
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

OSCAR P. LESTRADE, JR.

APPELLANT

VERSUS

CAUSE NUMBER: 2009-CA-01354

AUDREY A. LESTRADE

APPELLEE

ON APPEAL FROM THE
CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI

APPELLANT'S REPLY BRIEF

(ORAL ARGUMENT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the Court may evaluate whether the decision of the Chancery Court of Harrison County was in error.

1. Audrey A. Lestrade
2. E. Foley Ranson, Esq., Attorney for Audrey A. Lestrade
3. Patrick W. Kirby, Attorney for Appellant
4. Butler, Snow, O'Mara, Stevens & Cannada, PLLC

Respectfully submitted this the 1st day of June, 2010.

Oscar P. Lestrade, Jr.
Appellant

BY:

Patrick W. Kirby
Patrick W. Kirby
Attorney for Appellant

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STATEMENT OF THE ISSUES

The issues presented for consideration by this Court are:

1. Whether the modification of the Property Settlement agreement was barred by the applicable statute of limitations.
2. Whether the Plaintiff/Appellee established fraud, duress or unconscionability necessary to justify a modification of the Property Settlement Agreement.
3. Whether the Chancery Court of Harrison County erred in modifying the existing Property Settlement Agreement to require that Mr. Lestrade retire at the age of sixty five.
4. Whether retirement benefits earned by Mr. Lestrade after the 1989 divorce are marital property and subject to distribution by modification of a property settlement agreement.

ARGUMENT

A. Standard of Review.

Mrs. Lestrade argues in her brief that the standard of review in this matter should be “the substantial evidence/manifest error rule.” (Appellee’s Brief at p. 3). Notably, she fails to cite any law in support of this argument.

The pertinent case law is that, “When considering issues of law such as statutes of limitations, this court employs a *de novo* standard of review.” *Shaw v. Shaw*, 985 So. 2d 346, 351 (Miss.Ct.App., 2007); *Bayview Land Ltd. V. State*, 950 So. 2d 966, 972 (Miss. 2006); *Carter v. Citigroup, Inc.*, 938 So. 2d 809, 817 (Miss. 2006); *Carite v. Carite*, 841 So. 2d 1148, 1152 (Miss. App. 2002); *Sarris v. Smith*, 782, So. 2d 721, 723 (Miss. 2001). It cannot be disputed that one of the issues before this Court is whether the modification of the Property Settlement Agreement in this matter was barred by the applicable statute of limitations.

Furthermore, “Where the question before [the Court] is essentially one of interpretation of a legal text, (i.e. property settlement agreement), review is *de novo*.” *Breezley v. Breezley*, 917 So. 2d 803, 807 (Miss.Ct.App. 2005); *Webster v. Webster*, 566 So. 2d 214, 215 (Miss. 1990). Mrs. Lestrade admits in her brief that “this case is about interpretation of a contract” (Appellee’s Brief at p. 2). This matter presents the Court with a statute of limitations issue as well as an interpretation of a property settlement agreement. Thus, the applicable standard of review with regard to these matters is *de novo*.

B. Modification of the Property Settlement Agreement was barred by the statute of limitations.

In response to Mr. Lestrade's argument that the modification of the Property Settlement Agreement herein was barred by the statute of limitations, Mrs. Lestrade cites three (3) cases. Significantly, none of the three cases involve complaints to modify property settlement agreements. In *Holloman v. Holloman*, a case cited by Mrs. Lestrade implying the statute of limitations is seven (7) years, "Joan [Mrs. Holloman] filed a motion to cite Ronald [Mr. Holloman] for contempt, and thereafter amended, to have the 401-K incorporated into a revised QDRO in conformity with the settlement agreement." *Holloman v. Holloman*, 691 So. 2d 897, 898 (Miss. 1996). No attempt was made by Mrs. Holloman to modify the property settlement agreement. In *Carite v. Carite*, a case cited by Mrs. Lestrade implying the statute of limitations is ten (10) years, the Court found that "the chancery court did not err in finding that this action for contempt was not barred by Miss. Code §15-11-43." *Carite v. Carite*, 841 So. 2d 1148, 1152 (Miss. App. 2002)(emphasis added). Similar to *Holloman*, *Carite* did not involve a complaint for or an attempt to modify a property settlement agreement, it was an action for contempt.

