agreement more than three years after entry thereof are: Holloman v. Holloman, 691 So.2d 897 (Miss. 1996) (seven (7) years); Carite v. Carite, 841 So.2d 1148 (Miss. App. 2002) (ten (10) years).

Chancellors may modify property settlement agreements based upon the application of principles of equity, eg to interpret and enforce the intent of the parties in cases of ambiguity or misunderstanding; or to avoid undue hardship or injustice.

This case and this appeal are concerned with the equitable modification of a provision in the parties' property settlement agreement. There is no issue of equitable distribution.

ARGUMENT

Appellee (hereinafter "Audrey"), would submit that there is no question of law to be reviewed in this appeal and, therefore, the standard of review should be the substantial evidence/manifest error rule.

The real issue in this case is whether or not a Chancellor has the authority to modify

a provision in a property settlement agreement where there is an ambiguity or misunderstanding between the parties.

The provision in issue states:

Husband will pay one-half of his Civil Service Retirement to the Wife and will provide the proper and necessary proof to effect this payment.

It is Appellant's (hereinafter "Oscar") position that his obligation to Audrey was based upon the total retirement benefits that had accrued at the time the property settlement agreement was executed in 1989. (Transcript, P. 30, 41) (Appellee would cite to the Record Excerpts, but the pages are not numbered. The trial transcript is in the Appellant's Record Excerpts.)

It is Audrey's position that Oscar's obligation was to pay her one-half of his Civil Service Retirement beginning when he retired from Civil Service based upon the actual benefits he received at that time. (Transcript, P. 43)

Obviously, there is a misunderstanding between the parties as to how this provision should be interpreted.

In Dalton v. Dalton, 874 So.2d 976 (Miss.2004), the Supreme Court stated at Page 972:

"So the pivotal issue becomes how much deference a Chancellor should be given in enforcing property agreements and resolving disputes between parties concerning a property agreement during a contempt proceeding. The Chancellor found a good faith misunderstanding on the part of the parties regarding the terms of a recently executed agreement. There

was no abuse of discretion in molding the agreement to conform to the intent of the parties. We hold that the Chancellor's actions were proper under the circumstances."

The Chancellor found that there was a mutual misunderstanding between Oscar and Audrey and interpreted the provision to mean that Audrey would be entitled to one-half of his Civil Service retirement at the time of his retirement. He further found that since Oscar was 70 years old (his date of birth is 01/01/38) at the time of the hearing (in November, 2008) and was still working, that a reasonable interpretation would be to set Audrey's entitlement to commence at age 65, a reasonable and customary age of retirement. (Transcript, Pages 17-19 and 47-48).

Quoting again from Dalton, supra, at Page 971, our Supreme Court stated:

"Courts of equity have certain discretionary power in the matter of decreeing the specific performance of contracts and they may and should make equitable modifications in the form of relief granted where to do otherwise would result in undue hardship or injustice."

Another basis for equitable modification of a property settlement agreement is set forth in Morgan v. Morgan, 744 So.2d 321 (Miss. App. 1999). In that case, the husband agreed to pay the remaining three years of note payments and tag and insurance costs on a vehicle provided to the wife. Several months after the divorce, the vehicle was totally destroyed in an accident.

The Husband's insurance paid off the loan and a surplus of \$1,650.43 was given to the wife. At this time there were twenty-seven (27) monthly payments of \$318.00

outstanding on the car loan. The wife had \$1,650.43 and no vehicle and the husband was relieved of approximately \$8,500.00 in car payments, plus the cost of tags and insurance.

The Court of Appeals at Page 323 of the Morgan decision stated:

“Under those circumstances, she claims that she has been unfairly deprived of the benefits of the bargain she struck and that her former husband has enjoyed an unanticipated and inequitable windfall if he is not required to honor the terms of the agreement, or at least some equitable modification of the original agreement which has been rendered impossible due to unanticipated events beyond the parties’ control.”

And at Page 324 stated:

“...the Chancellor should have fashioned an equitable remedy that would have permitted Mrs. Morgan to acquire a replacement vehicle and would have compelled Mr. Morgan to make contributions to this alternate vehicle that would have been essentially the same had the Honda not been unexpectantly destroyed. Under these circumstances equity would have been accomplished.”

