

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 2001-CA-00824-COA**

LARRY GENE DALTON

APPELLANT

v.

LINDA ANN DALTON

APPELLEE

DATE OF TRIAL COURT JUDGMENT:	05/14/2001
TRIAL JUDGE:	HON. J. LARRY BUFFINGTON
COURT FROM WHICH APPEALED:	COVINGTON COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	DAVID SHOEMAKE
ATTORNEY FOR APPELLEE:	ALEITA M. SULLIVAN
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	TIME WAS EXTENDED FOR SALE OF THE MARITAL HOME
DISPOSITION:	AFFIRMED - 11/26/2002
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

BEFORE KING, P.J., IRVING, AND BRANTLEY, JJ.
KING, P.J., FOR THE COURT:

- ¶1. Linda Ann Dalton and Larry Gene Dalton were granted an irreconcilable differences divorce by the Covington County Chancery Court on October 12, 2000. As required by Section 93-5-2(2) of the Mississippi Code Annotated (Rev. 1994), the parties executed a property settlement agreement which was approved by the trial court and incorporated into the final decree of divorce.
- ¶2. Mr. Dalton alleges that the trial court improperly modified the property settlement agreement subsequent to the entry of the final decree.

FACTS

¶3. The Daltons were divorced on October 12, 2000. As a part of their divorce, a property settlement agreement was executed which allowed Mrs. Dalton to purchase several jointly owned real properties from Mr. Dalton.

¶4. The relevant portion of the agreement provided:

A. Real Property

That the parties own the hereinafter described land is [sic] situated in Covington County, Mississippi, to-wit:

TRACT I: Commence at the Southeast Corner of the NW¹/₄ of the SW¹/₄ of Section 27, Township 9 North, Range 17 West and Run North on and along the Eastern boundary line of said forty for a distance of 209 feet to and for the point of beginning; thence continue North on and along the Eastern boundary line of said forty for a distance of 1,111 feet to the Northeast corner of said forty; thence run West on and along the North boundary line of said forty for a distance of 209 feet; thence run South for a distance of 1,111 feet more or less, to a point 209 feet North of the South boundary line of said forty; thence run East 209 feet to the point of beginning; containing 5.3 acres, more or less and being in the NW¹/₄ of the SW¹/₄, Section 27, Township 9 North, Range 17 West, Covington County, Mississippi.

TRACT II: Commence at the SE Corner of the NW¹/₄ of the SW¹/₄ of Section 27, Township 9 North, Range 17 West, and run West for a distance of 209 feet to and for the Point of Beginning; thence run North for a distance of 209 feet; thence run West for a distance of 263 feet; thence South for a distance of 319 feet, more or less, to the Northern boundary line of old Mississippi Highway No. 35; thence run in an Easterly direction on and along the Northern boundary line of old Mississippi Highway No. 35 to a point due South of the Point of Beginning; thence run North for a distance of approximately 100 feet to the Point of Beginning; containing 2 acres, more or less, and being situated in the NW¹/₄ of SW¹/₄ and SW¹/₄ of SW¹/₄ of Section 27, Township 9 North, Range 17 West, Covington County, Mississippi.

TRACT III: Beginning at the Southeast corner of the NW¹/₄ of the SW¹/₄, Section 27, Township 9 North, Range 17 West, thence run North 209 feet; thence run West 209 feet; thence run South 249 feet to the North boundary of a local paved road; thence run North 84 degrees, 32

minutes East 209.95 feet on and along the North boundary of the local road; thence run North 20 feet to the point of beginning, containing 1.14 acres more or less, and being in the West ½ of the SW¼ of Section 27, Township 9 North, Range 17 West, Covington County.

TRACT IV: Lot 19, Block 48, Sherwood Forest Part #5, a subdivision according to a map or plat on record in the office of the Chancery Clerk of Rankin County, Mississippi.

