2006-CA-00328

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

KELLI ANN DORSEY, APPELLANT

VS.

BILLY WAYNE DORSEY, APPELLEE

ON APPEAL FROM
THE CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

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 this Court may evaluate possible disqualifications or recusal.

1. John Robert White; Attorney for Appellee
2. Pamela Guren Bach; Attorney for Appellee
3. Billy Wayne Dorsey; Appellee
4. John W. Christopher; Attorney for Appellant
5. Debra Allen; Trial Attorney for Appellant
6. Kelli Dorsey; Appellant
7. Hon. Janace Harvey-Goree; Trial Court Judge

THIS 13th day of June, 2007.

John Robert White
JOHN ROBERT WHITE

Pamela Guren Bach
PAMELA GUREN BACH

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II. The chancellor properly divided the parties' marital assets.

III. The chancellor properly found that Kelli Dorsey was not entitled to lump sum or periodic alimony.

IV. The chancellor properly denied Kelli's request for attorney's fees and costs.

STATEMENT OF THE CASE

This appeal arises from the October 10, 2005 Final Judgment of Divorce to Kelli Ann Dorsey (hereafter "Kelli") and Billy Wayne Dorsey (hereafter "Billy"). (R.1 at 145, R.E. 2).[1] Following the entry of the Final Judgment of Divorce, Kelly filed a Motion for New Trial, or in the Alternative, a Motion for Amendment of Judgment on October 20, 2005. (R.2 at 167). The hearing was held on January 18, 2006. (R.2 at 188). The chancellor entered a Corrected Order on January 18, 2006. (R.2 at 192, R.E. 4).

In the Corrected Order, the chancellor denied Kelli's request to reconsider the classification and valuation of certain property Billy had received as *inter vivos* gifts from his family, particularly one hundred shares of stock in Engineered Systems, Inc. (hereafter "ESI"), a small family business, as well as Lot 6, Pine Hill Acres, a five (5) acre parcel of land adjacent to the former marital home. (R.2 at 193, R.E. 4). The chancellor further denied rehearing on the application of the *Ferguson* factors to the division of the marital assets. (R.2 at 193, R.E. 4). The chancellor, however, ordered Billy to pay outright unto Kelli certain credit card debt as well as half the debt accumulated by the parties on their home equity line of credit, substantially reducing Kelli's indebtedness and Billy's liquidity. (R.2 at 193-194, R.E. 4).

Based on the evidence in the record, the chancellor neither abused her discretion nor committed manifest error in the classification of the parties' property as marital or non-marital and the division of their marital assets and debts. Moreover, taking into consideration Billy's separate estate, the division of marital property did not result in a significant disparity between the assets available to each party after the divorce. The chancellor, therefore, neither abused her discretion nor committed manifest error in refusing to award either lump

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[1] Citations to the record are designated as "R.___," and citations to the Transcript of Trial Testimony are designated as "Tr. ___." Citations to the record excerpts are designated as "R.E. ____."

sum or periodic alimony to Kelli. Finally, because there was no great disparity in the parties' assets following the chancellor's division of marital assets and because Kelli failed to establish her inability to pay her legal expenses, the chancellor did not abuse her discretion in denying Kelli's request for attorney's fees.

STATEMENT OF THE FACTS

Billy Wayne Dorsey and Kelli Ann Dorsey were married March 22, 1986. They are the parents of three minor children: Daniel Scott Dorsey, born September 26, 1985; Shawn Christopher Dorsey, born June 16, 1987; and Sarah Nicole Dorsey, born November 17, 1993.[2] The parties were divorced by a Final Judgment of the Madison County Chancery Court on October 10, 2005. (R.1 at 145, R.E. 2).

Throughout the marriage, both parties worked. Billy worked first as a surveyor, and later went to work for his family's business, Engineered Systems, Inc. (Tr. 5 at 346). In 1996, his father gave Billy stock representing 100% interest in the business. (Tr. 4 at 225, Exh. 16). The company has net tangible assets of approximately $20,151.43 and, based on the net-asset approach of valuation, was valued at $25,908.00. (Exh. 3). Billy earns a monthly salary from the business of $ 4,576.83. (Exh. D-1, R.E. 10).

