IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2006-CA-00328

KELLI ANN DORSEY **APPELLANT**

V.

BILLY WAYNE DORSEY **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons as having 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.

Honorable Janace Harvey-Goree, Chancellor

Kelli Dorsey, Appellant

John W. Christopher
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Billy Wayne Dorsey, Appellee

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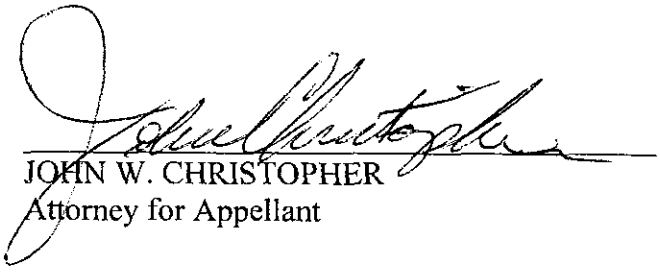

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ORAL ARGUMENT

Oral argument is not requested.

STATEMENT OF THE CASE

Kelli Ann Dorsey (Kelli) and Billy Wayne Dorsey (Billy) were married on March 22, 1986, and separated on June 29, 2004. Between the marriage and the separation, Kelli and Billy had three children, to-wit: Daniel, born September 26, 1985, and who is now over 21 years of age; Shawn, born June 16, 1987, and Sarah, born November 17, 1993.

In the early part of their marriage, Kelli worked at Valley Bank located in Ridgeland, Mississippi. Kelli worked at Valley Bank for nine years before quitting that job to enter nursing school which she successfully completed, received her license from the State of Mississippi, and began working at Baptist Medical Center in Jackson, where she was employed at the time of the trial.

At the time of trial, Billy was the sole shareholder of Engineered Systems, Inc., a Mississippi corporation, which was given to him by his father, approximately 10 years before the parties separated.

During the course of the marriage, in addition to maintaining her other employment, Kelli worked for Engineered Systems, Inc., performing clerical and bookkeeping services for which she was not paid during the time she worked at Valley Bank but for which she was paid after she quit working at the bank and went to nursing school. Kelli's pay was based upon $10 an hour for 20 hours per week or approximately $800.00 per month minus withholding taxes.

Billy was also deeded a tract of real property which adjoined the property upon which the marital residence was situated with the lot being generally described as Lot 6 of Pine Hill Acres. The testimony was that the lot lay between the house and a lake and was unsuitable to be used for a construction site for another house. After the lot was given to Billy, the family used it for

recreational purposes and ad valoram tax and expenses of upkeep were paid by Kelli out of the parties' joint checking account.

Billy admitted both in pretrial discovery and at trial that he consumed alcoholic beverages excessively and that he was an alcoholic. There was further ample evidence of Billy's abuse of Kelli and the children and of the estrangement that existed between Billy and the parties' daughter, Sarah.

At the conclusion of the trial, the judge did not enter a separate bench or written opinion but on October 10, 2005, filed her final judgment of divorce which contained her findings of facts and conclusions of law. In the final judgment, the hancellor awarded Kelli a divorce on the grounds of Billy's habitual drunkenness. The Chancellor also determined that custody of the minor children was awarded to Kelli with Billy required to pay child support.

The judgment further provided, *inter alia*, that Lot 6 of Pine Hill Acres and Engineered Systems, Inc., were the sole property of Billy and were not marital assets subject to equitable distribution. The judgment further denied Kelli's prayer for alimony and attorney's fees.

Feeling aggrieved by the Chancellor's classification of Engineered Systems, Inc., and Lot 6 of Pine Hill Acres as being Billy's separate estate and not a marital asset, and being aggrieved by the Chancellor's division of marital assets and the denial of alimony and attorney's fees, Kelli has perfected her appeal for appellate review.