The first paragraph of the *D'Avignon* opinion states that "Karen D'Avignon filed a complaint for modification of alimony in the Chancery Court of Harrison County. Louis also filed a motion for modification of alimony, requesting that his alimony obligations be reduced or terminated." *D'Avignon v. D'Avignon*, 945 So. 2d 401, 403-04 (Miss. App. 2006)(emphasis added). While it is undisputed that alimony may be modified beyond the three year limitations period, the *D'Avignon* case does not hold that property settlement agreements can be modified

beyond the three year statute of limitations. Quite the contrary, the *D'Avignon* case specifically holds, with respect to property settlement agreements, that:

It is a well established principle in Mississippi that “[a] true and genuine property settlement agreement is no different than 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.” *West v. West*, 891 So. 2d 203, 210 (Miss. 2004)(quoting *East v. East*, 493 So. 2d 927, 931-32 (Miss. 1986)). Consequently, we find that the chancellor did not err in applying the three-year statute of limitations to this contract issue.

Id. at 408(emphasis added). The *D'Avignon* Court specifically held that property settlement agreements are subject to the three year statute of limitations.

C. Plaintiff failed to allege or establish fraud, duress or unconscionability that would justify a modification of the Property Settlement Agreement.

Mrs. Lestrade failed to make any argument or offer any authority to suggest that property settlement agreements may be modified absent a showing of fraud, duress or unconscionability.

The Supreme Court has repeatedly held that “property settlement agreements are fixed and final, and may not be modified absent fraud or contractual provisions allowing modification.” *Weathersby v. Weathersby*, 693 So. 2d 1348, 1352 (Miss. 1997)(citing *Mount v. Mount*, 624 So. 2d 1001, 1005 (Miss. 1993); *Brown v. Brown*, 566 So. 2d 718, 721 (Miss. 1990); *East v. East*, 493 So. 2d 927, 931-32 (Miss. 1986); *Bell v. Bell*, 572 So. 2d 841, 844 (Miss. 1990)); *see also Kelley v. Kelley*, 953 So. 2d 1139, 1143 (Miss. Ct. App. 2007). The *East* Court stated:

We have historical recognized that parties may upon dissolution of their marriage have a property settlement incorporated into the divorce decree, and such property settlement is not subject to modification.

East v. East, 493 So. 2d 927, 931-32 (Miss. 1986)(emphasis added). “Absent fraud, duress or unconscionability, property settlement agreements that divide property are enforced by this

Court.” *Woodfin v. Woodfin*, 26 So. 3d 389, 395 (Miss. App. 2010)(citing *McManus v. Howard*, 569 So. 2d 1213, 1215(Miss. 1990). Based on this line of cases, the *Woodfin* Court reversed the modification of the property settlement agreement and reinstated the parties original property agreement finding that “the chancellor made no findings of fraud, duress or unconscionability which is required for the chancellor to modify the property agreement.” *Woodfin*, 26 So. 3d at 396 (Miss. App. 2010).

In this matter, Mrs. Lestrade did not allege fraud, duress, or unconscionability in her Complaint for Modification (R.E. 14 – 16) nor did she offer any such testimony at the trial of this matter. Her sole allegation was that she had “a reasonable expectation” that she would begin receiving one-half of Defendant’s Civil Service Retirement when Defendant reached age 65. (R.E. 15). As in *Woodfin*, the chancellor failed to make any findings of fraud, duress, or unconscionability. Absent such a finding, the modification entered herein should be reversed.

D. The Chancery Court of Harrison County erred in modifying the Property Settlement Agreement to require that Mr. Lestrade retroactively retire at the age of sixty five.

Mrs. Lestrade cites two (2) cases to support her contention that the chancellor has the authority to modify the provisions of a property settlement agreement “based on the principles of equity.” As with the cases cited by Mrs. Lestrade in her statute of limitations argument, both of the “equitable modification” cases cited by Mrs. Lestrade arise from contempt proceedings, not Complaints for Modification as was filed in this matter. The *Morgan* case “arises from a judgment in a post-divorce contempt proceeding brought by Christy Morgan against her former husband, John Morgan.” *Morgan v. Morgan*, 744 So. 2d 321, 322 (Miss. App. 1999)(emphasis added). The *Dalton* Court held that “the pivotal issue becomes how much deference a

chancellor should be given in enforcing property agreements and resolving disputes between the parties concerning a property agreement during a contempt proceeding.” *Dalton v. Dalton*, 874 So. 2d 967, 972 (Miss. 2004)(emphasis added).

