

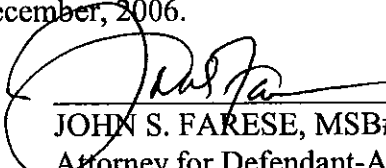


### **CERTIFICATE OF INTERESTED PERSONS**

That 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 the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Angela Hancock Wilson, Appellant;
2. Mary Lynn Damare, Attorney for Appellant;
3. John S. Farese, Attorney for Appellee;
4. William Franklin Wilson, Appellee; and
5. Honorable Percy Lynchard, Chancery Court Judge, Trial Judge.

Respectfully submitted, the 1st day of December, 2006.

  
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JOHN S. FARESE, MSB# [REDACTED]  
Attorney for Defendant-Appellee

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## **I. STATEMENT OF ISSUES**

The issues are: (1) Did the trial court err in finding Tri-State Underground, Inc. to be the sole property of Frank Wilson, was the valuation of Tri-State underground utilized by the court clearly erroneous and was the distribution of property equitable; (2) Did the chancellor err in the amount of alimony awarded to the Appellant.

## **II. SUMMARY OF THE ARGUMENT**

**A. ISSUE 1: Did the trial court err in finding Tri-State Underground, Inc. to be the sole property of Frank Wilson, was the valuation of Tri-State underground utilized by the Court clearly erroneous and was the distribution of property equitable.**

The findings of a Chancellor will not be disturbed on review unless it is found that he abused his discretion, was manifestly wrong, or made a finding which was clearly erroneous.<sup>1</sup> In the case before the court the Chancellor properly found Tri-State Underground, Inc. an independent corporation qualified to do business in the State of Mississippi which was properly not made a party to this action.<sup>2</sup> The corporate entity of Tri-State Underground was properly classified as separate property, with the ownership interest of Frank Wilson classified as marital and subject to equitable division. Further, the Chancellor properly considered the undisputed value of Frank Wilson's interest in Tri-State in making a detailed finding on the *Ferguson* factors in his opinion. The Appellant offer no value of Tri-State Underground, from either expert or lay witnesses. The decision of the Chancellor was made in accordance with the relevant law and based on all the credible evidence presented.

**B. Issue 2: Did the Chancellor err in the amount of alimony awarded to the**

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<sup>1</sup>*Bank of Mississippi v. Hollingsworth*, 609 So. 2d 422, 424 (Miss. 1992)

<sup>2</sup>R.E. p.18

## **Appellant.**

The Court made a detailed analysis of the applicable *Armstrong* factors applying the relevant facts as presented at trial in making a determination of the amount of alimony to be awarded. The periodic alimony awarded was neither an abuse of discretion nor manifestly wrong. An award of lump sum alimony would not be proper as there was no disparity in the estates of the parties after the division of marital property.

### **III. ARGUMENT**

**A. ISSUE 1: Did the trial court err in finding Tri-State Underground, Inc. to be the sole property of Frank Wilson, was the valuation of Tri-State underground utilized by the Court clearly erroneous and was the distribution of property equitable.**

**(1) Classification of Tri-State Underground:**

The first step in equitable division is the classification of an asset as separate or marital property by using the *Hemsley* analysis.<sup>3</sup> It has long been understood in a unincorporated sole proprietorship the owner actually owns the assets of the business. Those assets if acquired during the marriage are marital in nature under *Hemsley*. However, it is equally clear that an owner in a corporation, as we have in the case of Tri-State Underground, has an ownership interest as a stockholder.<sup>4</sup> The business entity owns the underlying assets. The asset which is divisible in a case involving a corporation is the spouse's corporation stock.<sup>5</sup> In other words, only the spouse's ownership interest is subject to division.

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<sup>3</sup>*Hemsley v. Hemsley*, 639 So.2d 909 (Miss.1994)

<sup>4</sup>*A & L, Inc. v. Grantham*, 747 So.2d 832 (Miss.1999)

<sup>5</sup>*Id.* at 839

Case law gives us the specific situations in which a spouse may seek to divest the corporate assets.<sup>6</sup> In the case sub judice, there was no evidence presented to dispute the legal status of Tri-State Underground, Inc. It is undisputed that Tri-State is a an independent corporation qualified to do business in the State of Mississippi. The Chancellor properly classified Tri-State Underground as a separate legal entity and only the Defendant's interest in Tri-State was considered in the division of marital property.