The Court of Appeals opined that while the possibility of a casualty loss to a vehicle furnished under the Morgans’ agreement always exists, it would not seem that such a loss is so foreseeable that the parties should be required to explicitly contract as to Mr. Morgan’s duties in the event of such a loss prior to the fulfillment of his end of the bargain.

Likewise, while the possibility that Oscar would not retire at or about age 65 did exist in 1989, Audrey should not be deprived of the benefit of her bargain because the subject provision did not state a certain date when she would start receiving one-half of Oscar’s

Civil Service retirement.

Following the instructions of Morgan and Dalton, the Chancellor stated in paragraph VI of his Order of Modification (C. P. Pages 38-39) as follows:

The Court finds that the intent of the parties as expressed in the contract provision recited hereinable was that Plaintiff would begin to receive one-half of Defendant's Civil Service Retirement at a reasonable and customary time which the Court finds to be at Defendant's reaching age 65. To find otherwise would deprive Plaintiff of the benefit of her bargain and provide to Defendant an unexpected and inequitable windfall.

So the only real issue before this Court is whether the equitable relief fashioned by the Chancellor in this case amounts to an abuse of discretion.

Based upon Oscar's testimony, the Chancellor found that his Civil Service Retirement was \$40,000 per year for the five years proceeding the trial (November 24, 2008) and \$45,000 per year for January, 2009, forward. (C.P. P. 38)

The Chancellor awarded Audrey \$20,000 per year for the proceeding five years, plus interest, for a total judgment of \$125,000.00. However, in an effort to fashion a remedy that would not be too burdensome to Oscar, the trial court only required that Oscar pay \$300.00 per month toward this amount.

In addition, Oscar was ordered to pay \$1,875.00 per month — one-half of Oscar's entitlement to \$45,000 per year in Civil Service Retirement — beginning in January, 2009, when Oscar would have attained age 71.

Audrey would note here that the provision that goes back five years really goes back

to 2004 when Oscar was 66 years of age. So while it was the intent of the Chancellor to award retirement benefits at Oscar's age 65, in fact, the award actually begins after Oscar attained the age of 66 (January 1, 2004).

The Chancellor had to take into consideration that Oscar admitted to earning approximately \$85,000.00 annually and at age 70 was still working with no intent to retire at any certain date.

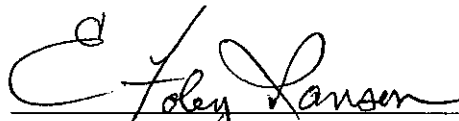
Audrey was living on Social Security benefits of approximately \$1,100.00 per month and caring for an adult Downs Syndrome child whose only income was Social Security benefits of approximately \$600.00 per month.

Audrey would submit that under the totality of the circumstances, the remedy fashioned by the chancellor was fair and equitable and supported by the legal authorities cited herein.

CONCLUSION

The findings of the chancellor are not manifestly wrong and are supported by the credible evidence presented. The Order of Modification is supported by the applicable legal authorities and should be affirmed.

Respectfully submitted,



E. FOLEY RANSON
Attorney for Appellee

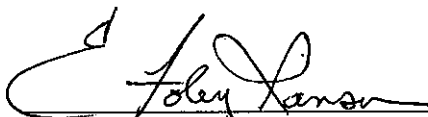
CERTIFICATE OF SERVICE

I, E. FOLEY RANSON, Attorney for Appellee, certify that I have this day served a copy of this Appellee's Brief by United States Mail, postage prepaid on the following persons at these addresses:

Mr. Patrick W. Kirby
Attorney for Appellant
Post Office Drawer 47
Waveland, MS 39576-0047

Honorable Sandy Steckler
Chancellor
Post Office Box 659
Gulfport, MS 39502

This the 12 day of May, 2010.



E. FOLEY RANSON
Attorney for Appellee
Post Office Box 848
Ocean Springs, MS 39566
Tel: 228-875-8770
Fax: 228-875-9989
MS BAR NO. [REDACTED]