IN THE MISSISSIPPI SUPREME COURT

BRUCE H. PENTON **APPELLANT**

VERSUS **NO. 2007-CA-02046**

CAROL ANNETTE PENTON **APPELLEE**

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 judges of the Mississippi Supreme Court and the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

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   Appellant

2. Carol Annette Penton
   Appellee

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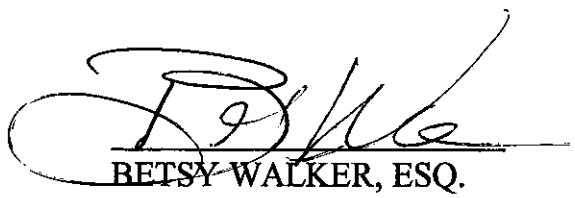

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5. The Chancellor erred when he awarded Mrs. Penton all of the personal property she set out in the exhibits for unlisted numbers, and did not award Mr. Penton all of the personal property that was used by him in B&B construction (the backhoe/.dirt business)

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SUMMARY O F THE ARGUMENT

The essence of Mr. Penton's appeal to this Court centers around the manner in which the Chancellor divided the martial estate and the manner it which it determined the value to give each parties' entitlement to the marital property . Mr. Penton also takes issue as to who was awarded what principle assets. Mr. Penton also takes issue with the inconsistently applied criteria and mechanisms the Chancellor use to distribute each parties' portion of the marital property. The Chancellor did not follow the Ferguson Factors and seemed to disregard factors 6, 7, and 8 .

In so doing Mr. Penton argues that the Chancellor only looked at the appraised value of the marital assets and completely ignored the income of the businesses as a factor in determining value and distribution. The Chancellor also did not take into account the the income that Mrs. Penton might have had from other sources, and if it did take that into account it was not apparent enough.

Mr. Penton also argues that the Chancellor granted Mrs. Penton certain credits and thereby raising the value she received from the marital estate and deducted certain value from Mr. Penton's portion of the marital estate thereby lowing the value that he was to

receive. Mr. Penton argued that based on the totality of the circumstances and all the facts in the transcript, record, and exhibits of the Trial Court, the Chancellor 's manner of choosing particular deductions and credits was arbitrary and unfair. Mr. Penton argues that the Court should have used a uniform criteria when dealing with these various deductions and credits to and from the marital estate especially in light of the fact that the Chancellor himself itself found that an accounting in this situation would be impossible and not necessary and that both parties did things post-separation with the marital assets that were wrong.

Therefore, the Chancellor should have either deducted every single thing (value) which each party alleged the other party had taken or the parties admitted they had taken pre and post separation from the marital assets or found that it was impossible to determine fairly and taken nothing from either parties' marital value.

Mr. Penton would argue that although the Court did award Mr. Penton his business formerly known as B & B Construction and some assets it awarded Mrs. Penton her business, Unlimited Numbers, and awarded her all of her assets involved in the business. Mr. Penton believes that this was in arbitrary and unfair.

Additionally the Chancellor did not give any weight to the debt that remained on the assets which were to be distributed. He saw the debt saw as possible deduction in the value only and did not factor in the debt and income ratio that would exist with each asset in determining the who should be awarded what asset. As already pointed out, the Court also did not look at the income of each business and what they would possibly be

producing along with each parties individual income to determine which assets should be awarded to which party.

Finally, the Chancellor choose ,without any discussion, or any alternative, found in the record, to order the marital residence valued at $214,000.00, sold at a judicial sale on the Courthouse steps.

Mr. Penton would argue that the method the Chancellor chose to dispose of the marital residence was a harsh and that there were many other less harsh and punitive ways upon which the property could have been sold. The Chancellor should have ordered these methods first before resorting to the Judicial sale on the Courthouse steps. Mr. Penton's arguments as stated above primarily concern the fairness of the values and the manner in which the Court applied the criteria to the division which in many instances made the division arbitrary and unfair.

STATEMENT OF THE CASE AND THE PROCEEDING BELOW

Bruce H. Penton and Carol Annette Penton were married on July 13, 1980 in Pearl River County, Mississippi. They separated on November 24, 2004 in Pearl River County. (R. pgs. 4-5) That there were three children born to this marriage, namely, Bruce H. Penton, II, Crystal Darlene Penton, and Sarah Anne Penton, but at the time of the divorce, hearing none of the children were minors. (R. pg. 5)

The parties had a long term marriage and they had acquired numerous assets. In fact the Chancellor commented during in the Judgement that if the parties had stated

together in harmony that as far as their financial picture, the sky would have been the limit (R.pg. 103, 567)

Bruce H. Penton, Appellant, hereinafter referred to as "Bruce or Mr. Penton", filed for Divorce on January 18, 2005. In his Complaint he asked for a divorce on the grounds of Habitual Cruel and Inhuman Treatment as set forth in Section 93-5-1 et seq., Mississippi Code of 1972 as amended, or on the grounds of Irreconcilable Differences as set forth in Section 93-5-1 et seq., Mississippi Code of 1972, as amended. (R. pg 5)