STATEMENT OF THE FACTS

Kelli and Billy were married on March 22, 1986, in Madison County, Mississippi, and separated on June 29, 2004. (T. 27) During their marriage, Kelli and Billy had three children, to-wit: Daniel Scott Dorsey, born September 26, 1985, Shawn Christopher Dorsey, born June 16, 1987, and Sarah Nicole Dorsey, born November 17, 1993. (T. 27; R.E. 5)

Both Kelli and Billy testified that Billy used alcoholic beverages to excess and smoked marijuana during the marriage. (T. 30, 46-48, 360-364, 375) The court granted a divorce to Kelli on the grounds of Billy's habitual drunkenness. (R.E. 3, p. 21) However, the granting of the divorce is not an issue being presented to the Court by Kelli and, therefore, the facts contained in the record to support the chancellor's award of the divorce will not be developed in detail.

At the beginning of the marriage, Kelli worked at Valley Bank in Ridgeland, Mississippi, and her hours were Monday through Friday from 8 a.m. until 5 p.m. (T. 77) During this same period of time, Kelli was doing work at Engineered Systems, Inc., a Mississippi corporation, in which Billy was a sole shareholder. Kelli worked at the bank during the week and worked at Engineered Systems, Inc. (ESI) on the weekends. While Kelli was employed at Valley Bank, she was not paid for the work she performed at ESI, however, after working at the bank for approximately 9 years, she decided to go back to school to get a degree in nursing, which she did. Upon leaving the Valley Bank employment and returning to school to get her nursing degree, the company began to pay her for the work she did at ESI, and Kelli testified that she was paid $10.00 per hour for 20 hours per week giving her approximately $800.00 a month in gross income. (T. 77-78)

After Kelli graduated from nursing school and received her degree, she went to work at Mississippi Baptist Medical Center as a post-op surgery nurse. (T. 27) At the time of trial, Kelli was paid approximately $27.00 per hour as a nurse at Baptist Medical Center. (T. 60)

After Kelli received her nursing degree and began working at Baptist Medical Center, she continued her part-time work for ESI.

ESI, a Mississippi corporation, was previously owned by Billy's father, Jackie Dorsey, who testified that Billy had worked for him in the company and that he gave the company to Billy as a gift. (T. 225) Kelli testified that Jackie Dorsey gave Billy ESI in 1993. (T. 73) After Billy received ownership of ESI, Kelli worked in the business on weekends while she maintained her fulltime employment during the week. (T. 77, 183, 231)

ESI was a business under which Billy operated water and water waste treatment plants for providers of those services. (T. 74) ESI contracted with companies or political subdivisions to operate and maintain water and waste water services plants which included testing fresh water to make sure it was safe for human consumption and to test waste water treatment facilities to make sure they were complying with all state and federal guidelines. (T. 321) In addition, ESI was responsible for reading the water meters to determine the individual user's consumption of water for the billing period and bill the customer for water used, cut grass and check on the pumping stations at each facility. (T. 400) Not only did Kelli work in the business but so did their children, Scott and Shawn. (T. 400)

Kelli would go with Billy and help him "spray down the treatment plants", help him read meters and keep the books. (T. 77)

The assets of ESI consisted of the following: a 2001 Chevrolet extended cab, 4-wheel drive pickup equipped with tool boxes. (T. 82, 353) ESI owned a lawnmower, flat bed utility trailer, a 36-inch lawn mower (T. 354), a golf cart (T. 83), and a 35-foot camper (T. 84).

Even though these items of personal property were owned by ESI, the purchase of each item was financed with personal funds of Kelli and Billy being used to pay the payments for the purchase price. Often times the payment came from advancing money off the home equity loan the parties had which was secured by a deed of trust on the marital residence. (T. 83-84)

The 35-foot camper was fully furnished and included a television with a satellite dish. (T. 84) The only business purpose that either party testified that the camper was used for was to go to the NASCAR races at Talladega. (T. 84) Billy testified that the camper was never used by him in performing his work for ESI and that he was never required to stay in the camper overnight to perform his work at ESI. (T. 421)

The family made use of the camper by going to the races at Talladega and on camping trips. (T. 84-85)