In this matter, Mrs. Lestrade did not file a Complaint for Contempt nor did she file a Motion to Enforce or even a Motion to Clarify. She filed a *Complaint to Modify* the terms of the existing Property Settlement Agreement. She sought to change the terms of the existing agreement, an admission that the existing Agreement does not contain the terms that she now seeks to add to the Agreement. More specifically, she asked the Court to insert a mandatory retirement date into the agreement. The existing Property Settlement Agreement clearly does not contain a mandatory retirement provision. In response to Mrs. Lestrade’s Complaint, the Court entered an *Order of Modification* not only inserting the additional terms but applying the modification retroactively to Mr. Lestrade’s sixty-fifth (65th) birthday despite the fact that Mr. Lestrade has not retired and has not received one nickel in retirement benefits himself. The Court further modified the existing agreement to award Mrs. Lestrade one-half of all of Mr. Lestrade’s retirement benefits, including benefits that were accrued by Mr. Lestrade outside of the marriage.

The contempt cases cited by Mrs. Lestrade are not applicable to the *Complaint for Modification* filed in this matter. However, even had this case arisen in the context of a complaint for contempt, the modification of the agreement in this matter is not consistent with the intent of *Dalton* and *Morgan*. The intent of both cases is to “give the parties an opportunity to effect the intended purpose of the contract.” *Dalton*, 874 So. 2d at 970 (Miss. 2004). The *Dalton* Court held that “where 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 and render its clauses harmonious in light of that intent.” *Id* at 971; *Switzer v. Switzer*, 460 So. 2d 843, 846 (Miss. 1984). With regard to intent, the Supreme Court has repeatedly held that,

Intent of the parties is crucial in contract interpretation. Of course, it must be understood that the words employed in a contract are “by far the best resource for ascertaining intent and assigning meaning with fairness and accuracy.

Newell v. Hinton, 556 So. 2d 1037, 1042 (Miss. 1990); citing *Roberts v. Roberts*, 381 So. 2d 1333, 1335 (Miss. 1980). As previously argued, the clear reading of the Agreement, which Mrs. Lestrade seeks to modify, does not impose a mandatory retirement age or date on Mr. Lestrade.

Mrs. Lestrade states in her brief that “The Chancellor found that there was a mutual misunderstanding between Audrey and Oscar. . . .” (Appellee’s Brief at p. 5). The record contains no such finding. Quite the contrary, the Court below found the contract “clear on its face.” (Trial Transcript p. 47, lines 27-29). The record herein contains no finding of ambiguity and no finding of good faith misunderstanding, essential elements of the “equitable modifications” of *Dalton* and *Morgan*.

Further, the testimony and argument of counsel in this matter is clear that the parties never discussed, contemplated, intended or agreed that the Agreement would contain a mandatory retirement age. Mrs. Lestrade did not offer any testimony that she and Mr. Lestrade ever discussed or agreed that he would retire at 65. Mr. Lestrade testified that he never represented to Mrs. Lestrade or anybody else that he intended to retire at age 65. (Trial Transcript p. 32, lines 16-18). This is the sole testimony in the record on the subject.

Plaintiff’s counsel argued that “She [Mrs. Lestrade] didn’t anticipate, while it’s not totally unforeseeable that he might not retire until age 70 or 71, that wasn’t contemplated at the time. (Trial Transcript p. 24, lines 12-15). Counsel further argued that,

“She did not think that he might not retire at normal retirement age. Maybe that should have been put in there. But you can’t always think of everything that may happen in the future, even though it is reasonably foreseeable.”

(Trial Transcript p. 26, lines 5-10).¹ Any analysis of this Property Settlement Agreement pursuant to *Dalton* and *Morgan* must “seek to gather the intent of the parties and render its clauses harmonious in light of that intent.” *Dalton*, 874 So. 2d at 971 (Miss. 2004). The plain reading of the agreement as well as the entirety of the testimony in this matter, are clear that a mandatory retirement age was never even contemplated, much less intended by the parties to this Property Settlement Agreement.