Mr. Penton stated in his Complaint for Divorce that the separation of the parties was a direct and proximate cause of the conduct of the Defendant (R. pg 5)

Mr. Penton, stated in his Complaint that, during the marriage, the parties had acquired various assets and liabilities, and he asked that the Court should equitably divide these assets and liabilities and that Court should make any other orders necessary to effect such division. (R. pg. 5)

On April 20, 2005, Carol Annette Penton, the Defendant, filed her Answer to the Complaint for Divorce and Counterclaim. (R. pgs. 12-19)

Carol Annette Penton, Appellee, hereinafter referred to as "Carol Penton or Mrs. Penton "denied the date of separation or that the separation of the parties was the direct result of her conduct and instead alleged in her Counterclaim that the cause of the separation of the parties belonged to the Bruce Penton. Mrs. Penton denied Mr. Penton grounds for divorce, and denied that there should be an equitable distribution of the marital assets. (R pg. 13)

Carol Annette Penton filed a Counterclaim. (R. pgs. 13-19) . She alleged that the parties were separated on November 21, 2004, and that they have not lived together since that time. Defendant, Carol Annette Penton, also claimed that on November 24, 2004, the Plaintiff and not the Defendant left without just cause. Defendant/Counter-plaintiff also asserted that there were three children born of the marriage, but, as stated earlier, they were all adults at the time of the Trial on the merits. (R. pg. 14)

Mrs. Penton asked the Court to grant her use and occupancy of the marital home and furnishings and asked that the Court order the Bruce Penton to pay the note, taxes, and insurance on same. She also asked that the Court direct the Mr. Penton to pay alimony . (R. pgs. 15-16)

Mrs. Penton, in her Counterclaim, asked that Bruce Penton be required to pay all outstanding debts incurred during the marriage and to keep them current and to hold her harmless thereon. She also asked that Mr. Penton be ordered to pay all attorney's fees and costs of the proceeding. Mrs. Penton wanted Mr. Penton to be required to provide medical and dental insurance for her and that he be required to pay all medical, dental, eye care and drug bills not covered by insurance. (R. pg. 16)

In addition, Mrs. Penton requested that there be an injunction placed on the parties and that no assets at any time should be dispersed or transferred until the matter could be heard on the merits and that the indispensable and necessary parties that should be joined in this proceeding were B&B Construction Company, LLC, Crystal Clean Car Care, LLC, and Pine Haven Mobile Home Park, LLC. (R. pg. 22) She further stated that

the parties were equal owners of certain corporations and that she desired that all assets be liquidated and the moneys derived therefrom be deposited with the Chancery Clerk of Pearl River County, Mississippi, for disposition at a later date. (R. pg. 24)

On October 13, 2005, Carol Annette Penton, filed a Motion to Join Indispensable and Necessary Parties . (R. p. 22) In the Motion she stated that during the marriage the parties had acquired certain assets and converted said assets into the following corporation: B&B Construction Company, LLC; Crystal Clean Car Care, LLC, and Pine Haven Mobile Home Park, LLC . In her Motion she avers that the above corporations are necessary and indispensable parties to this proceeding and should be joined. Mrs. Penton stated that she and Mr. Penton were equal owners and shareholders in said corporations and that all of their assets should be liquidated and the moneys derived therefrom be deposited with the Chancery Clerk for later disposition. (R. p. 22).

That it would appear from the Record that no Order was entered joining any of the parties set out in Carol Annette Penton's Motion to Join Indispensable and Necessary Parties.

Discovery was filed by Bruce H. Penton on November 3,2005. (R pg. 26)

An Order was entered on July 20, 2006, appointing Colette A. Oldmixon Special Master It is interesting to note, that there is no Order of July 20, 2006, in the Record, however it is contained in one of the Exhibits. The July 20, 2006, was essentially the same as the September 5, 2006, Order which is set out below. .

On September 5, 2006, the Court entered an Order stating that the Special Master

sought a clarification of the Order entered by this Court on July 20, 2006. That there appears to be no Order of July 20, 2006, in the record. However, there is some recitations in the September 5, 2006, Order which states that the July 20, 2006, Order gave Colette A. Oldmixon, the Special Master, authority to obtain appraisals on all the assets, both real and personal, of the parties as she deems necessary and to retain the services of a realtor, accountant and/or surveyor; and to have access to any and all financial records, business records, banking records, expense and income information, tax returns, both federal and state, contracts, equipment, investment records, portfolios, tenants, creditors, debtors, insurance policies, insurance claims, insurance proceeds and that the parties each should maintain insurance and pay taxes on the property and businesses until such time as they are sold and to effect any and all necessary repairs to the properties. (R. pg. 28) The Order of September 5, 2006, found that the parties shall cooperate and confer with the Special Master in producing materials, records, papers, documentation and information, all of which the Special Master would need to comply with the mandate of this Court set out on the Order of July 20, 2006. (R pg. 28-29) The parties were also directed to sign any and all authorizations to allow the Special Master to make inquiry of banking and financial institutions, insurance companies, employers and any and all other persons/entities with knowledge of the parties' assets, debts, liabilities and obligations.