The company also purchased and owned a Suburban vehicle which was used by the family to take trips and was not used in the business. That vehicle was later sold or traded in on another. (T. 85-86)

The marital residence was given to Billy, Kelli and their three children as tenants in common by Billy's parents. (T. 61, 71) In addition, Engineered Environmental Equipment, Inc., a company previously owned by Billy's father, which had been given to Billy's brothers, conveyed to Billy individually an adjoining lot described as Lot 6, Pine Hill Acres, which was a 5-acre lot. (T. 347)

The lot was maintained by the family who kept the grass cut and was also used by the children to ride their bicycles. (T. 67) In addition, the ad valoram tax on the parcel was paid by Billy and Kelli from their family funds. (T. 67)

ESI had an Amoco credit card which was used to purchase gas for the company vehicle and lawnmower. Kelli paid the Amoco credit card from personal funds which were drawn from the line of credit secured by the family residence. (T. 418)

After the trial of the case the Chancellor entered a Final Judgment of Divorce granting Kelli a divorce from Billy, awarding Kelli custody of the children and adjudicated *inter alia,* that ESI and Lot 6, Pine Hill Acres were Billy's separate estate and not subject to equitable distribution, and denied Kelli's prayer for alimony and attorney fees. (R.E. Tab 2). Kelli filed a Motion for New Trial, or in the Alternative, Motion for Amendment of Judgment (R.E. Tab. 7) moving the Chancellor to reconsider the classification of ESI and Lot 6 of Pine Hill Acres as Billy's separate estate and to award Kelli her attorney fees and alimony. After a hearing on the motion the Chancellor entered an Order denying Kelli the relief she had sought. (R.E. Tab. 3).

Feeling aggrieved by the Judgment of the Chancellor and by the denying of any relief on her motion for a new trial, Kelli perfected her appeal for a review of these issues.

SUMMARY OF THE ARGUMENT

The marriage of Kelli Dorsey and Billy Dorsey ended with the entry of a judgment of divorce in the Chancery Court of Madison County, Mississippi.

1. In awarding Kelli a divorce, the Chancellor adjudicated that the business known as Engineered Systems, Inc., was Billy's separate estate and never became a marital asset because of family use. It is respectfully submitted that Kelli had worked in the business, initially without pay, the personal funds of the parties, which would have included Kelli's paycheck from her employment, were used to pay business expenses incurred by Billy while working for the company. The company purchased items which were used by the family with some of the purchase price of the items being paid from the checking account maintained by Kelli and Billy. It is respectfully submitted that the Chancellor committed manifest error in holding that the business remained Billy's separate estate in spite of the fact that personal funds of Kelli and Billy were used to pay business expenses and that Kelli worked in the business, at times without pay. It is further submitted that there was more than sufficient familial use of the business to make it a marital asset.

2. The Chancellor also determined that a parcel of real property described as Lot 6 of Pine Hill Acres, and consisting of approximately five acres, was also Billy's separate estate in spite of the family's use of the property. This property was given to Billy as a gift at the insistence of his father through another corporation which was owned by Billy's brothers and which had been previously owed by his father, Jackie Dorsey. The uncontradicted evidence was that the family used the lot which adjoined their marital residential lot, for family uses, ad valoram taxes were paid on the property using, in part, money that was earned by Kelli, the family including Kelli and the children, kept the lot up by mowing it and cleaning it up and the

children used it from time to time as a place to ride their bicycles. It is respectfully submitted that the Chancellor was manifestly wrong in her adjudication that this property also maintained its status as Billy's separate property and that it did not become a marital asset through family use.

