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STATEMENT REGARDING ORAL ARGUMENT

As noted in Appellant's principal Brief, this appeal involves complicated issues of property classification, valuation and distribution. This appeal presents several interrelated issues involving the ownership, valuation and distribution of Northeast Metal Processors, Inc., a business owned jointly by the Parties which the Trial Court held to be only partially a marital asset. In resolving this appeal, the Court must determine whether any part of Northeast Metal Processors, Inc. was Walter Fleishhacker's separate property, if so, the date that should have been used to value his separate portion, and further what value of the business should have been used by the Trial Court in any event.

Oral argument would be helpful to discuss each of these related issues. Accordingly, oral argument should be granted in this case.

REPLY ARGUMENT I.

A. WALTER'S SEPARATE INTEREST IN NMP WAS COMMINGLED WITH THE MARITAL INTEREST SUCH THAT IT BECAME MARITAL PROPERTY.

Walter acknowledges that he owned only twenty-five percent (25%) of NMP at the time of the Parties' marriage in 1981, and that he acquired the remaining seventy-five percent (75%) during the marriage. Walter further concedes, as he must, that all the ownership interest of NMP was held together, as a single cohesive asset during the Parties' marriage. Walter's sole argument appears to be that, while his pre-marital interest in NMP was obviously commingled with the marital interest, he had no intention to transmute his interest into marital property.

Walter's reliance on *Oliver v. Oliver*, 812 So. 2d 1128, 1135 (Miss. Ct. App. 2002) is misplaced. In fact, *Oliver* further compels a conclusion that Walter's interest in NMP was commingled with the marital interest. The Court in *Oliver* reasoned as follows:

> The evidence in the record shows that Helen simply deposited the inheritance into the family's checking account in order that it would remain there, untouched, until she could decide what would be a suitable use for it. Roger presents nothing to dispute Helen's assertion that she removed these monies from the family's checking account before they could ever be used for the benefit of the entire family. We find nothing in the record which would show that Helen ever intended to use these inherited funds for anyone else's benefit, such as living expenses for the family or personal loans or gifts to the family. In other words, B. A. and Roger never benefitted from the presence of these monies in the personal checking account for this interim period.
>
> We are not convinced that the Mississippi Supreme Court meant that any funds obtained by one spouse, which are subsequently commingled with marital funds, automatically become marital property simply because they are placed in the same account. ***We opine that the intent of the court in Johnson and other cases of its kind was that a party must prove that these commingled funds were not only present in a joint marital account, but were being used for the benefit of the other spouse and/or the entire family.*** *See Johnson*, 650 So. 2d at 1286. Because the facts in the case at bar do not support that principle, we decline to hold that Roger is entitled to half of Helen's inheritance by the laws of succession. It is our finding that Helen's inheritance never became a part of B. A.'s estate and therefore, would not transfer to Roger in any fashion.

Oliver, 812 So. 2d at 1135 (emphasis added).

As is apparent from the quoted passage, the facts of *Oliver* were completely different from those in this case. Thus, the Court in *Oliver* found that the property had not been commingled. Under the rationale of *Oliver*, where separate property is mixed with marital property, and is then used for the benefit of the marriage, the separate property is transmuted into marital property through the doctrine of commingling. *Id.* It is beyond dispute that this is precisely what occurred here. Walter commingled his twenty-five percent interest in NMP with the seventy-five percent marital interest *for the use of the marriage*. Walter concedes that he and Patricia supported their lifestyle from the operation of NMP. There is, accordingly, no question that Walter used the entirety of NMP – not just seventy-five percent – for the benefit of the marriage. Accordingly, under *Oliver*, Walter's interest in NMP was commingled during the marriage.

Walter also cites to *Craft v. Craft*, 825 So. 2d 605, 609 (Miss. 2002). Walter's analogy to *Craft* is misleading. *Craft* does not bear on the issue of commingled property at all. In *Craft*, the husband owned one-half of a business with his brother. The Trial Court in *Craft* found that the husband's entire ownership in the business was his separate property and was not marital property. The Supreme Court affirmed the Chancellor's decision that the husband's ownership in the business was separate property.