1. That the hereinabove described land shall be appraised and that Arnold Mooney of Collins, Mississippi, shall appraise said property and the parties shall each pay Arnold Mooney one-half of the costs of the appraisals. That Wife shall have the right to purchase Husband's interest in Tracts I, III, and IV, for one-half of the equity therein or one-half of the appraised value thereof less all sums owed thereon. That Wife shall have sixty days from the date of said appraisal to purchase Husband's interest in said property and if within said sixty days Wife does not purchase Husband's interest in said property, then Husband shall have sixty days from said date thereof within which to purchase Wife's interest in said property. If Husband does not purchase Wife's interest in said property within said 60 day period then said property shall be sold and the proceeds divided equally between the parties, subject to the lien thereon.

2. That Husband shall have the right to purchase Wife's interest in Tract II of the hereinabove described land for one-half of the appraised value thereof less all sums owed thereon and Husband shall have sixty days from the date of said appraisal within which to purchase Wife's interest in Tract II of the hereinabove described land. That if Husband does not purchase Wife's interest in said Tract II within sixty days from date of said appraisal then Wife shall have the right to purchase Husband's interest in said land within sixty days thereof. If Wife does not purchase Husband's interest in said land during said period that the land (Tract II) shall be sold and the proceeds divided equally between the parties.

3. That upon tender of a check for one-half of the appraised value thereof less the liens thereon to the other person, (subject to the medical bills as set forth in VI. A. 1.) that said person selling said property shall execute a Quitclaim Deed and convey to the other person, his or her undivided interest therein.

Pursuant to that agreement, Mrs. Dalton was given the option to purchase Mr. Dalton's interest in tracts I, III, and IV, for one-half of the net equity therein or one-half of the appraised value less all sums owed. She was required to complete the purchase within sixty days from the date of the appraisal. If she did not do so, Mr. Dalton had sixty days from the expiration of that period, to

purchase Mrs. Dalton's interest in the property. If Mr. Dalton failed to complete the purchase within the required time, the property was to be sold and the proceeds divided equally between the parties.

¶5. Mrs. Dalton secured a real estate loan to purchase Mr. Dalton's interest. The loan was slated for closing on November 27, 2000. At closing, the parties disagreed on what deductions¹ were to be made from the loan proceeds as obligations of Mr. Dalton. As a result, the parties were unable to complete the purchase as required.

¶6. In December 2000, both parties filed contempt petitions alleging a failure to abide by the property settlement agreement. The chancellor heard testimony on the contempt motions on January 19, 2001, and rendered a bench opinion at the conclusion of the hearing.

¶7. The chancellor declined to hold either party in contempt, but felt it appropriate to clarify what deductions were to be taken from the sale proceeds to Mr. Dalton under the decree.² This bench

¹ Mrs. Dalton claimed the proceeds to Mr. Dalton should be reduced by the following deductions:

one-half equity	\$29,466.00
½ lot value	\$ 400.00
less value 2 acres	\$ 2,200.00
less ½ closing costs	\$ 1,113.00
less ½ tax & escrow refund to Larry	\$ 500.00
less quilt	\$ 2,000.00
less 2 house payments and late fees	\$ 625.00
less ½ appraisal	\$ 325.00
less medical bills	\$ 800.00
less damage to house	\$ 1,000.00
less personal items missing from house	\$ 1,000.00

² Judge Buffington resolved the issue of deductions from sale proceeds by saying: I'm going to allow Ms. Dalton to tender to Mr. Dalton the sum of \$26,439.46. Coming to this figure, one-half of the equity is \$30,466.47. He was also purchasing a lot which was \$400. That's \$30,866.47 that he would be entitled to. I'm deducting the \$2200 which was half the value on the two acres that he's getting that he will get at this date. I'm deducting the \$625 for the payment on the house. He was living in the house at the time. And therefore that even though it may not have been a proper motion at that time, it's proper now so I'm going to make it that way so we can cure all of this. The appraisal fee was \$300. It would [sic] \$600 according to what was tendered instead of the 650 as this shows. So I'm going to allow him a deduction of \$300 to be paid to Mr. Mooney. And the decree does say that the \$800 -- and that is one thing that I noticed on Mr. Shoemake's demand that she tender on the

ruling was affirmed in an order dated March 8, 2001, and an order denying rehearing dated May 14, 2001.