3. The Chancellor also denied Kelli's claim for alimony, which it is respectfully submitted is error. The undisputed evidence was that when Kelli left her employment with Valley Bank to begin attending nursing school, she withdrew her retirement account in its entirety of approximately $51,000.00 which was used to pay family and business expenses, with the money being placed in the joint account of Kelli and Billy and used to pay business expenses of ESI as well as Billy's expenses incurred in support of his lifestyle which included excessive drinking and drug use. During the time Kelli was in nursing school and was otherwise unemployed, she continued to work in the business of Engineered Systems, Inc., where she was paid a modest wage of $10.00 per hour. Because Kelli withdrew her retirement plan in its entirety, Billy was permitted to maintain his retirement account which by his admission contained approximately $111,000.00 at the time of trial. Had Kelli not withdrawn her retirement account and used it for family expenses, Billy, as "head of the household" would have been required to either work harder to make more money, or would have been required to cash in part of his retirement account or the family would have had to do without some of the extras they enjoyed as well as of the necessities . It is respectfully submitted that under the circumstances of this case Kelli was treated inequitably by the court in its denial of alimony and Billy, who brought about the total destruction of the marriage, leaves the marriage with substantial assets intact while Kelli leaves the marriage with very little in the way of assets but with her share of the marital debt. It is respectfully submitted that even though the Chancellor had broad

discretion on whether or not to award alimony, it is submitted that the Chancellor abused her discretion and committed manifest error in denying Kelli alimony.

4. The Chancellor also denied Kelli's prayer for her attorney's fees and expenses incurred in the trial. The evidence was that Kelli had incurred approximately $15,000.00 in legal fees and expenses for the trial, much of which was incurred because she was having to take Billy back to court on contempt petitions for his failure to abide by the temporary orders entered by the Chancellor between the filing of the complaint and the trial of the case. While awarding attorney's fees is a matter left to the discretion of the court, it is further submitted that the Chancellor abused her discretion and committed manifest error in denying Kelli's prayer for attorney's fees, in light of the inequities brought upon Kelli by the court's adjudication of other issues including adjudicating that Engineered Services, Inc., and Lot 6 of Pine Hill Subdivision were Billy's separate estate not subject to division. After the division of assets was completed, Kelli was left substantially short on having adequate funds to provide for herself and the children and had no money to pay her attorney's fees, which the undisputed testimony disclosed she was required to borrow from a friend.

ARGUMENT

Standard of Appellate Review

The standard of review for distribution of property in divorce cases has been established by the Supreme Court in several cases to be the following:

> "Such division and distribution 'will be upheld if it is supported by substantial credible evidence.' **Carrow v. Carrow**, 642 So.2d 901, 904 (Miss. 1994) .... The chancellor's findings will not be disturbed 'unless the Chancellor was manifestly wrong, clearly erroneous or any erroneous legal standard was applied.' **Bell v. Parker**, 563 So.2d 594, 596-97 (Miss. 1990)."

Stewart v. Stewart, 864 So.2d 934, 937 (Miss. 2003).

The standard of review of a chancellor's consideration of alimony has been stated as:

> "Alimony awards are largely at the discretion of the trial judge. A chancellor's decision concerning the amount and type of alimony will be upheld on appeal unless the decision is found to be manifestly in error either in fact or law, or otherwise an abuse of discretion."

Drumwright v. Drumwright, 812 So.2d 1021, 1027 (Miss.Ct.App. 2001) citing *Armstrong v. Armstrong*, 618 So.2d 1278, 1280 (Miss. 1993).

The matter of attorney's fees is likewise to be reviewed on appeal by the substantial evidence/manifest error standard. *Grice v. Grice,* 726 So.2d 1242 (Miss. Ct. App. 1998)

I. THE CHANCERY COURT COMMITTED MANIFEST ERROR IN FAILING TO CLASSIFY ENGINEERED SYSTEMS, INC., AND A 6-ACRE PARCEL OF LAND AS MARITAL ASSETS

II. THE CHANCERY COURT COMMITTED MANIFEST ERROR IN THE DIVISION OF MARITAL ASSETS

While these arguments have been stated separately, they will be briefed and argued together because of the overlapping nature and the principles of law are equally applicable to both.

