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

MELISSA WEEKS WOODS — APPELLANT

VERSES — CAUSE NO. 2009-TS-00679

KELLY DREW WOOD — APPELLEE

BRIEF OF APPELLEE KELLY DREW WOOD

APPEAL FROM THE CHANCERY COURT
OF LOWNDES COUNTY, MISSISSIPPI
CAUSE NO. 2009-TS-00679

TIMOTHY C. HUDSON
ATTORNEY AT LAW
809 THIRD AVENUE NORTH
COLUMBUS, MISSISSIPPI 39703
TELEPHONE: 662-328-2711
FACSIMILE:662-328-0745
EMAIL: thudson.simsandsims@yahoo.com
MS BAR NO: [redacted]

ATTORNEY FOR APPELLEE

ORAL ARGUMENT NOT REQUESTED

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

MELISSA WEEKS WOOD	APPELLANT
VERSES	CAUSE NO. 2009-TS-00679
KELLY DREW WOOD	APPELLEE

CERTIFICATE OF INTERESTED PERSONS

In accordance with Rule 28 (a) of the Mississippi Supreme Court Rules, the undersigned counsel of record certified that the following listed persons have an interest in the outcome of this case:

These representatives are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

1. Melissa Weeks Wood, Appellant
2. Kelly Drew Wood, Appellee
3. Marc D. Amos, Attorney for Appellant
4. Kristen Wood Williams, Attorney for Appellant
4. Timothy C. Hudson, Attorney for Appellee
5. Honorable Dorothy W. Colon, Chancellor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

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

MELISSA WEEKS WOODS — APPELLANT

VERSES — CAUSE NO. 2009-TS-00679

KELLY DREW WOOD — APPELLEE

STATEMENT OF THE CASE

On May 2nd, 2009, the Parties herein executed an agreement in a divorce proceeding setting out the division of marital property. The portion of this agreement which lead to this lawsuit and appeal is found in paragraph VIII, sub-paragraph b, which states:

> "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 dollars ($376,000.000). Husband shall receive the sum of one-hundred seventy-two thousand eight-hundred and no/100 dollars ($172,800.00)."(Appellant's Record Excerpts Pg. 22 (hereinafter "A.R.E.")).

The Appellant filed a motion for contempt on January 12, 2009, for Appellee's failure to pay the sum set forth above. In response Appellee, filed a Motion For Clarification seeking the trial court's interpretation of this clause. (A.R.E. 1).

A trial was held March 9, 2009 with the Trial Court failing to hold the Appellee in contempt and ordered the Appellee to transfer 54% of any monies in the account as of April 1, 2009, to the Appellant. (A.R.E. 31-33).

Testimony at the contempt proceeding was offered by the parties and the testimony showed a judgement of divorce was granted on August 12, 2008, (Trial Transcript ("T.T.") Page 6, Lines 18-21; A.R.E. 34 & 7-26). The value of the GGC account on May 2, 2009, when the

property settlement was executed, was $376,000.00. The testimony at trial indicated the value of the investment changed daily fluctuating either up or down (T.T.P. 19, L 22-29; A.R.E. 47). Further testimony showed the balance to be approximately $365,000.00 as of July 31, 2008 (T.T.P 13, L 8-10; A.R.E. 41). The account had begun a steady decline in the summer of 2008, as had most all investment accounts and had fallen to $206,000.00 as of the date of the contempt hearing (T.T.P. 8, L 12-13; A.R.E. 36; & T.T.P. 7, L 21-26; A.R.E. 35).

Testimony showed that the Appellant had her attorney prepare the divorce agreement (T.T.P. 20, L 27-29; A.R.E. 48; & T.T.P 27, L 6-14; A.R.E. 55) and the Appellee was unrepresented (T.T.P. 21, L 1-2; A.R.E. 49). In this agreement it was expressly stated the transfer was intended to be a tax-free transfer (T.T.P. 21, L 7-15' A.R.E. 49 & 23). Appellee further testified it was his understanding there needed to be a proper account which meet the qualifications of a tax and penalty free transfer (T.T.P. 21, L 16-29; A.R.E. 49).

There was no testimony as to the preparation of a Qualified Domestic Relations Order by the Appellant or her attorney and when asked why the Appellant didn't transfer the money on August 12, 2008, the Appellee responded he did not because it was impossible to make the transfer as Appellee was unaware of the existence of a qualifying account (T.T.P. 9, L 5-13; A.R.E. 37) and it was impossible for the Appellee to receive $203,000.00 and the Appellant $172,800.00 as stated in their agreement, because there was not enough money to accomplish this (T.T.P. 20, L 15-22; A.R.E. 48; & T.T.P. 13, L 8-10; A.R.E. 41).