Kelli worked at Valley Bank for more than nine years. (Tr. 3 at 77-78). In 1997, she left her job to go to nursing school. (Tr. 3 at 104, Tr. 5 at 344). Billy's parents paid for her education and Billy supported the family with his earnings from ESI. (Tr. 4 at 242). To help supplement the family's income while she was in school, Kelli used money from her Valley Bank ESOP. (Tr. 3 at 104). Although she had occasionally helped Billy on weekends at ESI while she was working, she was paid a salary of $10.00 per hour to keep the books for the business while she was in school to further augment their income. (Tr. 4 at 184, Tr. 5 at 350). After completing her nursing degree, Kelli started working at the Baptist Medical Center, where she was earning $27.00 per hour. (Tr. 4 at 187). She reported a gross monthly income of $3,813.00. (Exh. P-1, R.E. 9).

[2] The support and custody of the minor children is not at issue in this appeal.

Billy's parents have been extremely generous to Billy, Kelli and their children. In addition to ESI, the sole source of Billy's income, the few assets acquired by the parties during the marriage were gifts from Barbara and Jacky Dorsey. They helped the parties purchase their first home and car and, after retiring and moving to Starkville, deeded their home to Billy, Kelli and the children, leaving most of the furniture as well. (Tr. 5 at 344). Five adjacent acres of land also were deeded solely to Billy. (Tr. 4 at 224, Exh. D-2). The elder Dorseys further paid for Kelli to return to nursing school and have provided educational funds for the parties' two older children. (Tr. 4 at 242).

Despite both parties' incomes and Billy's family's generosity, Billy and Kelli amassed substantial debt. In excess of $67,000.00 had accumulated on the parties' home equity line of credit, largely due to the purchase of cars, recreational equipment and televisions for the family. (Tr. 6 at 453). The chancellor found that the parties' total stipulated consumer debt, including the home equity line balance, totaled approximately $121,300.00 and that they owed back-due income taxes of $9,237.00. (R.2 at 156-57).

SUMMARY OF THE ARGUMENT

In her first assignment of error, Kelli contends that the chancellor erred in finding that stock in Billy's company, Engineered Services, Inc., as well as five acres of land adjacent to the former marital home should be classified as non-marital property. As Kelli acknowledges, the assets at issue, *inter vivos* gifts given solely to Billy by his family, are part of his separate estate. The evidence in the record, as well as the applicable case law, supports the chancellor's finding that those assets were not transmuted into marital property.

In very general terms, Kelli further asserts that the chancellor committed manifest error in the division of the parties' marital assets. Based on the chancellor's application of the factors set forth in *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994), to the evidence in the record, a fair and equitable classification, valuation and division of the parties' marital assets were made.

Kelli next asserts that the chancellor erred in refusing to grant her request for both lump sum and periodic alimony. However, even factoring in Billy's separate estate, there is not a significant difference in the parties' relative financial positions, which would warrant a further balancing of the equities through the award of alimony. The evidence in the record supports the chancellor's findings, and she neither abused her discretion nor committed manifest error in refusing to award alimony to Kelli.

In her final assignment of error, Kelli complains that the chancellor's denial of attorney's fees was manifestly wrong. However, there was not a significant disparity in the parties' assets, and the chancellor correctly found that Kelli had failed to establish an inability to pay her attorney's fees. In so doing, she neither abused her discretion nor committed manifest error by denying Kelli's request for attorney's fees and her decision should be affirmed.

ARGUMENTS AND DISCUSSION OF THE LAW

I. THE CHANCELLOR CORRECTLY CLASSIFIED A FIVE-ACRE PARCEL OF LAND AND THE STOCK OF ENGINEERED SERVICES, INC. AS NON-MARITAL ASSETS

In making a distribution of marital assets pursuant to *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994), the chancellor first is required to classify the parties' assets as marital or non-marital. *Johnson v. Johnson*, 650 So. 2d 1281, 1287 (Miss. 1994); *Hemsley v. Hemsley*, 639 So. 2d 909, 914 (Miss. 1994). The chancellor did so, making specific findings of fact with regard to the acquisition of property and its classification. (Tr. 2 at 156-59). *Henderson v. Henderson,* 703 So. 2d 262, 264 (¶ 15) (Miss. 1997). On appeal, Kelli asserts that the chancellor committed manifest error in refusing to find that two particular assets which were given solely to Billy by his family – a five acre parcel of land and stock in Billy's company, Engineered Services, Inc. – transmuted into marital property. (Appellant's Brief at 13). In classifying the assets in question as non-marital assets, however, the chancellor applied the correct legal standard to the evidence presented. Her decision was neither clearly erroneous nor manifestly wrong and should be affirmed. *Goodson v. Goodson*, 816 So. 2d 420, 424 (¶ 9) (Miss. Ct. App. 2002).