Both Engineered Services, Inc. (ESI) and Lot 6 of Pine Hill Acres were held solely in Billy's name with the stock in ESI, a Mississippi corporation, being given to Billy by his father, Jackie Dorsey. Also, Billy received title in his name only to Lot 6 of Pine Hill Acres Subdivision from Engineered Environmental Equipment, Inc., which was a Mississippi corporation owned by Billy's brothers and formerly owned by his father. (R.E. 11)

While both properties were conveyed solely to Billy and were his separate estate, the question becomes whether or not he used either or both of the properties in such a manner that either lost its identity as being his separate estate or whether it had become commingled to become a marital asset.

While the Chancellor found in her opinion (R.E. 2, p. 14-15) that:

> "In the case at bar, it appeared that some personal funds may have been used to pay the business credit card, and vice versa, but, if so, the money used to pay such debts are readily traceable. Therefore, the evidence presented by Kelli is 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."

In so holding, the Chancellor overlooked the uncontradicted testimony that Kelli performed clerical and bookkeeping services for approximately nine years for which she was not paid while she worked at the Valley Bank during the week and for ESI on the weekends. (T. 77-78) The testimony established that it was not until Kelli left Valley Bank to pursue a nursing education that she was paid $10.00 per hour for 20 hours per week. The Chancellor also failed to take into account that ESI purchased personal property on credit with Kelli's and Billy's personal funds being used to make the payments which was often advanced from the home equity loan secured by a deed of trust on the marital residence. (T. 83-84) The Chancellor further failed to fully account for the evidence which established that the 35-foot camper purchased by ESI was fully furnished and the only business use was Billy had taken some customers to the NASCAR

races at Talladega to stay overnight. Otherwise, the camper was used for family purposes including going to the races at Talladega and family camping trips to such places a Cole's Bluff on the Barnett Reservoir. Billy further testified that he had never used the camper in performing his work at ESI. (T. 84-85, 421)

In addition, the Amoco credit card issued to ESI was used to purchase gas for the company vehicle and lawnmower, however, Kelli paid the Amoco bill from personal funds which were drawn from the line of credit secured by the family residence. (T. 418)

It is respectfully submitted that while the Chancellor cites *Hemsley v. Hemsley*, 639 So.2d 909 (Miss. 1994) and *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994) at the beginning of her analysis of the equitable distribution of marital assets, it is respectfully submitted that she failed to properly apply the facts which were established at the trial in making her determination that both ESI and Lot 6 of Pine Hill Acres maintained their identity as Billy's separate assets rather than marital assets.

In *Stewart v. Stewart*, 864 So.2d 934, 937-938 (Miss. 2003), the Supreme Court held the following:

> "The first step in property distribution as a result of divorce is to classify the property as either marital property or non-marital property based on **Hemsley v. Hemsley**, 639 So.2d 909 (Miss. 1994), and which defined marital property for divorce proceedings as:
>
> > Any and all property acquired or accumulated during the marriage. Assets so acquired or accumulated during the course of the marriage are marital assets and are subject to an equitable distribution by the chancellor. We assume for divorce purposes that the contribution and efforts of the marital partners, whether economic, domestic or otherwise, are of equal value.
>
> 639 So.2d at 915. *See also Waring v. Waring*, 747 So.2d 252, 255 (Miss. 1999).
>
> Separate property that has been 'commingled with the joint marital estate' also becomes marital property subject to equitable distribution. *Johnson v. Johnson*,

650 So.2d 1281, 1286 (Miss. 1994) *See also Maslowski v. Maslowski*, 655 So.2d 18, 20 (Miss. 1995). 'Assets which are classified as non-marital, such as inheritances, may be converted into marital assets if they are commingled with marital property or **utilized for domestic purposes, absent an agreement to the contrary**. *Boutwell v. Boutwell*, 829 So.2d 1221 (Miss. 2002) (citing *Heigle v. Heigle*, 654 So.2d 895, 897 (Miss. 1995); *Johnson*, 650 So.2d at 1286.'" (Emphasis added)

The established principle that the Chancellor failed to properly apply is that by using ESI for domestic purposes, it became a marital asset. There was no agreement between Kelli and Billy that ESI would not become a marital asset while marital funds were being used to pay ESI business expenses and debts. In addition, Kelli worked at ESI, originally without pay and later for the nominal wage of $10.00 per hour, and there was no agreement produced at the trial that this would not convert ESI into a marital asset in the event of a divorce.