The trial court properly ruled in its Order denying the Plaintiff's motion for joinder of a necessary party, as it is not necessary to join a divorcing spouse's corporation simply to divide the spouse's interest.<sup>7</sup> The spouse's interest may be classified as marital in accordance with *Hemsley* and equitably divided without affecting the legal status of the corporation or the legal interests of third-parties.<sup>8</sup>

In the case sub judice, Angela Wilson appears to be putting forth the argument that the business is a marital asset acquired through her joint efforts, while ignoring the legal status of Tri-State Underground. At no point has the Appellant made the argument necessary to attack the corporate form and to possibly allow a division of the business assets of the corporate entity. At no point has the legal status of Tri-State Underground been attacked by the Plaintiff and the trial court properly did not consider the division of the business assets, but the only the business interest of Frank Wilson. Ms. Wilson never showed or even plead that a "piercing of the corporate veil" was justified making the joinder of Tri-State necessary and opening up the

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<sup>6</sup>*East v. East*, 493 So.2d 927 (Miss. 1976)

<sup>7</sup>*A & L, Inc. v. Grantham*, 747 So.2d 832 (Miss.1999)

<sup>8</sup>*Burns v. Burns*, 789 So.2d 94 (Miss. 2000)

possibility of a division of the business assets of Tri-State. Tri-State Underground would have been a necessary party if Angela Wilson had sought to set aside the corporate form, or to otherwise directly affect any third-party rights.<sup>9</sup> None of these issues were before the trial court. Accordingly, The Chancellor was correct in finding only the business interest of Frank Wilson to be subject to equitable division.

The *MacDonald* case cited by the Appellant is easily contrasted from the case at bar. The Appellant summarizes the position of the court in *MacDonald* to attempt and strengthen her position. *MacDonald* tells us that when there is a material contribution by the spouse toward accumulating an asset titled in the other spouses name they may be entitled to an equitable division of the property.<sup>10</sup> In the case before the court, the Chancellor did consider Frank Wilson's interest in Tri-State and the Appellant's contribution to acquiring the asset in his opinion.<sup>11</sup>

(2) Valuation of Tri-State Underground:

Anglea Wilson asserts the valuation of the Tri-State Underground was clearly erroneous. However, as the record clearly reflects, the value utilized by the trial court was established by the documents introduced in her case-in-chief. No other value was presented on Tri-State Underground, Inc. by lay opinion or expert testimony.

The crux of the Appellant's gripe with the value assigned to Frank Wilson's interest in Tri-State comes from the fact that despite every piece of tangible evidence showing otherwise,

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<sup>9</sup>*A & L, Inc. v. Grantham*, 747 So.2d 832, 839 (Miss.1999)

<sup>10</sup>*MacDonald v. MacDonald*, 698 So.2d 1079 (Miss. 1997)

<sup>11</sup>R.E. p.22



Ms. Wilson has an incredibly over-inflated belief in the value of Tri-State. Throughout the process, Ms. Wilson showed a misunderstanding of the way a business operates. Her focus only on the income into the business and failure to consider business expenses in her figures caused her to greatly overvalue Tri-State in her mind.

In considering the equitable division of the marital property the Chancellor properly considered Frank Wilson's interest in Tri-State based on the credible evidence presented at trial. Angela Wilson offered no proof as to the value of Tri-State or Mr. Wilson's interest therein. How can a value be clearly erroneous when there is nothing to contradict the facts considered by the Chancellor? To quote Ms. Wilson's brief..."evidence which is not contradicted by positive testimony or circumstances, and is not improbable, incredible, or unreasonable cannot be arbitrarily disregarded...unless untrustworthy it should be taken as conclusive and binding to the trier of fact."<sup>12</sup> In other words, for the Court to uphold Ms. Wilson's position *would* be manifest error.

Ironically, the Chancellor utilized the value of Tri-State as provided in Ms. Wilson's own exhibit, introduced during her testimony.<sup>13</sup> This was and remains the only value provided for Tri-State Underground or Mr. Wilson's interest therein. Despite this matter pending for over a year, and the presence of the Profit-Loss Statement long before trial, Ms. Wilson never attempted a valuation of the business entity by court order or on her own volition. She waited until the eve of the trial and had a very competent and respected local accountant CPA Danny Williams examine the information she provided. Mr. Williams explained at trial that he could

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<sup>12</sup>*A & F Properties, LLC v. Lake Caroline, Inc.*, 775 So.2d 1276 (Miss. Ct. App. 2000)

<sup>13</sup>R.E. p.18

not value Tri-State Underground with the limited time and information the Appellant provided. This was simply a situation where the Appellant failed to exercise due diligence in disputing the value put forth by the Appellee.