A. Lot 6, Pine Hill Acres

The marital home, which was conveyed to the parties and their children by Barbara and Jacky Dorsey in three installments beginning in 1998 and ending in 2002, is located on Lot 5, Pine Hill Acres subdivision in Madison County, Mississippi. (Tr. 4 at 222, Exh. 13). Adjacent to Lot 5 is Lot 6, Pine Hill Acres, a five-acre parcel of land which was deeded separately to Billy Dorsey by Engineered Environmental Equipment, Inc. on January 15, 2003. (Tr. 4 at 224, Exh. D-2). The parties agree that the fair market value of Lot 6 is $20,000.00. (Tr. 3 at 68, Tr. 5 at 349, Exh. 2). At trial, the un-contradicted testimony of

Jacky Dorsey and Billy Dorsey established that Lot 6 was given to Billy as a gift from Engineered Environmental Equipment, Inc., which was owned by Billy's brothers. (Tr. 4 at 235). The gift was made at the direction of Billy's father, Jacky Dorsey, who, at one time, owned Engineered Environmental Equipment, Inc. before giving it to Billy's brothers. (Tr. 4 at 224). Therefore, the land was not purchased by Billy with assets of the marriage or from income earned during the marriage.

The evidence presented at trial sufficiently established that all of the requirements of an *inter vivos* gift were met. *Hankins v. Hankins*, 729 So. 2d 1283, 1287 (¶ 17) (Miss. 1999). Indeed, Kelli acknowledges that the land at issue is part of Billy's separate estate. (Appellant's Brief at 11).

Kelli, however, continues to assert that the land, which was transferred only a year before the parties' separation, was transmuted into marital property because the taxes on Lot 6 allegedly had been paid from marital funds and the family had used and maintained it. (Appellant's Brief at 13, Tr. 4 at 198-99). Kelli offered no documentary evidence of any alleged tax payment on Lot 6 from marital funds, nor did any witness testify concerning the extent to which the family actually used Lot 6 for recreational purposes after the land was transferred to Billy. Jacky Dorsey testified that his grandchildren had played on the land when he and his wife lived there, but that since the transfer of the property, no one had maintained the orchards he had planted. (Tr. 4 at 235-36).

Kelli's claims are almost identical to the unsuccessful claims made by the husband in *Brock v. Brock*, 906 So. 2d 879 (Miss. Ct. App. 2005), in which a house, intended as a gift to the wife by her father, was titled in her name alone. The Court acknowledged that "property obtained by inheritance or by gift is non-marital property and not subject to equitable distribution." *Brock*, 906 So. 2d at 887 (¶ 48). The husband argued that the property had

transmuted into marital property because he had paid taxes on the home and had made repairs to the home. The Mississippi Court of Appeals rejected those arguments, stating:

> J.D. also argues that he had an equitable interest in the property because he paid taxes and made repairs to the home. He argues that, in doing so, Robin's gift, intended as separate property, transmuted into marital property, subject to equitable distribution. *Henderson v. Henderson,* 703 So. 2d 262, 264 (¶ 16) (Miss. 1997). We disagree. "When separate property and marital property are mixed to such a degree that the elements cannot be distinguished, i.e., that the separate element cannot be traced, then the entire property is considered marital property: the separate property has transmuted by commingling into marital property. **Consequently, the key to determining when there has been transmutation by commingling is whether the marital interests can be identified, i.e., can be traced.**" Laura W. Morgan & Edward S. Snyder, 18 J. Am. Acad. Matrim. Law 335, 341 (2003). **In the present case, J.D. made a minimal number of repairs to the house, and his contributions to the home by paying property taxes are readily traceable.**

906 So. 2d at 887 (¶ 50) (emphasis added).

The same rationale is applicable in the present case. Any alleged contributions to the taxes on Lot 6 for 2003 or 2004 can be readily traced, if they were made at all. As the chancellor found, expressly relying on *Henderson,* 703 So. 2d at 264 (¶ 16), non-marital property only becomes marital property if it is mingled to the extent that the separate elements become indistinguishable. (R.2 at 158, R.E. 2). The payment of the property taxes, which was not even proven by documentary evidence, as the chancellor correctly found, was insufficient to cause the separate *inter vivos* gift to Billy to become marital property.