In addition, Lot 6 of Pine Hill Acres was used by the family, maintained by the family, and taxes paid by Kelli and Billy from personal funds. It is respectfully submitted that the Chancellor committed manifest error when she failed to find that both ESI and Lot 6 had been commingled to the extent that they became marital assets.

III. THE CHANCERY COURT COMMITTED MANIFEST ERROR IN FAILING TO AWARD APPELLANT ALIMONY

The Mississippi Court of Appeals citing the Mississippi Supreme Court case of *Armstrong v. Armstrong*, 618 So.2d 1278, 1280 (Miss. 1993), has stated:

> "Alimony awards are largely at the discretion of the trial judge. A chancellor's decision regarding the amount and type of alimony will be upheld on appeal unless the decision is found to be manifestly in error either in fact or law, or otherwise an abuse of discretion.:

Drumwright v. Drumwright, 812 So.2d 1021, 1027 (Miss.CtApp. 2001)

The Court of Appeals in its *Drumwright* decision held that under Mississippi law, the factors to be considered in the alimony determination are those established by *Armstrong* which are:

1. The income and expenses of the parties;
2. The health and earning capacities of the parties;
3. The needs of the parties;
4. The obligations and assets of each party;
5. The length of the marriage;
6. The presence of absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide, childcare;
7. The age of the parties;
8. The standard of living of the parties, both during the marriage and at the time of the support determination;
9. The tax consequences of the spousal support order;
10. Fault or misconduct;
11. Wasteful dissipation of assets for either party; or
12. Any other factor deemed by the court to be 'just and equitable' in connection with the setting of spousal support."

Drumwright, 812 So.2d at 1227-1228.

It is respectfully submitted that the Chancellor failed to adequately weigh each of the factors required by *Armstrong* and *Drumwright*. In the judgment, the Chancellor did not consider all of the factors. (R.E. 2, p. 19-20) It is respectfully submitted that the chancellor failed to properly evaluate *Armstrong* factor #1, income and expenses of the parties. She cited Billy's employment at ESI reflected a gross income of $4,576.83 which she took from his 8.05 financial statement. (R.E. 10) It appears that the Chancellor accepted Billy's statement of his income at face value while omitting other relevant evidence to show that he makes substantially more than he reflected on his 8.05 financial statement. Kelli offered Elbert Bivens as an expert to express his opinions of the value of ESI as a going business. While the Chancellor found that the value of the business as established by Billy's expert, Annette Turner, was the more reliable opinion concerning value, the Chancellor then overlooked Bivens testimony concerning the

income of ESI. Kelli recognizes that the Chancellor had the discretion to accept or reject the testimony of Elbert Bivens concerning the value of ESI when it was contradicted by the expert opinion of Annette Turner. However, the Chancellor does not have the discretion to totally disregard the other testimony of Elbert Bivens pertaining to the income that had been realized by ESI in the past. Mr. Bivens testified that in developing his opinion of the value of the business, he had reviewed business records and after he was asked what he took into consideration to establish the value, he testified as follows:

> "Well, the things that I thought were important was that he has been in business a long time. It's been a steady business, and for the past three years, a steady $200,000.00 gross revenue. He has what we call discretionary earnings. Those are earnings available to the owner – 80 to $90,000 per year." (T. 258)

Mr. Bivens specifically testified that he had found that over the preceding three years that discretionary income, or income available to Billy over and above expenses, was $88,000.00 per year. (T. 258-259). His testimony is supported by the statement of income of ESI received by the Chancellor as Exhibit 6 (R.E. Tab 12) which reflects a 2003 gross income of $235,936.59 and a 2004 gross income of $195,713.75.