Patricia's argument is completely different from the issue in *Craft*. Here, there is no dispute that seventy-five percent of NMP was marital property. No portion of the business in *Craft* was marital. In this case, Patricia claims that by combining the marital interest in NMP with Walter's separate interest, the separate portion was commingled and became marital property. The *Craft* decision had nothing to do with such a claim.

Similarly, Walter cites other cases which had absolutely nothing to do with the doctrine of commingling and disingenuously claims that Patricia's argument would require their wholesale reversal. The decision in *Waring v. Waring*, 722 So. 2d 723 (Miss. Ct. App. 1998), just like *Craft*, dealt with an entirely pre-marital interest in a closely-held business. Commingling marital and separate property was not at issue in *Waring*. Moreover, the Supreme Court subsequently reversed the decision which Walter cites in *Waring*. *See Waring v. Waring*, 747 So. 2d 252 (Miss. 1999). Similarly, Walter grossly mischaracterizes the decision in *Barnett v. Barnett*, 908 So. 2d 833, 839 (Miss. Ct. App. 2005). The only discussion of the doctrine of commingling in *Barnett* strongly cuts in Patricia's favor. The *Barnett* Court stated:

> On cross-appeal Bard asserts that the chancellor committed abuse of discretion in classifying a certain Raymond James investment account, in the amount of $2,502.98, as a marital asset and in considering it in the equitable distribution of property. Bard testified that he closed his mother's investment account with Prudential in the amount of $ 4,736.39 and opened the Raymond James account the next day for the same amount in his name. He stated that while the money belonged to his mother, the account was in his name "to get it out of my mother's name . . . because she had no money and we were considering trying to get her on medicaid." On cross examination, however, Bard admitted that he co-mingled the money from "his mother's" account with his own. . . . The person claiming that an asset is non-marital has the burden of demonstrating the assets to be non-marital. We find that the chancellor did not abuse his discretion in finding that the Raymond James account was a marital asset since Bard's name was the only name on the account, the statement was mailed to his post office box, and he admitted to co-mingling the assets with his own during the marriage.

Id. at 840-41. (internal citation omitted).

Contrary to Walter's urgings, a finding that Walter's pre-marital interest in NMP was commingled and became marital property in this case is wholly consistent with the cases Walter cites and with well-established Mississippi law.

Walter's Brief largely ignores the fact that one hundred percent of the shares of NMP, including the shares he now claims to have been his separate property, were titled in his and

Patricia's name jointly in 1996. Patricia executed an agreement to convey her interest in the stock back to Walter upon his request, and agreeing that her joint ownership would not give her any greater interest in NMP "than she would otherwise have." Notably, the record shows that Walter *never* requested Patricia to re-convey the stock. Moreover, nowhere does the agreement indicate either Party's intent that the stock ownership not be commingled and considered marital property. If this had been Walter's intent, as he now claims, the Agreement would have said so. Indeed, the Parties had treated NMP as a marital asset before 1996. The property had already been commingled and converted to marital property under Mississippi law.

As even Walter's Brief notes, a business's appreciation in value during the marriage due to the active efforts of a spouse is a marital asset. *A & L, Inc. v. Grantham*, 747 So. 2d 832, 839 (Miss. 1999). Thus, it is beyond dispute that the accretion of value in NMP after the 1981 marriage was marital.[1] Of course, "[c]ommingled property is a combination of marital and non-marital property which loses its status as non-marital as a result." *Maslowski v. Maslowski,* 655 So. 2d 18, 20 (Miss. 1995). In this case, despite Walter's arguments, the fact remains that Walter's pre-marital twenty-five percent interest was combined with both the marital seventy-five percent interest and the marital accretion in value of NMP for a period of decades. Of course, there would not have been such appreciation in value, and wealth enjoyed by the Parties, without the marital seventy-five percent interest. Thus, Walter's pre-marital interest was manifestly commingled with marital property, was not segregated and was used for the benefit of the marriage such that it lost its status as separate property.