There further was no evidence that Kelli or the children had done anything to maintain the property or to increase its value so as to transmute it into marital property. Although Kelly testified that "they" mowed the grass (Tr. 3 at 67), that is insufficient to established co-mingling or family use. In *Ory v. Ory,* 936 So. 2d 405 (Miss. Ct. App. 2006), the husband argued that his efforts to clear and plant seedlings on a seventy-acre parcel of land adjacent to the marital home, which the wife had owned prior to the marriage, had

served to transmute the land into marital property under the doctrine of co-mingling. 936 So. 2d at 411 (¶ 15). The Court of Appeals found that the husband had failed to "put forth sufficient evidence that his activity was so persuasive as to convert the entire seventy-five acre parcel into a marital asset, or show how the land had increased in value subsequent to his marriage." *Id.* Kelli's claim is considerably less persuasive than that set forth in *Ory.* Therefore, the chancellor's finding that Lot 6, the five-acre parcel of land at issue, was non-marital property and that Kelli failed to establish that it was transmuted into marital property, should be affirmed.

B. Stock in Engineered Services, Inc.

Billy's business, ESI, was begun in 1985 by Jacky Dorsey, who owned 100% of the company's stock until he gave his stock in the company to Billy in 1996. (Tr. 4 at 225, Exh. 16). Jacky Dorsey further testified that he endorsed the stock in ESI to Billy as a gift and he intended it as a gift to Billy only. (Tr. 4 at 225-26). Jacky Dorsey's un-contradicted testimony sufficiently established that the requirements of an *inter vivos* gift were met. *See Hankins*, 729 So. 2d at 1287 (¶ 17).

Although Billy received the ESI stock during the marriage, the Mississippi Supreme Court clearly has stated that "property obtained by inheritance *or by gift* is non-marital property and is not subject to equitable distribution." *Brock,* 906 So. 2d at 887 (¶ 48); *Johnson,* 650 So. 2d at 1287.

Kelli claims that even though the stock in ESI was a gift to Billy, it transmuted into marital property because Billy allegedly purchased personal items on a business credit card and sometimes allegedly used personal funds to pay the business credit card. (Appellant's Brief at 11-12). The chancellor found that the evidence presented by Kelli was insufficient to

convince the Court that personal expenses and business expenses were so interwoven as to have caused the stock of ESI to have transmuted into marital property. (R. 2 at 158-59).

Kelli further claims that the stock in ESI became marital property because Billy allegedly sometimes used equipment owned by ESI for personal endeavors. (Appellant's Brief at 12). The record supports the chancellor's finding that Billy sufficiently explained the business use of each corporate asset and that his occasional use of business equipment for personal endeavors was not sufficient to have caused the transmutation of the gifted corporate stock into a marital asset. (Tr. 5 at 352-57).

Kelli's argument overlooks a line of cases decided by the Mississippi Supreme Court and the Mississippi Court of Appeals in recent years which have addressed the transfer of stock in family-owned businesses. In *Hankins*, *supra,* the husband worked full-time in his father's lumber company, where he earned an income and periodically was given shares of stock in the lumber business. 729 So. 2d at 1285 (¶ 4). Prior to the marriage, the husband owned eleven shares of stock and was given fifty-seven and one-half (57½) shares of stock during the marriage. *Id.* The father also gave stock to two of the husband's brothers and a nephew, all of whom also worked for the family lumber company. *Id.* There was no indication, however, that 100% of the stock of the business was given away. Ultimately, the husband sold his shares of stock back to the father for $700,000.00. *Id.*

In determining whether the husband's stock in the family business was his separate property or marital property, the chancellor determined that the original eleven shares he received were separate property, but that the fifty-seven and one-half shares of stock given during the marriage were marital property. *Hankins*, 729 So. 2d at 1287 (¶ 18). The Mississippi Supreme Court affirmed that decision based on its finding that the husband had

failed to prove all of the requirements of an *inter vivos* gift. *Id.* That is, the evidence did not clearly establish that the stock certificates were gifts given gratuitously. *Id.*

As distinguished from *Hankins,* the undisputed testimony of Jacky Dorsey showed that the stock was given to Billy gratuitously and not in consideration for any past work done for ESI. (Tr. 4 at 225-26). Moreover, the present case further is distinguishable from *Hankins* because it involves only one donee, whereas *Hankins* involved a number of donees, all of whom worked for the family business. Finally, in *Hankins*, the father retained a number of shares in the corporation, whereas in the present case, Jacky Dorsey conveyed his entire ownership interest to Billy, thereby giving his son complete control of the corporation.