The Appellant points to *Mace v. Mace* and supporting their position concerning the valuation of Tri-State. The obvious difference in the *Mace* case was the reliance of the Chancellor on clearly erroneous values as admitted by the party making the valuation. The court relied on Dr. Mace's value even though he admitted in his testimony when questioned about the value he had provided that the valuation he provided was:

*"'not that much,' and he valued the practice according to a formula he had seen in a medical journal but stated that his valuation according to the formula was merely an attempt to be responsive to questions from wife's counsel and was not his opinion regarding the value of the practice." <sup>14</sup>*

Of course, in the case before the Court we do not have such an extreme and obvious case of the value being misstated. Here the Chancellor had ample opportunity to consider all the testimony presented by both sides concerning the valuation of Tri-State. No evidence was presented to show the valuation provided was unreliable nor was there an admission of misstating the value by the person making the valuation.

The Appellant cites *West v. West*, 891 So.2d 203 (Miss. 2004) to support her position. Again, *West* is easily distinguished from the case at bar. As admitted in the brief of the Appellant *West* involved the Chancellor abusing his discretion by limiting discovery to only depositions.<sup>15</sup> The *West* Court found that such a limitation did not allow the aggrieved party to make a

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<sup>14</sup>*Mace v. Mace*, 818 So.2d 1130 (Miss. 2002)

<sup>15</sup>*West v. West*, 891 So.2d 203, 218 (Miss. Ct. Appeals 2004)

substantive showing of its case.<sup>16</sup> Obviously, no such limitation is involved in the case sub judice. In fact, despite pending for over a year the Appellant made no effort to even take depositions and extensive written discovery was completed by the parties. There were no limitations placed on discovery by the Chancellor. The Appellant had every opportunity to build her case.

It appears that intermingled in the argument of the Appellant is her assertion that the Chancellor abused his discretion in the handling of matters concerning discovery and denying her motion to suspend trial setting filed in April 2005. Specifically she argues that the case should have been continued and an “independent accounting” be ordered. While this was not listed in the issues on appeal, the Appellee will address the issue raised within her argument out of an abundance of caution.

The Appellant fails to explain the need for an “independent accounting” but as it has already been stated this cause was pending over a year before trial and Ms. Wilson waited until the eve of trial to employ CPA Danny Williams. Mr. Williams explained he was not provided enough time to complete the accounting. The inability of the Appellant to finish the accounting lays firmly on her shoulders. No action of the Chancellor limited the Appellant’s ability to get the accounting done in a timely fashion.

It has long been held that trial judges have vested in them broad discretionary powers in granting or refusing to grant a continuance.<sup>17</sup> In addition, the abuse of discretion standard

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<sup>16</sup>Id. at 219

<sup>17</sup>*McClendon v. State*, 335 So.2d 887, 888 (Miss. 1976)

applies to issues involving discovery.<sup>18</sup> It appears that the Appellant is asserting the denial of the continuance to allow more information to be gathered (i.e. additional discovery conducted accounting done) was an abuse of discretion by the Chancellor and therefore reversible error. The Chancellor noted several times that the Appellant had more than ample time to complete her discovery and conduct any other valuations or accountings that were necessary for the trial of the case on the merits.

While the factual scenarios are different, this Court has addressed similar allegations of a parties arguing late in the process that the Court should have taken action to allow further discovery or other action in *Frye v. Southern Farm Bureau*.<sup>19</sup> In *Frye*, the Appellant argued that the refusal of a their motion for continuance made it impossible for them to complete discovery and obtain information vital to their case.<sup>20</sup> The language in *Frye* was almost identical to the language used by the Appellant here. In *Frye* the Appellant claimed the Defendant “engaged in contemptuous conduct in refusing to produce documents relevant and responsive.”<sup>21</sup> Despite the claims by the Appellant, the Court in *Frye* found there was not a manifest injustice in denying the requested continuance for further discovery, citing the numerous opportunities the Appellant had to exercise due diligence in preparing for trial.<sup>22</sup> In other words, the Court ruled the Appellant had plenty of time to complete discovery and did not do so. The Appellee asserts the

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<sup>18</sup>*DeBlanc v. Stancil*, 814 So.2d 796 (Miss. 2002)

<sup>19</sup>*Frye v. Southern Farm Bureau Cas. Ins. Co.*, 915 So.2d 486 (Miss.Ct.App. 2005)

<sup>20</sup>*Id.* at 490

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

same situation exists in the cause before the Court. Angela Wilson cannot show that an injustice resulted because of the denied continuance. Simple due diligence by the Appellant would have had any accounting or valuation done long before the eve of trial. There is nothing to support finding the Chancellor abused his discretion in denying the motion to continue and refusing to order an independent accounting.