There is no testimony from any other witness who contradicted Mr. Bivens' calculation of $88,000.00 annual discretionary income available to Billy after he paid all the company expenses. The Chancellor committed manifest error in overlooking this critical point, and in accepting Billy's self-serving statement of income which is contradicted by other evidence of ESI's income which was taken for its own records.

In the second *Armstrong* factor, the Chancellor was correct in her assessment that both are in relatively good health except Billy is an alcoholic.

The Chancellor was manifestly wrong in the evaluation of the third *Armstrong* factor in stating that "the court finds that either party would suffer a monthly deficit" after reviewing the

8.05 financial statements of both parties. That may be a correct assessment if the chancellor only looked at Billy's income reflected on his 8.05 declaration, but it is certainly incorrect in the light of other evidence that ESI had a $200,000.00 annual gross income and Billy had $88,000.00 income in excess of expenses.

The Court does not address the third *Armstrong* factor concerning the needs of each party nor does the Court address the fourth *Armstrong* factor concerning the obligations and assets of each party.

The length of this marriage, considering contemporary standards, was rather lengthy from March 22, 1986, until the separation on June 29, 2004, for a total of 18 years. In addition, the Chancellor failed to address *Armstrong* factor #4 and as a result left Kelli with a substantial debt with only her income as a nurse to be used to pay it in addition to providing support for herself and her children. The Chancellor also failed to address *Armstrong* factors #8, the standard of living, #9, the tax consequences, and most importantly failed to discuss *Armstrong* factors #10 and #11. Factor #10 addresses the fault or misconduct and the Chancellor merely states that Billy is an alcoholic but fails to address the fact that Kelli contended with Billy's alcohol and drug use for most of the marriage and the marriage would not have ended but for Billy's conduct. The record is replete with evidence of how abusive Billy was while drinking and using drugs and how he was abusive not only to Kelli but to the children. This factor, it is submitted, was totally omitted from the judge's consideration.

Armstrong factor #11 on wasteful dissipation of assets by either party fails to address Billy's use of marital assets to buy alcohol and drugs during the course of the marriage.

The factors which the Chancellor failed to address in her judgment, it is respectfully submitted, all weigh in Kelli's favor and had they been properly considered by the Chancellor,

Kelli should have awarded alimony. This is especially true in light of the fact that when Kelli left her job at Valley Bank to begin her education to become a registered nurse, she withdrew approximately $51,000.00 from her retirement plan which totally exhausted it, while Billy retained his retirement account and at the time of the divorce had $111,280.00 available to him in that account. In denying Kelli alimony, she is being punished for having been the ever-dutiful wife to the extent that she would liquidate her retirement account to help support the family while she went to nursing school in addition to working at ESI for Billy.

When all of the *Armstrong* factors are weighed according to the evidence offered at trial, it is respectfully submitted that the Chancellor committed manifest error in denying Kelli alimony, either periodic, lump sum, or both, in order to enable her to recover financially from this divorce and the years of abuse suffered by her at Billy's hands.

Kelly recognizes that the courts favor making a final settlement of financial issues between the divorcing parties, it is submitted that this a case which is appropriate for the award of lump sum alimony. The Supreme Court has established factors to be considered by the Chancellor in deciding the issue of lump sum alimony which are:

1. Contribution to the marital estate;
2. Length of the marriage;
3. The relative financial condition of the parties; and
4. Whether, without receiving an award, a party would lack financial security.

Grogan v. Grogan, 641 So.2d 634 (Miss. 1994)

It if respectfully submitted that had the Chancellor weighed the **Grogan** factors she would have found that all of those factors weigh in favor of awarding Kelli lump sum alimony

and it is further submitted that to fail to award this relief to Kelli is manifest error and a misapplication of the law as pronounced by the Mississippi Supreme Court.

IV. THE CHANCERY COURT COMMITTED MANIFEST ERROR IN FAILING TO AWARD APPELLANT HER ATTORNEY'S FEES AND COSTS

The Chancellor in the adjudication of the judgment does not address Kelli's prayer or proof in support of attorney's fees but in the mandate of the judgment merely states that Kelli's request for attorney's fees is denied.