¶8. The chancellor determined that Mrs. Dalton had attempted in good faith to complete the purchase, and allowed her an additional fourteen days from January 19, 2001, within which to complete it.

ISSUE AND ANALYSIS

Whether the chancellor erred by rewriting the parties' property settlement agreement which was a valid unambiguous contract.

¶9. Mr. Dalton contends that in allowing Mrs. Dalton an additional fourteen days to complete the purchase, the chancellor rewrote the property settlement agreement, and thus committed error. He suggests that, contrary to the chancellor's finding, Mrs. Dalton did not act in good faith in seeking to deduct various items from the sale proceeds due to Mr. Dalton.

¶10. An appellate court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion or was manifestly wrong, or the judgment was clearly erroneous, or an erroneous legal standard was applied. *Dilling v. Dilling*, 734 So. 2d 327 (¶22) (Miss. Ct. App. 1999).

[sic] closing the full amount without any deductions. The Court decree is quite explicit that it does allow an \$800 deduction. So therefore that \$800 will be deducted from the amount that she would have owed. And then there was the tax and the escrow refund. So therefore based on my figures, there was a total deduction of \$4,452 -- excuse me. \$4,477. That is to be deducted. So that would have been -- leaves a balance of \$26,439.46 that would be due.

...

Of course, as stated and I think as agreed to, she's entitled to one-half of the CDs a [sic] set forth, plus the interest from the date that the CDs were purchased.

...

The water bill and the electric bill, she testified to that. . . . So upon her tendering to Mr. Shoemake the bills showing what those amounts were prior to her moving in, . . . he'll pay those two amounts. . . .

¶11. In his ruling, the chancellor found that both parties had a good faith misunderstanding of the terms of the agreement and that Mrs. Dalton had attempted to close the loan, "even though she wrongfully felt that there ought to be certain deductions."

¶12. The supreme court has stated that when the parties have reached agreement and the chancery court has approved it, we ought to enforce it and take as dim a view of efforts to modify it, as we ordinarily do when persons seek relief from their improvident contracts. *Bell v. Bell*, 572 So. 2d 841, 844 (Miss. 1990). However, 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 the light of that intent. *Switzer v. Switzer*, 460 So. 2d 843, 846 (Miss. 1984) (citations omitted).

¶13. The record supports the chancellor's finding that a good faith misunderstanding existed between the parties as to the effect of the property settlement agreement. It was therefore appropriate for the chancellor to resolve those ambiguities, and give the parties an opportunity to effect the intended purpose of the contract. The chancellor did not abuse his discretion, and this matter is affirmed.

¶14. **THE JUDGMENT OF THE CHANCERY COURT OF COVINGTON COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

McMILLIN, C.J., SOUTHWICK, P.J., LEE, IRVING, MYERS, CHANDLER AND BRANTLEY, JJ., CONCUR. BRIDGES, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, J.

BRIDGES, J., DISSENTING:

¶15. I dissent because the portion of the Daltons's agreement on property division that contains the options to purchase property does not properly form an option contract. A valid contract contains these elements: two or more parties; consideration; *an agreement that is sufficiently definite*; parties with the legal capacity to contract; mutual assent; and no legal prohibition barring the contract's

formation. *Hunt v. Coker*, 741 So. 2d 1011, 1015 (¶9) (Miss. Ct. App. 1999) (emphasis added). Of particular concern is the following portion of the agreement, applying to Tracts I, III, and IV:

That Wife shall have sixty days from the date of said appraisal to purchase Husband's interest in said property and if within said sixty days Wife does not purchase Husband's interest in said property, then Husband shall have sixty days from said date thereof within which to purchase Wife's interest in said property.