The Trial Court erred in concluding that twenty-five percent of NMP could retain its identity as separate property when it had been commingled with all of the remaining ownership

[1] This fact is also crucial as to Patricia's argument that she was deprived of this accretion since the Chancellor valued Walter's claimed separate interest as of June 30, 2004, rather than the date of the marriage. *See* Reply Argument II, *infra*.

and appreciation in the Company, which were marital assets. Accordingly, the Trial Court's decision should be reversed.

REPLY ARGUMENT II.

IF WALTER'S PRE-MARITAL INTEREST IN NMP WAS SEPARATE PROPERTY, THE APPRECIATION IN THE INTEREST DURING THE MARRIAGE WAS MARITAL.

In one breath Walter's Brief correctly states that accretion in the value of a business during the marriage "may be a marital asset." (Brf. of Appellee at 11). However, in another breath Walter ostensibly claims that the appreciation in his twenty-five percent pre-marital interest in NMP throughout the marriage is his separate property. (See Brf. of Appellee at 13). Walter cannot have it both ways.

Well-established Mississippi law, including the cases cited by Walter, exhibits that even if Walter's twenty-five percent interest in NMP were separate its increase in value during the marriage was marital property. Despite this, the Trial Court held that the **appreciated value** of the twenty-five percent interest was Walter's separate property. The Court thus deprived Patricia of the appreciation in Walter's twenty-five percent interest which had occurred since 1981. This was clear error.

It must be remembered that the party who asserts that a pre-marital ownership position in a business is separate property bears the burden of proving the non-marital character of the company. *Grantham*, 747 So. 2d 839. Further, the Party with the burden must establish the value of the asset as separate property. *Id.* Thus, where a business's worth is increased by a spouse's efforts during the marriage, its appreciation is a marital asset, and the spouse claiming a separate interest must prove the value of the business **at the time of the marriage**. *Id.* The *Grantham* Court stated:

> Where, as here, there is a suggestion that the net equity in the assets may have increased due to the spouse/owner's efforts, as opposed to enhanced value passively acquired, there must be a showing such as would allow the chancellor to separate the former, a marital asset, from the latter, a non-marital asset.

Id. Further, as noted previously, Professor Deborah Bell's treatise echoes this logic noting that "[a] premarital business which appreciated during the marriage through a spouse's efforts must be valued at the date of marriage as well as at the time of trial." DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW § 6.07 (1st ed. 2005).

Walter concedes in his Brief that his efforts caused the appreciation in NMP during the marriage. Walter's Brief states that "NMP is what it is because of Walter." (Brf. of Appellee at 4). Walter claims that "[w]ithout Walter there would be no business." (*Id.*). Walter notes that since the business was highly specialized and "had only three main customers, Walter's personal relationship with these customers was of the utmost importance." (*Id.*). Walter, of course, downplays Patricia's role in fostering and developing these business relationships, and her hosting and socializing with customers during the marriage. (*See* T. Vol. 3, p. 248).

Since, as Walter concedes, his efforts were the driving force behind the success of NMP, there is no question that the appreciation in value in NMP since 1981 was a marital asset. Thus, just as Professor Bell explains in her treatise, Walter's separate interest in NMP (if any) should have been valued as of the date of the marriage (1981), since the subsequent appreciation in this interest was unquestionably marital. Under *Grantham*, Walter bore the burden of proving the separate value of NMP as of 1981. Walter failed to present evidence to meet his burden.

Walter's Brief fails to cite any authority standing for the proposition that the appreciation in value of property during a marriage can be separate property where a spouse's efforts caused the appreciation.[2] That is because there is no such authority.

The Trial Court effectively ruled that the appreciation in twenty-five percent of NMP for 23 years of marriage was Walter's separate property, even though the appreciation was brought about by Walter's active efforts during the marriage. This ruling is completely inconsistent with *Grantham*. Accordingly, the Trial Court's decision in this regard should be reversed.

REPLY ARGUMENT III.