It is respectfully submitted that the Chancellor committed manifest error in her findings and her order denying attorney's fees is not supported by the substantial credible evidence in this case.

In the complaint for divorce (R.E. 5), in paragraph 6 Kelli alleged that she was entitled to a divorce from Billy on the grounds of habitual cruel and inhuman treatment, habitual drunkenness, adultery, excessive use of opium, morphine or other like drugs. In Billy's answer (R.E. 6) in response to the allegations, Billy denied the averments. Billy continued to deny that he was guilty of any of these offenses until trial at which time he admitted on cross-examination that Kelli was entitled to a divorce on the grounds of his habitual drunkenness. (T. 375)

As a result of Billy's steadfast denial, Kelli was required to incur substantial attorney's fees and expenses in order to prove the allegations alleged in the complaint. In addition, there are no assets available to Kelli to pay her attorney's fees of $14,468.00 which was incurred prior to trial. And Kelli has no assets with which to pay the attorney's fees since she depleted her retirement account of $51,000.00. While the Chancellor gave her exclusive use and possession of the marital residence and ordered Billy to convey to her his undivided 1/5 interest, Kelli cannot borrow money against the marital residence since she only owns an undivided 2/5 interest

in the residence and must pay the sum of $33,500.00 which is one-half of the marital debt on the line of credit secured by the residence. This happens to be the Kelli's circumstances because Jackie Dorsey, Billy's father, and his wife, deeded the property to Billy, Kelli, and their three children, as tenants in common. (T. 219, 223)

It is respectfully submitted that pursuant to the holding in *McKee v. McKee,* 418So.2d. 764 (Miss. 1982) the Chancellor committed manifest error in denying attorney's fees to Kelli under the circumstances of this case. When the **McKee** factors are considered they weigh heavily in favor of Kelli being awarded attorney fees. **McKee** and other cases have directed that the matter of awarding attorney fees is largely entrusted to the discretion of the Chancellor, with the primary factor to be used by the chancellor is to determine whether or not the party requesting attorney fees is financially unable to pay those fees. The Chancellor did not address this factor but denied Kelli's prayer for fees and costs. It is respectfully submitted that had the Chancellor considered Kelli's inability to pay attorney fees that an allowance of those fees would have been proper and to deny the fees is an abuse of discretion and is manifestly wrong. *Riddick v. Riddick,* 906 So.2d 813, 827-828 (Miss. Ct App. 2004)

CONCLUSION

Kelli Dorsey, appellant, respectfully prays that this Court, upon review of this case, will determine that the Chancellor committed manifest error and her judgment was not supported by substantial credible evidence in the finding that Engineered Services, Inc., and Lot 6 Pine Hill Subdivision were not marital assets and will reverse and render the chancery court on these two issues and order that those assets were marital assets subject to equitable distribution and remand the case to the Chancellor for a determination of an equitable distribution of those assets.

Further, that the Court will find that the Chancellor was manifestly wrong and that her judgment is not supported by credible evidence in her denying Kelli's prayer for alimony. Kelli prays that this Court will reverse the Chancellor and remand the case for the Chancellor to award Kelli lump sum alimony in lieu of conveying to Kelli a part of ESI or Lot 6 Pine Hill Subdivision. Further, that this Court will direct the chancery court on remand to award Kelli periodic alimony in a sufficient amount, and in light of Billy's available income of $88,000.00 per year, to enable her to maintain a decent standard of living for her and the children in her care.

And finally, Kelli prays that this Court will reverse the Chancellor on her denial of attorney's fees to Kelli and will remand the case to the chancery court for an award of attorney's fees for the trial and this appeal.

Respectfully submitted,

KELLI ANN DORSEY, Appellant

BY: _____
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CERTIFICATE OF SERVICE

I, JOHN W. CHRISTOPHER, hereby certify that I have this day forwarded via United States Mail, postage prepaid, a true and correct copy of the foregoing **Brief of Appellant** to:

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This the 9th day of April, 2007.

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