The Appellant testified she first requested a transfer of funds in September, 2008, with the Appellee responding there was not enough funds at the time and I would have to wait until the account went back up. At this time the Appellee stated she would like her money by the end of the year (T.T.P. 30, L 14-22; A.R.E.58). The Appellant does not state she ever gave specific

instructions as to what account she wanted her funds transferred to nor does she allege she ever had her attorney prepare a Qualified Domestic Relations Order directing the transfer of these funds. The Appellee testified the first time he received documents directing the transfer to a specific account was in late February, 2009 (T.T.P 22, L 1-6; A.R.E. 50). He further testified he had requested account information which was not provided at the time (T.T.P. 17, L 1-5; A.R.E. 45). The Appellee indirectly acknowledges that Appellee had requested an account number when questioned as to why she made her second request for a transfer of funds in November 2008, when she previously agreed to wait until the first of the year, by stating " Because I had not heard anything from him as far as if he needed any information from me other than the account number." (T.T.P. 34, L 5-9; A.R.E. 62).

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

MELISSA WEEKS WOODS — APPELLANT

VERSES — CAUSE NO. 2009-TS-00679

KELLY DREW WOOD — APPELLEE

SUMMARY OF ARGUMENT

The trial Court did not rewrite the parties' contract and did not err in determining that the intent of the parties was for there to be a percentage split rather than a dollar amount split. The Court heard the testimony and considered the evidence, and as the trier of fact determined the intent of the parties. These findings of fact may not be overturned under the applicable standards of review.

Under equitable principles, applying the facts as determined by the Chancery Court, said Court was not in error in determining a date for division of the GGC account because the Court did not determine value, as alleged by the Appellant in her brief, but simply set a date for transfer and set the percentage of the transfer consistent with the Chancellor's previous findings and application of the rules of equity and law.

I. STANDARD OF REVIEW

The standard of review employed by this Court in domestic relations cases is well settled. Chancellors are vested with broad discretion, and this Court will not disturb the Chancellor's findings unless the Court was manifestly wrong, the court abused its discretion, or the Court applied an erroneous legal standard. *Andrew v. Williams,* 723 So.2d 1175, 1177 (paragraph 7) (Miss. Ct. App. 1998) (citing Sandlin v. Sandlin 699 So.2d 1198, 1203 (Miss. 1997). Where the Chancellor was the trier of facts, his findings of fact on conflicting evidence cannot be disturbed by this Court on appeal unless we can say with reasonable certainty that these findings were manifestly wrong and against the overwhelming weight of the evidence. Even if this Court disagreed with the lower court on the finding of fact and might have arrived at a different conclusion, we are still bound by the Chancellor's findings unless manifestly wrong. *Richardson v. Riley*, 355 So.2d 667, 668 (Miss. 1978).

II. ARGUMENT:

The Appellee addresses all of Appellants assignment of error collectively. The Parties had $376,000.00 in an investment account in May of 2008 when they executed a divorce agreement. The agreement, which Appellee concedes is a contract, specifies the Wife is to receive $203,200.00 and the Husband is to receive $172,800. This agreement was prepared by the Wife's attorney and executed by both. When the divorce was final (Aug. 12, 2008) there was not enough money to meet this requirement due to the global financial crisis. This was to be a tax-free transfer and the Wife did not provide the Husband with sufficient information (account number) until after she filed this action. Further, she agreed to wait for her transfer in hopes the market would turn around. It did not. She now takes the position the contract her attorney

prepared is clear and that she should receive $203,000.00 of the $206,000.00[1], while ignoring the fact that the contract is just as clear that Husband should receive $172,800.00, not $2,800.00 which would be left which would be the remainder if she took the $203,000.00.

The Court of Equity was faced with how to rectify this situation. The Appellant contends the Chancellor rewrote the parties' contract. The Chancellor did nothing of the sort. Even the Appellant stated the following at trial (T.T.P. 34, L 18-24; A.R.E. 62):

Q. But in August, 2008, when you were divorced, do you contend that this $203,000.00 was what you should have received the day of the divorce?

A. Yes, sir.

Q. And do you contend that he should receive $176,000.00 that same day?

A. I suppose.

This was an impossibility due to mathematical principals. The amount of money would not allow one to receive the specified amount without the other suffering a loss.

This Court has recognized the doctrine of impossibility of performance of a contract of when "the destruction, from no default of either party, of the specific thing, the continued existence of which is essential to the performance of the contract "*Piaggio v. Summerville*, 119 Miss. 6, 80 So.3 42, 344 (1919). Here the $376,000.00 did not exist due to a decrease in market value. The Court made a finding of fact this decrease was beyond either parties' control (A.R.E. Page 33). The Court further found it was not the intent of the parties that one party would get all of the funds (A.R.E. page 32).

Section 93-5-2 (2) of the Mississippi Code, as amended, states " If the parties provide by

---

[1] The total in the account at the time of trial.

written agreement for the custody and maintenance of any children of that marriage and for the settlement of any property rights between the parties and the court finds that such provisions are adequate and sufficient, the agreement may be incorporated in the judgement, and such judgement may be modified as other judgements for divorce". While the Appellee does not contend this is a modification, Section 93-5-2 recognizes the potential need to make adjustments to property settlements, even to the extent of modifying a Parties' obligations.