(3) Was the division of marital property equitable?

It is well-established that a strict standard of review is applicable in considering a Chancellor's division of marital assets. The division of assets will not be reversed unless "the Chancellor is manifestly wrong, clearly erroneous, or applied an erroneous legal standard."<sup>23</sup> Of course, the Chancellor is charged with making findings in regards to all the relevant *Ferguson* factors *v. Ferguson*.<sup>24</sup>

In the case sub judice the Court conducted a thorough analysis of all the relevant *Ferguson* factors in his opinion addressing each specific asset he was dividing and addressing all factors relevant to that item.<sup>25</sup> The value used in regards to the business interest of Frank Wilson in Tri-State Underground was based on the undisputed value presented during the testimony of Angela Wilson as discussed *supra*.

The Appellant's reference to the amount of temporary support ordered is not relevant to this section but will be addressed in depth below.

As mentioned previously, the Chancellor is given great deference when reviewing the

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<sup>23</sup>*Thompson v. Thompson*, 815 So.2d 466, 468 (Miss.Ct.App. 2002)

<sup>24</sup>*Ferguson v. Ferguson*, 639 So.2d 921 (Miss.1994)

<sup>25</sup>R.E. pp. 22-23

division of marital assets. Here the property legal standard was utilized and the Chancellor made the required findings. The division of the marital assets was not manifestly wrong and must therefore be affirmed.

**B. Issue 2: Did the Chancellor err in the amount of alimony awarded to the Appellant?**

The Chancellor is given broad discretion in alimony awards and he will not be reversed without finding the trial court committed a manifest error and he abused his discretion.<sup>26</sup> In the case subjudice there is certainly no justification for reversing the award of periodic alimony or the refusal to award a lump sum alimony payment.

**(1) Lump Sum**

The entire argument presented by the Appellant for an award of lump sum alimony is based on the assertion that the valuation of Tri-State is incorrect and that the corporate entity of Tri-State should be deemed a marital asset. As discussed above neither position is valid therefore the discussion of an additional award of lump sum alimony cannot be justified.

As discussed above the court provided a detailed analysis of the relevant *Ferguson* factors in equitably dividing the marital assets.<sup>27</sup> In reviewing the division of the assets provided by the Chancellor the court will find that the Appellant was granted a 2004 GMC Yukon which she had driven or a similar vehicle free and clear of any indebtedness.<sup>28</sup> Even now a similar vehicle is

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<sup>26</sup>*Powers v. Powers*, 568 So.2d 255 (Miss.1990)

<sup>27</sup>R.E. pp.22-23

<sup>28</sup>R.E. p.22

valued at over \$20,000.<sup>29</sup> She received all property and furnishings located in the Hernando, Mississippi residence and all interest in the Hernando home including any incoming payments on the leasehold interest in the home.<sup>30</sup> By the Appellant's own testimony just the Hernando home, not including the furnishings she receive, has a value in excess of \$300,000.<sup>31</sup> The parties were to sell the Tate County, Mississippi home and split the proceeds received from the sale after the payment of all liens on the property.<sup>32</sup> Mr. Wilson received his personal items and his interest in Tri-State Underground which was valued at \$10,000.<sup>33</sup>

As the Appellant properly notes in her brief, if there are sufficient marital assets which, when equitably divided and considered with each spouse's marital assets, will adequately provide for both parties, no more need be done."<sup>34</sup> Clearly in the case at bar, Ms. Wilson leaves the marriage with the majority of the marital assets and actually left Mr. Wilson with the deficit and as this Court has noted, a disparity in the separate estates is the single most important factor in deciding whether to award lump sum alimony.<sup>35</sup> It is apparent that requiring an additional lump sum alimony payment from Mr. Wilson would be completely unjustified.