In *Sanderson v. Sanderson*, 824 So. 2d 623 (Miss. 2002), the Mississippi Supreme Court considered whether the husband's stock holdings in the family business were marital or non-marital assets. The evidence at trial showed that Mr. Sanderson had acquired his holdings in Sanderson Farms principally from family gifts, stock dividends, and stock splits. *Sanderson*, 824 So. 2d at 625 (¶ 3). The stock was publicly traded and had a fair market value of approximately $4,000,000.00. *Sanderson*, 824 So. 2d at 626 (¶ 11). Mr. Sanderson also was employed by Sanderson Farms at the time of the divorce and earned a salary in excess of $100,000.00. *Id.* at 625 (¶ 3). Despite the fact that the wife testified that the parties had considered Mr. Sanderson's stock as their retirement funds, the Supreme Court affirmed the chancellor's finding that the stock was a non-marital asset. *Id.* at 627 (¶ 13).

In *Johnson v. Johnson*, 877 So. 2d 485 (Miss. Ct. App. 2004), the Mississippi Court of Appeals found that stock owned by the company in two corporations which were organized, incorporated, and began operations during the term of the marriage were marital property. Each corporation was funded with assets from the parties' marriage or income earned during the marriage. *Id.* at 492 (¶ 25). As distinguished from the businesses at issue

in *Johnson,* ESI was neither incorporated during the term of the marriage, nor was it funded by assets of the marriage. Although the stock was transferred to Billy as an *inter vivos* gift during the marriage, ESI was formed prior to the marriage, and no marital funds were used in its origination. (Tr. 5 at 350).

Finally, in *Seymour v. Seymour*, No. 2005-CA-00668-COA (Miss. Ct. App. 2006), the Court of Appeals cited a line of cases which found that even if the corporate stock or business were found to be non-marital property, any appreciation of value in the asset during the marriage may be found to be marital property. *Id.* at (¶ 12). Because no evidence had been presented which was determinative of whether certain stock owned by the husband had increased in value during the marriage, the court found no error in the chancellor's assignment to him of its entire value as non-marital property in making an equitable distribution analysis. *Id.* As in *Seymour,* no evidence was presented to show that any increase in the value of ESI or its stock occurred after Jacky Dorsey conveyed the shares to his son.

Based on the rulings of this Court and the Mississippi Supreme Court, the chancellor's determination that the ESI stock was solely Billy's property should be affirmed.

II. THE CHANCELLOR PROPERLY DIVIDED THE PARTIES' MARITAL ASSETS

Aside from her contention in her first assignment of error that the chancellor improperly classified Lot 6 and Billy's stock in ESI as non-marital property, Kelli makes no separate argument regarding the division of the parties' marital assets. Based on the evidence presented, the chancellor properly classified the parties' marital and non-marital assets. The record supports her finding that neither Billy's stock in ESI nor the property deeded solely to

him transmuted from non-marital property into marital property. The decision of the chancellor should be affirmed.

Having classified the parties' assets as marital or non-marital, the chancellor then valued the only asset whose value was disputed, Billy's interest in ESI. The chancellor valued his interest at $25,908.00, which was consistent with the $20,151.43 value placed on ESI's net tangible assets. (Exh. 3). In so finding, she relied on the net asset approach, which was approved by the Mississippi Supreme Court in *Singley v. Singley*, 846 So. 2d 1004, 1010 (¶17-18) (Miss. 2003). The chancellor's decision was based on her consideration of the extensive testimony presented by Billy's valuation expert, Annette P. Turner, who employed an asset-based approach, and Kelli's expert, Elbert Bivins, who used the so-called "Income/Market Approach," which the Mississippi Supreme Court expressly criticized in *Watson v. Watson,* 882 So. 2d 95, 103-04 (¶ 33) (Miss. 2004). It is well within the chancellor's discretion to use either approach, unless there is evidence in the record to show that one method is less reliable than the other in valuing the asset at issue. *Watson*, 882 So. 2d at 105-06. Ms. Turner presented evidence to show that under the facts of this particular case, the asset-based approach would generate a fairer, more reliable picture of ESI's value. *See Dunn v. Dunn*, 911 So. 2d 591, 598 (¶ 21) (Miss. Ct. App. 2005). She reported that:

> The cost approach, or net asset value method, appears to be the most applicable approach to valuation in this situation; however, the maintenance contracts do not appear to have a marketable value to the Company and should be excluded from the value calculation.
>
> A discount for lack of marketability should be considered in the final opinion of value. Based on my experience, a reasonable range for a marketability discount in this situation would be approximately 10 to 20 percent.
>
> Mr. Bivins indicated value utilizing the cost approach as presented on page 6 of his report is $99,480. Reducing this amount $69,000 to eliminate the maintenance contracts and applying a 15 percent marketability discount would

> produce a final value of $25,908 for Engineered Systems, Inc. as of December 31, 2004.