THE COURT ERRED IN VALUING NMP AS OF THE DATE OF THE TEMPORARY ORDER, RATHER THAN THE DATE OF THE DIVORCE.

Walter's Brief simply argues the basic rule that the entry of a temporary support order generally serves the same purpose as a separate maintenance order, and property acquired after the temporary order is separate property of the acquiring spouse. *See, e.g., Pittman v. Pittman*, 791 So. 2d 857, 864 (Miss. Ct. App. 2001); *Godwin v. Godwin*, 758 So. 2d 384, 386 (Miss. 1999). Patricia concedes this truism.

However, contrary to Walter's urging, *Pittman* does not resolve the issue of the appreciation in a going concern, which is marital property, after the entry of a temporary support order. The *Pittman* Court dealt with post-support order earnings deposited into a bank account. The *Pittman* Court held that the trial court correctly found the funds to be separate based on *Godwin*.

The issue here is different. Here, NMP appreciated over $2 million between the time the temporary order was entered and the time of trial. The Chancery Court allowed Walter all of this

[2] Walter's Brief quizzically refers to Patricia as a "non-titled spouse" in this section of its argument. (Brf. of Appellee at 15). Walter is wrong. All of the shares of NMP were titled in titled in the name "Walter Fleishhacker and Patricia Fleishhacker, as joint tenants with right of survivorship" in 1996. (Exhibits Vol. 1, Exs. 18-19).

remarkable appreciation, since it occurred after the entry of a temporary order in this case. While Walter was in control of the business during the time period after the temporary order and before trial, Patricia still owned the stock jointly with Walter. The company was a marital asset.

Allowing Walter the entire benefit of the $2 million appreciation is inequitable, and is not compelled by *Pittman* or *Goodman*. Rather, the result should be as explained in *Heigle*. *Heigle v. Heigle*, 771 So. 2d 341, 353 (Miss. 2000). (Banks, J., concurring in part and dissenting in part). As explained in Justice Banks' opinion in *Heigle*, as well as by Professor Bell, it is clearly unfair for the spouse in possession to reap all of the benefits of appreciation in a marital asset prior to trial where the appreciation is caused by outside portions such as market forces.[3] *Heigle*, 771 So. 2d at 353; *See also* BELL, *supra*, § 6.02(3)(b). As mentioned in Patricia's opening Brief, there was much evidence before the Trial Court that some of the marked appreciation during this time period was attributable to economic forces in the scrap metal industry since market fluctuations play a significant role in the value of this business. The Trial Court should have determined how much appreciation after the entry of the temporary order was attributable to Walter's efforts, and how much was caused by external forces.

Patricia contends that this Court should hold that the appreciation in value of a marital going concern after the entry of a temporary order, but before trial, constitutes a marital asset subject to equitable division. Any other result is inequitable, especially to the extent the appreciation in value is due to external sources such as market growth. To allow the spouse in possession of the marital asset to keep all appreciation of the asset produces an unfair windfall.

[3] As noted previously, Walter claimed that his own efforts were largely responsible for some of the increases in NMP's value. However, testimony from both expert valuators established that market factors also played a role. At a minimum, at least some of the phenomenal appreciation in NMP from June 2004 to October 2006 was based on market factors.

Accordingly, the Court should reverse the Trial Court's decision, and find that the appreciation of NMP after the entry of the temporary order constituted marital property.

REPLY ARGUMENT IV.

THE COURT ERRED IN IGNORING THE DEBT WALTER OWED TO NMP IN DETERMINING THE VALUE OF NMP.

Walter claims the Trial Court was correct in disregarding significant debt which he owed to NMP since "he owned the company." (Appellee's Brief at 19).

First of all, Walter's statement is simply wrong. He and Patricia owned the company. The stock was in the name of both Parties with rights of survivorship. The majority ownership in NMP was a marital asset, not Walter's separate property.