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<sup>29</sup>kbb.com

<sup>30</sup>R.E. p.22

<sup>31</sup>R.E. p.19

<sup>32</sup>R.E. p.22

<sup>33</sup>R.E. p.22

<sup>34</sup>*Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss.1994)

<sup>35</sup>*Cheatham v. Cheatham*, 537 So.2d 435 (Miss.1988)

(2) Periodic

The Appellant's argument that the periodic alimony was inadequate is based on faulty logic. The crux of Angela Wilson's argument appears to rely on the temporary order which Mr. Wilson agreed to pay \$10,000 in temporary support. What the Appellant fails to note is temporary payment was ordered in an attempt to cover monthly expenses which the Appellant claimed. The Chancellor properly found at trial that the \$9,063.00 in monthly expenses originally claimed by Ms. Wilson were "greatly exaggerated."<sup>36</sup> The court went on to note that the parties had long "lived far beyond the means of their income."<sup>37</sup> The temporary arrangement in no way reflects what would be an adequate award of periodic alimony it was more a reflection of the fact that the parties were living well above their means and spending more monthly than they were bringing in.

The Court properly considered the need for alimony by progressing through the relevant *Armstrong* factors in great detail, an analysis covering almost three pages of his opinion.<sup>38</sup> In reaching the amount of periodic income Chancellor Lynchard properly noted Mr. Wilson has an adjusted gross income of \$8,257 compared to monthly expenses that will total \$4,287.00 after the divorce.<sup>39</sup> As the Court notes in reference to the first factor, the Chancellor awarded a amount equal to approximately one-half of the income of Mr. Wilson.<sup>40</sup> Again, it appears that the

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<sup>36</sup>R.E. p.19

<sup>37</sup>R.E. p.20

<sup>38</sup>R.E. p.20-22

<sup>39</sup>R.E. pp.19-20

<sup>40</sup>R.E. p.20



Appellant is basing such incredible figures on her inflated perception of the Tri-State Underground and not the individual income of the Appellee. A party's unrealistic beliefs, which are completely unsupported by any facts presented at trial, cannot be the basis for overturning the decision of the lower court.

This Court has long held that an on-the-record analysis is required to uphold a award of alimony.<sup>41</sup> Obviously, the Chancellor in the case before the Court more than satisfied this requirement with a three page analysis. Moreover, recent cases have even lowered the standard necessary for upholding awards of alimony.<sup>42</sup> Either way the Appellant gives no valid reason or supporting case law for overturning the Chancellor's award of periodic alimony.

#### **V. CONCLUSION**

In conclusion, the Chancellor was not manifestly wrong, nor did he abuse his discretion in making his ruling in the case sub judice. The Chancellor applied the proper legal standards in all the issues presented. His decisions on the credible facts presented during the trial of the case in regards to all issues before the court. The decision by the trial court must be affirmed.

**Respectfully Submitted,**

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<sup>41</sup>*Henderson v. Henderson*, 703 So.2d 262, 266 (Miss.1997)

<sup>42</sup>*Gable v. Gable*, 846 So.2d 296 (Miss.Ct.App. 2003)

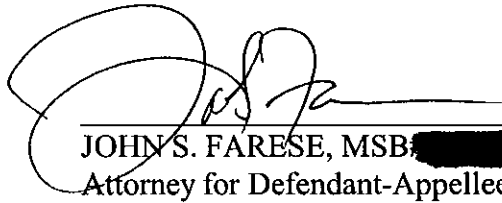
**CERTIFICATE OF SERVICE**

I, JOHN S. FARESE, Attorney of Record for the Defendant, Appellee, WILLIAM FRANKLIN WILSON, do hereby certify that I have this day served by United States Mail, postage pre-paid, a true and correct copy of the above and foregoing **BRIEF OF THE DEFENDANT-APPELLEE: WILLIAM FRANKLIN WILSON**, to the following:

Mary Lynn Damare', Esq.  
291 Loshier Street  
Hernando, Mississippi 38632

Honorable Percy Lynchard  
Post Office Box 340  
Hernando, Mississippi 38632-0340

This the 1st day of December, 2006.


  
\_\_\_\_\_  
JOHN S. FARESE, MSB: [REDACTED]  
Attorney for Defendant-Appellee

**CERTIFICATE OF MAILING**

I, the undersigned, hereby certify that I have, this day placed the original of the above and foregoing **BRIEF OF THE DEFENDANT-APPELLEE: WILLIAM FRANKLIN WILSON**, together with three (3) copies of the same and an electronic disk containing the text of the brief in Word Perfect 12, in the regular United States Mail, postage pre-paid, addressed to:

Betty W. Sephton  
Supreme Court Clerk  
Supreme Court of Appeals, Mississippi  
Post Office Box 249  
Jackson, Mississippi 39205-0249

THIS, the 1st day of December, 2006.

  
\_\_\_\_\_  
JOHN S. FARESE, MSB# [REDACTED]  
Attorney for Defendant-Appellee