(Exh. 22 at 1583, R.E. 14). The chancellor, therefore, did not abuse her discretion in placing a value of $25,908.00 on Billy's interest in the stock of ESI.

Finally, taking into consideration the value of Billy's non-marital assets, the chancellor made a thorough on-the-record analysis of the *Ferguson* factors, ultimately dividing the parties' marital assets and considerable marital debt evenly between them. (R.2 at 161-63, R.E. 2). Because there is substantial evidence in the record to support the chancellor's findings, she neither abused her discretion nor committed manifest error, and her classification, valuation and division of the parties' assets – both marital and non-marital – should be affirmed.

III. THE CHANCELLOR PROPERLY FOUND THAT KELLI DORSEY WAS NOT ENTITLED TO LUMP SUM OR PERIODIC ALIMONY

In her Complaint for Divorce, Kelli requested awards of periodic and lump sum alimony. (R.1 at 3). Applying the evidence set forth by the parties to the factors set out in *Hemsley*, the Chancellor correctly ruled in the Judgment of Divorce that Kelli was not entitled to an award of any alimony. (R.2 at 163-64, R.E. 2). Kelli now asserts that the chancellor's refusal to award lump sum alimony or periodic alimony was manifest error and, further, that she failed to properly weigh the factors set forth in *Armstrong v. Armstrong*, 618 So. 2d 1278 (Miss. 1993) in making her determination that Kelli was not entitled to any form of alimony. (Appellant's Brief at 17).

Kelli completely overlooks the purpose of alimony and its intended role to "conclude the parties' legal relationship, leaving each in a self-sufficient state." *Ferguson*, 639 So. 2d at 929. "Alimony together with equitable distribution work together to provide for parties after divorce." *Johnson*, 877 So. 2d at 489 (¶ 11). "[W]hen one expands, the other must recede."

Ferguson, 639 So. 2d at 929. As the Mississippi Supreme Court further explained in *Ferguson*, "[i]f the marital assets, after equitable distribution and in light of the parties' non-marital assets, will adequately provide for both parties, then 'no more need be done.'" *Id.* On the other hand, if the distribution of marital assets, taking into consideration each parties' non-marital assets, leaves a deficit *for one party*, then alimony should be considered. *Id.* This is not one of those cases.

A. Lump Sum Alimony

Lump sum alimony generally serves to equalize any relative disparities in the parties' resources which remain after the distribution of marital assets. In cases where the chancellor finds such an award is necessary, she is required to consider the four factors set out in *Cheatham v. Cheatham*, 537 So. 2d 435 (Miss. 1988), which include "(1) substantial contribution to the accumulation of total wealth of the payor by quitting a job to become a housewife, or by assisting in the spouse's business; (2) a long marriage; (3) where the recipient spouse has no separate income or the separate estate is meager by comparison; and (4) without the lump sum award, the receiving spouse would lack any financial security." *Hammers v. Hammers*, 890 So. 2d 944, 954 (¶ 33) (Miss. Ct. App. 2004); *Grogan v. Grogan*, 641 So. 2d 634 (¶ 742-43) (Miss. 1994). The most important factor is the disparity of the separate estates. *Cheatham*, 537 So. 2d at 438.

The chancellor equally divided the parties' marital assets, as well as the considerable debt they had amassed during the marriage. As a result, Billy received net marital assets of $63,838.62, and Kelli received net marital assets of $65,095.00. (R. 2 at 163, R.E. 2). Billy, however, was ordered to pay his share of the debt on the line of credit to Kelli, in the amount of $28,764.56, as well as $14,667.76 of the parties' credit card

debt, thus reducing both Kelli's financial obligations and Billy's available assets. (R.2 at 193, R.E. 4).

The chancellor awarded Billy the separate property given to him by his family members, valued at $45,908.00. (R.2 at 158-59, R.E. 2). Of Billy's separate property, the chancellor valued the stock of ESI, Billy's employer and his sole source of income, at $25,908.82. (R.2 at 161, R.E. 2). Billy's stock in ESI is of limited liquidation value, however, because in order to realize any monetary gain from the stock, he would have to sell it. That would necessarily result in the loss of his job and his ability to earn an income, as well as to pay the $685.00 per month in child support he was ordered by the court to pay. (R.2 at 165, R.E. 2).