Finally, it is important to note that had the Court found ambiguities, “uncertainties should be resolved against the party who prepared the instrument.” *Wood v. Wood*, 2010 WL 2106020, *3 (Miss. 2010); *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352-53, (Miss. 1990)(citing *Clark v. Carter*, 351, So. 2d 1333, 1334 & 1336(Miss. 1977)). In this recently decided case, the Supreme Court held that “Melissa’s attorney drafted the Agreement, so it should be construed against her interpretation. . .” *Wood*, 2010 WL 2106020, *3 (Miss. 2010). Likewise in this matter, it is undisputed that Mrs. Lestrade’s attorney drafted the Property Settlement Agreement at issue herein. Any ambiguities and/or uncertainties should be construed against her interpretation.

E. Retirement Benefits earned by Mr. Lestrade after the 1989 divorce are not marital property and therefore not subject to equitable distribution.

Mrs. Lestrade argues that “There is no issue of equitable distribution” in this matter. (Appellee’s Brief at p.3). Again, Mrs. Lestrade fails to offer any authority to support her

¹ It is undisputed that E. Foley Ranson, attorney for the Plaintiff Audrey Lestrade, drafted the Property Settlement Agreement at issue herein. (R.E. 46).

argument. She simply relies on her argument that the chancellor “may modify property settlement agreements on the principles of equity.” *Id.* However, the “principles of equity” do not allow the re-allocation of assets acquired by a party after the termination of the marriage.

It is undisputed that Mrs. Lestrade is entitled to one-half of the Civil Service Retirement “acquired or accumulated” by Mr. Lestrade during the marriage. She will become entitled to these benefits when Mr. Lestrade actually retires. Mississippi law is clear that “For purposes of dividing marital property, retirement plans are considered marital assets.” *Carrow v. Carrow*, 741 So. 2d 200, 202 (Miss. 1999); *Coggin v. Coggin*, 837 So. 2d 772, 775 (Miss. Ct. App. 2003). The law is equally clear that “Assets are not subject to distribution where it can be shown that such assets are attributable to one of the parties’ separate estates prior to the marriage or outside the marriage.” *Helmsley v. Helmsley*, 639 So. 2d 909, 914 (Miss. 1994). Accordingly, any retirement benefits earned by Mr. Lestrade after the marriage ended in 1989 cannot be construed as marital assets.

In *Helmsley*, the Supreme Court “determined that marital assets subject to equitable distribution by the chancellor are any and all assets acquired or accumulated during the marriage. A spouse who has made a material contribution toward the acquisition of the asset titled in the other spouses name may claim an equitable interest in such jointly accumulated property.” *Id.* at 913. There can be no dispute that the retirement benefits earned by Mr. Lestrade after the divorce are not a marital asset as Mrs. Lestrade made no material contribution toward the acquisition of these benefits after the marriage ended.

Despite this case law to the contrary, the Court below entered an *Order of Modification* requiring Mr. Lestrade to pay one-half of all of his Civil Service Retirement benefits to Mrs.

Lestrade. A substantial portion of these benefits were earned by Mr. Lestrade after the divorce and are therefore not “marrital assets” subject to distribution by the court.

In its analysis, the Court below stated as follows:

When you get down to Chancery Court and you have to figure out how to take apart a marriage and how to provide for the best interest of the respective parties after the divorce and how to divide the marrital assets, it's extremely difficult to decide what is a marrital asset as opposed to what is alimony on many occasions. Right now the Supreme Court continues to wrestle with alimony and separate it from property rights.

(Trial Transcript at pp. 45-46)(emphasis added). However, in this matter, the line between marrital assets and alimony is much more clear. On January 2, 2003, the parties herein entered an *Agreed Order of Modification* in which Mrs. Lestrade accepted the proceeds from the sale of the marrital home in exchange for the termination of Mr. Lestrade's obligation to pay alimony. A Copy of the *Agreed Order of Modification* is attached hereto as Exhibit “A.” Mr. Lestrade's obligation to pay alimony was terminated by Agreed Order. The sole issue remaining between these parties is the division of marrital assets, namely, Mr. Lestrade's Civil Service Retirement.

Based on the line of cases holding that retirement benefits “acquired or accumulated” outside of the marriage are not subject to equitable distribution, buttressed by the fact that Mr. Lestrade's obligation to pay alimony was terminated by agreement, the Court below erred in modifying the Property Settlement Agreement to distribute after acquired property/benefits to Mrs. Lestrade. The Order of Modification entered herein should be reversed.