Next, Walter's Brief fails to cite a single authority in support of his argument that his debt to NMP is properly ignored in valuing the company. (Brf. of Appellee at 19-22). Therefore, Walter's argument is not properly before the Court. *TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So. 2d 991, 1008 (Miss. 1997) (stating that "claims with no citation in support are not to be considered as they are not properly before the Court.") (citing *Gerrard v. State*, 619 So. 2d 212, 216 (Miss. 1993)). Accordingly, Walter's argument should not be considered.

However, even if Walter's argument were considered, it is unconvincing. Walter simply argues that he borrowed some unknown amount of the subject funds (but not all) during the marriage for marital purposes. (*See* T. Vol. 2, p. 61). There was, of course, testimony that much of the loans were used to pay personal gambling debts. (T. Vol. 2, p. 46). The evidence at trial proved, and the Trial Court noted, that while Patricia accompanied Walter on gambling trips, her gambling paled in comparison to Walter's. (*See* T. Vol. 3, p. 249).

In any event Walter testified that the advances he took from NMP were ***loans*** which he fully intended to repay. Walter testified as follows:

> Q: Okay. Let me ask you this. We've established that you from time to time draw large amounts of money – you withdraw large amounts of money from the company for your own personal use. Are you saying those are not dividends?
>
> A: They're absolutely not dividends. They're a debt that I have to Northeast Metal. And as you cited earlier, I took care of my mother with those funds, lent money to my brother. Some of those funds were used for expansion of the home in Belden. Some of those funds were used to pay Patricia's gambling debts as well as mine. Some of those funds were used to reduce a note that she had by $140,000. And at that time, I had no problem in providing that. I never asked for a promissory note, but I had the ability to borrow funds from my company, but I never, ever put my company at risk with those borrowed funds.

(T. Vol. 2, p. 60-61).

Walter next implies that his debt to NMP would not have an effect on the value. This is untrue. As of June 30, 2004, NMP's books indicated that Walter owed a balance of $1,080,292 to the company. (T. Vol. 3, p. 158). If Walter's indebtedness were considered, NMP's fair market value would be $3.4 million as of June 30, 2004. (*Id.*). If Walter's indebtedness were not considered, NMP's value was $2,325,000. (*Id.*). Walter's indebtedness increases the value of the company as a legitimate account receivable.

Despite Walter's arguments, the fact remains that under Mississippi law NMP had a wholly separate legal identity from Walter. *See, e.g., Buchanan v. Ameristar Casino Vicksburg, Inc.*, 957 So. 2d 969, 977 (Miss. 2007). It is fundamental that NMP's legitimate accounts receivable should have been considered in computing the company's value. *Goodson v. Goodson*, 910 So. 2d 35, 37 (Miss. Ct. App. 2005). It is of no moment that the indebtedness was owed to the corporation by one of the two shareholders.

There is no legal basis for ignoring debts which Walter admitted were legitimately owed to NMP. The Trial Court erred in completely disregarding the debts in valuing the business. Thus, the Trial Court's decision should be reversed.

REPLY ARGUMENT V.

THE COURT ERRED IN DETERMINING THAT PATRICIA'S JEWELRY WAS MARITAL PROPERTY.

The Trial Court ruled completely contrary to *Oswalt v. Oswalt*, 981 So. 2d 993, 999 (Miss. Ct. App. 2007) in finding that inter-spousal gifts of jewelry were not Patricia's separate property. As explained in Patricia's principal Brief, it is indisputable that the gifted jewelry should have been held to be Patricia's separate property under Mississippi law.

Walter's only argument is that Patricia did not have a listing of her jewelry "such that would bring it within the provisions of the *Oswalt* . . . case." (Brf. of Appellee at 23). Of course, *Oswalt* held no such thing. *Oswalt*, applying *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994) simply held that inter-spousal gifts of a personal nature, such as jewelry, are separate property of the donee spouse. *Oswalt*, 981 So. 2d 999.

Despite Walter's ample attempts to obfuscate the issue, the testimony established that Patricia had jewelry valued at $35,000, and that all of the jewelry had been gifts to her from Walter. (*See, e.g.*, T. Vol. 4, p. 439). The Trial Court expressly found this to be a fact. (*Id.*). Walter can offer no way to distinguish this case from the rule explained in *Ferguson*, and applied to these exact facts in *Oswalt*, since there is none. The jewelry was manifestly Patricia's separate property.