Because of the absence of any real disparity between the parties' post-divorce estates, there is no further basis for Kelli's argument that the chancellor committed manifest error in her weighing of the relevant factors determinative of lump sum alimony. Although the parties' eighteen-year marriage was relatively long, the remaining *Cheatham* factors do not favor an award of lump sum alimony.

Looking first at whether Kelli made a substantial contribution to the accumulation of Billy's total wealth by quitting a job to become a housewife, or by assisting in his business, thus tipping the scale in favor of an award of lump sum alimony, the record indicates that the assets accumulated by the parties were largely attributable to gifts from Billy's family, and not by any effort put forth by Kelli. Moreover, there is no evidence that Kelli quit her job to become a housewife or to help in Billy's business. Kelli quit her job at The Valley Bank to pursue a nursing degree, which Barbara and Jacky Dorsey largely financed. (Tr. 4 at 242). Upon receiving her nursing degree, Kelli was regularly employed as a nurse at the Baptist Medical Center. Moreover, Kelli was compensated for her part-

time bookkeeping services she performed for Billy's business, ESI. (Tr. 4 at 184, Tr. 5 at 352).

In determining whether lump sum alimony is appropriate, the court should also consider whether Kelli has a separate income or whether her separate estate is meager by comparison. As the chancellor found in her *Ferguson* analysis, Kelli's income is comparable to Billy's. Moreover, her earning capacity as a nurse is comparable, if not superior, to Billy's. In addition, although Kelli appears to have no separate estate beyond the net marital assets of $65,095.00 awarded to her, her assets are not meager when compared to the assets awarded to Billy. His separate estate is comprised primarily of the value of ESI. In order to benefit from the sale of the ESI stock, Billy would, by necessity, lose his job and be left without an income.

Finally, the chancellor must consider whether, without the award of lump sum alimony, Kelli would lack financial security. In this case, neither party will enjoy a large degree of financial security after the divorce just as they have not enjoyed financial security during marriage. Kelli's financial position after the marriage will not be significantly worse than Billy's financial position.

Given the lack of disparity between the relative financial positions of the parties following the equitable distribution of the parties' marital assets, the chancellor neither abused her discretion nor was manifestly wrong in finding that Kelli was not entitled to lump sum alimony and her decision should be affirmed.

B. Periodic Alimony

Kelli further asserts that the chancellor's application of the facts to the law in determining that she was not entitled to periodic alimony was manifestly wrong. (Appellant's Brief at 17-18). Once a distribution of marital assets has been made, if further

financial support is required to prevent any inequity, periodic alimony may be awarded on the basis of need. *Armstrong,* 618 So. 2d at 1280. In this case, however, factoring in Billy's separate estate, the chancellor's division of the parties' assets left little disparity between their post-divorce financial conditions. Just as the chancellor found that an award of lump sum alimony was neither appropriate nor necessary in this case, periodic alimony is not warranted to remedy any inequity in Kelli's circumstances.

Contrary to Kelli's assertions, "the chancellor is not required to analyze each *Armstrong* factor individually, but to view the overall combination of factors as a whole, opting to discuss individual factors at his discretion." *Blalack v. Blalack,* 938 So. 2d 909, 911 (¶ 7) (Miss. Ct. App. 2006); *Stevens v. Stevens*, 924 So. 2d 645, 649 (¶ 8) (Miss. Ct. App. 2006). The chancellor's findings in the Judgment of Divorce relative to the *Armstrong* factors, which are couched in terms of the analogous factors set forth in *Hemsley,* are well-supported by the record.

The chancellor considered Billy's and Kelli's respective incomes, earning capacities and expenses. (R.2 at 163-64, R.E. 2). She found that Kelli could easily increase her earning capacity by working forty hours a week, providing her with an income comparable to Billy's. (R.2 at 164, R.E. 2). She expressed concern about Billy's long-term earning capacity due to his drinking problems. (R.2 at 164, R.E. 2). Reviewing both parties' Rule 8.05 Financial Statements, the chancellor found that each party would suffer a monthly deficit. (R.2 at 164, R.E. 2). Her findings are supported by the record. (Exh. 1, Exh. D-1).

She further noted that Kelli had free use of the former marital home and that Billy was required to pay one-half of the debt owed on the home equity line of credit, which served to significantly reduce Kelli's obligations and decrease the assets available to Billy.

(R.2 at 164, R.E. 2). In addition, she found that the child support Billy was required to pay more than adequately provided for the children, especially in light of the assistance Billy's parents were providing for the parties' son, Scottie, while he was in college. (R.2 at 164, R.E. 2).