¶16. It is unclear when the Husband's sixty day option shall begin to run; obviously, it cannot run concurrently with the Wife's option, although by the words of the agreement that is possible; but it may very possibly run either from the date when the Wife refuses to exercise her option, or it may run from the end of the sixty day period in which the Wife may exercise her option right. These terms are repeated almost verbatim for the property that Mr. Dalton had option rights to purchase, described as Tract II. The terms on their face are "inadequate to expressly delineate the rights of the pu[r]chaser or the obligations of the buyer." *Etheridge v. Ramzy*, 276 So. 2d 451, 454-455 (Miss. 1973).

¶17. As terms of an option, they lack crucial information: they do not describe the method of exercising the party's rights under the option, nor do they describe when the exercise of the option is to take place. Generally, when the time for performance of an option is specified it is binding, although courts have permitted options to run beyond their express time for reasonableness. *See R. A. Shapiro, Annotation, Validity of Option to Purchase Realty as Affected by Indefiniteness of Term Provided For Exercise*, 31 ALR 3d 522 (1970); 17 A Am. Jur. 2d *Contracts* § 49 (1991). Apparently, the parties wished the options to operate automatically; that is, that upon the sixty day period running for Mrs. Dalton, the sixty day period would begin to run for Mr. Dalton. But under the terms of the contract, this is by no means the only possible interpretation.

¶18. Combined with the very indigestible wordiness of the options, there is the curious behavior of the Daltons at the loan closing. They did not meet face to face; Mr. Dalton arrived at the closing

on time, and Mrs. Dalton did not arrive until after he had left. Mr. Dalton did not know the value of the appraisal; Mrs. Dalton knew the value of the appraisal, and then had the loan officer deduct certain costs from the appraised value that was due Mr. Dalton. Assuming that the terms of the contract were valid and binding, when Mrs. Dalton changed the amount of money she was to pay Mr. Dalton from the agreed upon value in the contract (that is, the appraised value) she rejected the offered contract, as a counter-offer is deemed a rejection of the offer. *Duke v. Whatley*, 580 So. 2d 1267, 1271-72 (Miss. 1991). Most likely, this constitutes an event of breach, terminating the option.

¶19. But even were this contract valid on its face, there remains the fact that the chancellor has crafted a new contract out of whole cloth. This was a manifest error, even if the contract was partly invalid, or could not be performed on its terms. *See East v. East*, 493 So. 2d 927, 931-32 (Miss. 1986) (forbidding modification of agreements incorporated in a divorce decree); *Ivison v. Ivison*, 762 So. 2d 329, 335 (¶¶16-17) (Miss. 2000) (requiring the court to enforce the terms of an agreement so incorporated unless the terms are ambiguous). There is no allowance made for courts to forge new contracts when the existing contract is partly invalid.

¶20. Both parties failed to perform the contract; Mr. Dalton was to sign the quitclaim deeds when he received the correct tender, by the terms of the contract. Mrs. Dalton tried to subvert the terms of the agreement by deducting additional costs from the agreed purchase price within the agreement. Both of these failures of performance occurred at the apparent eleventh hour of Mrs. Dalton's option rights.

¶21. A contract may by its nature and terms be severable, but by the intentions of the parties rendered entire; or a contract entire may be rendered divisible by the acts or agreement of the parties. *Mariana v. Hennington*, 229 Miss. 212, 230-31, 90 So. 2d 356, 364 (1956). As the parties are disputing only the portion of the agreement that deals with the real property, we may sever that

portion of the agreement from that portion dealing with the personalty of the parties. Consequently, although the portion of the agreement that establishes option rights for the parties is invalid, it would not be necessary to invalidate the whole contract. Indeed, it would be appropriate to further sever the portion of the agreement that establishes the option contracts from that which allows the court to order a sale of the real property and a division of the proceeds should the parties fail to properly exercise their option rights.

¶22. The contract states quite clearly that failure by either party to exercise their option rights will result in a sale of all disputed properties, with the proceeds to be divided equally between the parties. The terms of the agreement that allow the formation of an option contract are insufficiently specific for the option contracts to form. The appropriate action for this Court would be to reverse and render, ordering a sale of the disputed real property and the division of the proceeds, according to the valid terms of the agreement.

THOMAS, J., JOINS THIS SEPARATE OPINION.