The situation presented in this case is not unusual. It is common for assets to change in value. Hindsight dictates it would have been prudent to use percentages rather than amounts. This decision was not the Appellee's but that of the Appellant and her attorney. Based on the testimony before the Court, the trial judge made a finding the intent of the Parties was a percentage division rather that one Party bearing either a windfall or wipe out (A.R.E. Page 32). When the figure of $376,000.00 is used as a basis, 54% is just as definite as $203,200.00.

Rogers v. Rogers, 919 So.2d 184 (Miss.2005), addresses facts very similar to the ones before this Court. In Rogers, the husband and wife executed a property settlement agreement providing that wife would "receive one-half of the husband's 401 (k) in the approximate sum of $69,000.00," while the final decree reflected that wife was to be awarded $69,000 from husbands 401(k). Rogers, 919 So.2d at 185-187. Additionally, factually similar to the *case sub judice*, wife was represented by counsel, while husband was not, and wife's attorney in the proceedings drafted all of documents therein. Id. at 186.

In Rogers, this Court held:

> When questions arise concerning the meaning of a "judgment decree of opinion of court, . . . answers are sought by the same rules of construction which appertain to other legal documents." *Wilson v. Freeland*, 773 So.2d 305 (¶9)(Miss. 2000). "[W]here ambiguities may be found, a support and custody 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 the light of that intent". *Switzer v. Switzer*, 460 So.2d 843, 846 (Miss. 1984).

This Court went on to hold the Wife was entitled to one-half of the 401(k) as of the date of divorce, but also held she must share proportionately in any losses on gains caused by the ebb and flow of the stock market. *Rogers*, 919 So.2d at 188. *Rogers* also held the preparation of proposed orders or decrees is generally the responsibility of the attorney for the prevailing party. *Id.*, citing *Johnson v. Johnson* 67 N.C. App. 250, 257, 313 S.E. 2d 162, 166 (N.C. App. 1984). *Rogers* goes on to say where one party is unrepresented it places an added responsibility on the attorney to insure all appropriate orders are prepared and submitted to the Chancellor. *Id.*

In the case herein, the Appellee agreed in the Property Settlement Agreement to a split wherein the Appellant would receive a larger share of the investment. It was not until February, 2009, that the appropriate information was provided to the Appellee to accomplish the transfer. At that time it was an impossibility to transfer the money from the investment account using the numbers set forth in the original agreement. In an effort to find a remedy, Appellee filed a Motion for Clarification. (R.E. 1). While there was some dispute over when the necessary information was provided, the Chancellor made a finding of fact that the Appellant "did not establish to this Court's satisfaction that she provided the necessary information to effect the roll-over until 2009". (A.R.E. Page 32,33) This conduct amounts to laches on the part of the Appellant and prevents her from seeking retroactive relief due to failure to promptly provide the information and documents necessary to accomplish the transfer.

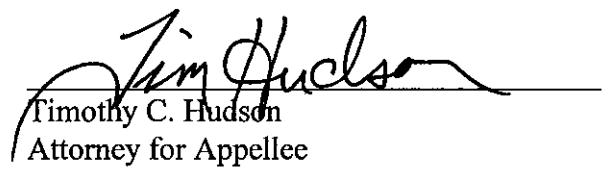
III. CONCLUSION:

The trial Court did not rewrite the Parties' contract and did not err in determining the intent of the Parties was a percentage split rather than a dollar amount. The Court heard the testimony and considered the evidence, and as the trier of fact, determined the intent of the Parties. These findings of fact may not be overturned under the applicable standards of review.

Under equitable principles, applying the facts as determined by the Chancery Court, said Court was not in error in determining a date for division of the GGC account because the Court did not determine value, as alleged by the Appellant in her brief, but simply set a date for transfer and set the percentage of the transfer consistent with the Chancellor's previous findings and application of the rules of equity and law.

Based upon the foregoing, the Appellee respectfully requested that the Chancellor's findings be affirmed and that the Appellant be assessed with all of the costs of this appeal.

Respectfully Submitted:



Timothy C. Hudson
Attorney for Appellee

CERTIFICATE OF SERVICE

This is to Certify that I have on this day mailed, postage prepaid, the original Brief of Appellee, and three true and correct copies of said Brief to Ms. Kathy Gillis, Clerk Mississippi Supreme Court, Post Office Box 249, Jackson, MS 39205-0249. Further, I have on this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellee to the Honorable Dorothy Colon, Chancellor, Post Office Box 708, Columbus, MS 39703, Honorable Marc D. Amos, Attorney for Appellant, Post Office Box 1827, Columbus, MS 39703, and Honorable Kristen Wood Williams, Attorney for Appellant, Post Office Box 1827, Columbus, MS 39703.

SO CERTIFIED, this the 15th day of October, 2009.

Timothy C. Hudson
Attorney for Appellee