Looking at the chancellor's findings in light of the evidence in the record, there were no inequities to resolve in this case, and the chancellor correctly found that Kelli was not entitled to periodic alimony.

IV. THE CHANCELLOR PROPERLY DENIED KELLI'S REQUEST FOR ATTORNEY'S FEES AND COSTS

Attorney's fees should not be awarded unless the party requesting payment of fees is unable to pay. *Watson,* 882 So. 2d at 110 (¶ 76); *Hammers,* 890 So. 2d at 958 (¶ 54). When the record demonstrates an "inability to pay and there is a disparity in the relative financial positions of the parties, an award of attorney fees is appropriate." *Langdon v. Langdon,* 854 So. 2d 485, 495 (¶ 40) (Miss. Ct. App. 2003); *Bates v. Bates*, 755 So. 2d 478, 482 (¶ 11) (Miss. Ct. App. 1999). Kelli, however, failed to establish both her inability pay as well any disparity between the parties' relative financial positions.

The evidence showed that each party has incurred substantial attorney's fees. Kelli incurred fees and expenses totaling $12,256.00 through March 15, 2005. (Exh. 8). Billy incurred attorney's fees and expenses of $26,919.42 through the third day of trial. (Exh. D-5). Kelli testified that all of her attorney's fees had been paid and her attorney's fee statement showed that Kelli still had money on account with her attorney. (Tr. 4 at 208, Exh. 8).

Kelli claims, however, that she was unable to pay her attorney's fees and that her attorney's fees were paid from a loan made by her friend, Reese Lincecum. Kelli admitted that the alleged loan agreement was not in writing and she could not identify the terms of

the alleged loan, including the interest rate and the due date. (Tr. 4 at 207-08). Because no loan documents have been signed, Kelli's agreement with Reese is not legally binding. *Goodson v. Goodson*, 910 So. 2d 35, 39 (¶ 6) (Miss. Ct. App. 2005). Even assuming *arguendo* that the loan was legally binding, "not having a cash reserve is not reason enough to order attorney fees to be paid by the other party." *Young v. Young*, 796 So. 2d 264, 268 (¶ 12) (Miss. Ct. App. 2001). By virtue of her income, assets and established credit, Kelli should have access to money and the ability to repay it.

Determination of the appropriateness of the *amount* of fees awarded is based on the factors set forth in *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982). The burden is on the party seeking attorney fees to demonstrate to the court that the amount requested is an appropriate "sum sufficient to secure one competent attorney." *Id.* As explained in *McKee*:

> The fee depends on consideration of, in addition to the relative financial ability of the parties, the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, as well as the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case.

Id. Kelli presented no evidence probative of any of the *McKee* factors. Further considering that there is very little disparity in the relative financial positions of the parties and that Kelli has not met her burden of proving her inability to pay, the chancellor did not abuse her discretion and correctly found that an award of attorney's fees to Kelli was not appropriate. *Westerburg v. Westerburg*, 853 So. 2d 826, 829 (¶ 13) (Miss. Ct. App. 2003). Her decision to deny Kelli's request for attorney's fees should be affirmed.

CONCLUSION

The chancellor applied the correct legal standards in reviewing the evidence presented by the parties during these proceedings, and her decision should be affirmed by this Court. She properly followed the roadmap set forth in *Ferguson* and *Hemsley* for classifying, valuing and dividing the assets and debts accumulated by Billy and Kelli during their marriage. In so doing, she achieved an equitable division of property which, even considering Billy's separate assets, did not result in a significant disparity between the parties' post-divorce financial situations. Because Kelli's post-divorce financial condition differs little from Billy's, an award of alimony would not have been appropriate. Further, considering the applicable standards for determining awards of lump sum and periodic alimony set forth in *Cheatham* and *Armstrong*, there is substantial credible evidence in the record to support the chancellor's determination that Kelli was not entitled to alimony. Finally, because there is no significant disparity between the parties' relative financial positions and Kelli failed to establish her inability to pay her own legal expenses, the chancellor did not abuse her discretion in refusing to grant Kelli's request for attorney's fees.

WHEREFORE, Billy Dorsey prays that upon consideration of this appeal, the court will affirm the chancellor's decision. Billy Dorsey also prays for any other relief to which he is entitled in the premises.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, John Robert White, Attorney for the Appellee, Billy Wayne Dorsey, hereby certify that I have this day caused to be served by first class mail, postage prepaid, a true and correct copy of the above *Brief of Appellee* on the following persons:

Chancellor Janace Harvey-Goree
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Trial Court Judge

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SO CERTIFIED, this the 13th day of June, 2007.

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