CONCLUSION

For the foregoing reasons, Appellant Oscar P. Lestrade, Jr. requests that the Court reverse the Order of Modification entered by the Chancery Court of Harrison County, Mississippi and to grant him any and all other relief to which he may be entitled.

Respectfully submitted, this, the 1ST day of June, 2010.

OSCAR P. LESTRADE, JR

APPELLANT

BY:


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CERTIFICATE OF SERVICE ON TRIAL JUDGE

I, Patrick W. Kirby, counsel of record to Appellant Oscar P. Lestrade, Jr., do hereby certify that I have this day filed a copy of the foregoing Appellant's Reply Brief, by U. S. mail, postage prepaid, on the following person at this address:

Judge Sanford R. Steckler
P.O. Box 486
Biloxi, Mississippi 39533

This the 7th day of June, 2010.


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CERTIFICATE OF SERVICE

I, Patrick W. Kirby, hereby certify that I have delivered a true and correct copy of the above and foregoing Appellant's Brief, via United States Mail, to:

E. Foley Ranson, Esq.
P.O. Box 848
Ocean Springs, Mississippi 39566-0848

I further certify that I have caused to be delivered by United States Mail, first class, postage prepaid, the original and four (4) copies of this Brief along with a copy of this brief on digital media, to:

Kathy Gillis, Clerk
Mississippi Supreme Court
P.O. Box 249
Jackson, Mississippi 39205-0249

SO CERTIFIED, this, the 1ST day of June, 2010.

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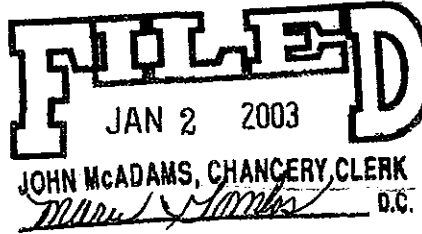
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IN THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

AUDREY A. LESTRADE

PLAINTIFF

VERSUS



CAUSE NO. 18,370

OSCAR P. LESTRADE, JR.

DEFENDANT

AGREED ORDER OF MODIFICATION

THIS CAUSE having come on for hearing and the Court having been advised that the parties have agreed that there has been a material change in circumstances since the entry of the divorce Judgment on October 5, 1989 and that the parties have agreed to modify the terms of said Judgment.

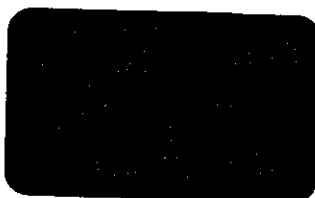
IT IS THEREFORE ORDERED AND ADJUDGED as follows:

I.

The Court has jurisdiction of the parties and the subject matter.

II.

That the real property owned by the parties located at 1465 Miller Street, Biloxi, Mississippi 39530 shall be placed on the market for sale. Both parties agree to fully cooperate in the execution of any documents necessary to complete this sales transaction.



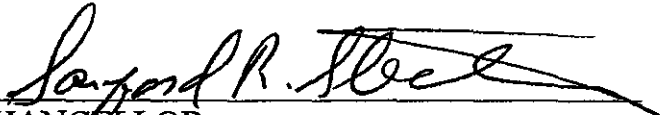
III.

Upon closing of the sale of this property, the net proceeds of the sale will be distributed to Audrey A. Lestrade. On that same date, the obligation of Oscar P. Lestrade, Jr. to pay alimony shall be terminated.

IV.

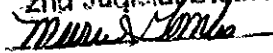
All other provisions of the above referenced Judgment not modified by this Agreed Order shall remain in full force and effect.

SO ORDERED, ADJUDGED AND DECREED this the 2nd day of January, 2003.


CHANCELLOR

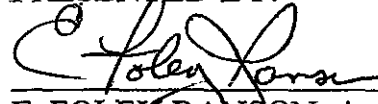
APPROVED AS TO FORM AND CONTENT:


OSCAR P. LESTRADE, JR.

FILED TRUE COPY
JOHN McADAMS
Chancery Court Clerk
Harrison County, MS
2nd Judicial District
 D.C.


AUDREY A. LESTRADE

PRESENTED BY:


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