The Trial Court erred in finding that Patricia's jewelry, given to her by Walter, was marital property.

REPLY ARGUMENT VI.

THIS CASE SHOULD BE REMANDED FOR VALUATION OF THE OLD WAVERLY CLUB AND CAMERON CLUB MEMBERSHIPS.

Walter does not dispute that the Old Waverly Club and Cameron Club Memberships were marital property and that the Trial Court made no disposition of these items. Walter claims that, while Patricia listed the assets on her 8.05 statement, neither Party introduced evidence of the value of the property.

Walter is correct in this regard. There was no evidence before the Trial Court as to the value of these assets. The Trial Court did not classify, value or distribute these related assets. However, Walter has obtained *de facto* ownership of these assets, since he was awarded the Old Waverly property by the Chancellor.

This Court addressed a similar situation, where the Parties failed to introduce evidence as to the value of marital property, in *White v. White*, 868 So. 2d 1054, 1057 (Miss. Ct. App. 2004). In *White*, the Trial Court did not classify or distribute a National Guard retirement account because of the absence of any proof of value. *White*, 868 So. 2d at 1057. This Court reversed and remanded for a determination of value, reasoning as follows:

> In this issue, Deborah claims that Douglas' National Guard retirement should have been included as a marital asset in the chancellor's *Ferguson* analysis and, therefore, distributed equitably. In his ruling, the chancellor stated, "I do not recall any proof in the record or how many years he's been in the Guard or what the retirement, if any, is . . . . I don't think with the state of the record, I can make a ruling on that because there's nothing here." The chancellor further reiterated this, saying, "I don't have any idea how many years . . . of overlapping marriage and guard time there is, how many year's he's got to retire if indeed he can retire. I have no idea of those figures." According to one of Douglas' exhibits, he had been in the National Guard for twenty-four years at the time of the trial.
>
> Douglas argues that there was no evidence in the record concerning the retirement and that, since Deborah did not offer any proof on the issue or cross-examine Douglas about the retirement, the chancellor was correct in not classifying and distributing the retirement. ***Although that may be true, we find***

> ***that it was incumbent upon Douglas to provide proof when submitting his financial disclosure form. Furthermore, we find that it was error for the chancellor not to request said information from Douglas before equitably dividing the parties' assets. It seems inequitable for Douglas to receive a benefit, the bulk of which was clearly accumulated during the marriage, and for Deborah to receive no benefit. We reverse and remand for further findings on this issue.***

Id. (emphasis added).

This case should be decided just as was *White*. The Trial Court erred in not classifying the Old Waverly and Cameron Club Memberships since the assets were identified on Patricia's 8.05 Statement. The Court should remand this case to the Trial Court for classification, valuation and distribution of these assets.

CONCLUSION

For the above and foregoing reasons, Appellant requests the Court to reverse the Trial Court's decision and to remand this case for further proceedings.

RESPECTFULLY SUBMITTED, this the 21st day of October, 2008.

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CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Reply Brief of Appellant** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

John Ferrell, Esq.
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Hon. Talmadge Littlejohn
Chancellor
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New Albany, MS 38652

This the 21st day of October, 2008.

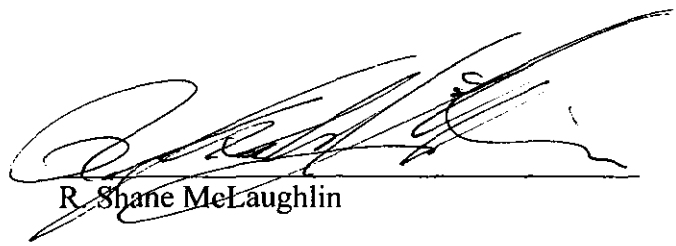
R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Reply Brief of Appellant** by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

Ms. Betty W. Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, MS 38295-0248

This, the 21st day of October, 2008.



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