That the parties shall deliver keys to the real properties to the Special Master so that she may have access to the properties of the parties for the purpose of inspection,

appraisals, and the showing of any all properties for sale. (R. pg. 29) The Special Master was given authority to pay for all appraisals, surveys, accountants, and related expenses and to open an interest bearing checking account at First National Bank of Picayune in which she was to deposit any and all rental proceeds, business proceeds, sale proceeds and other moneys received pursuant to the directive of the July 20, 2006, Order and from which all disbursements shall be made in payment of any and all debts, liabilities and obligations associated with the parties assets. (R. pg. 29)

Finally, the Special Master was given authority, in connection with the businesses and the rental properties, to file suit and/or take other legal action/recourse as may be necessary to protect said businesses and rental properties until such time as the properties are sold. (R. pgs.. 29-30)

That the Special Master issued numerous Subpoena Duces Tecums to Banks and financial institutions, requesting records concerning the parties and all of the businesses they were involved in, in any way. (R. pgs 31-44)

On April 19, 2007, Carol Penton filed a Motion for Contempt and Accounting, asking that Bruce Penton be held in contempt and alleged that he had disposed of certain assets and had not given an accounting for the business know as B&B Construction. Mrs. Penton also alleged that Bruce Penton had not given an accounting of rental income from the marital residence. (R p. 50-51)

Interestingly, the Special Master followed up with a letter in the record dated May 8, 2007 requesting that Bruce Penton provide information and documentation on the

items Mrs. Penton's listed in her Motion for Contempt and other information divided into the needed information into nine categories

A hearing was held on this matter on May 23, 2007, on Defendant Motion for Contempt and Accounting and addressed not only the issues Defendant raised as to documentation and information, but all of the issues and concerns of the Special Master listed in her May 8, 2007 , letter in the record. (R. p. 67)

The Order stated that, in addition to ordering Mr. Penton to provide certain information and documentation, Mr. Penton should, by June 1st , provide answers and documents to prior requests by the Special Master . Should the Special Master have any additional questions as to the information provided by Mr. Penton, then these questions should also be responded to by June 1, 2007, so long as the questions from the Special Master are provided to the Plaintiff in sufficient time for the Plaintiff and his Counsel to prepare responses by June 1, 2007. (R. p. 68)

The Order also set out certain directions to the parties, concerning their purchase of real property from the "martial estate", and granted the Special Master the power to sell the real properties not closed on as agreed, without any notice to either party. Further the Court ordered Mr. Penton to provide the list of real properties he desired to purchase from the marital estate by June 1, 2007. The one acre located on Old Highway 26 was excluded as the Defendant had already notified the Special Master of her intent to purchase that property (R. p. 67-68)

The Plaintiff, Mr. Penton, responded to all of the requests for information and

documents, and these responses and documentation are contained in Exhibit " 3" of the Record. There is another packet of information provided on June 1, 2007, to the Special Master by Plaintiff's Counsel which is very germane to this matter, and was contained in the Exhibits provided to the Court and Court reporter as part of the Record on appeals , but does not appear to be marked. It is Mr. Penton's 8.1 financial affidavit, his personal income tax returns for 2006 , his business tax returns, his asset list for B& B Construction ,which apparently was no longer B&B construction as it had been dissolved at the end of 2004, and his list of concerns about things he felt Mrs Penton had done with some of the marital property beginning right before the separation of the parties through June 1, 2007.(Exhibit 3)

That on July 25, 2007, a hearing was held on the Motion of the Special Master regarding her report filed on or about June, 27, 2007. The Order stated that the Special Master had filed her report, which included numerous detailed exhibits and an affidavit. Exhibit O of the Special Master's report, detailed her time, activities and out of pocket expenses. The Court found that the Special Master was entitled to a fee in the sum total of Ten thousand dollars ($10,000.00) and was to be reimbursed for out of pocket expenses in the sum of One thousand, one hundred, fifty- five dollars and three cents ($1,155.03). The Court further found that the Master's report should be accepted, and Ms. Oldmixon should be relieved of any further obligation. However, the Special Master was directed to be available to testify and otherwise assist the Court at the trial on the merits of this matter. (R. pgs. 72-73)

Further, in this Order the trial was set on the merits for September 11, 2007, at 9:00 a.m. in Poplarville, MS. (R. p 73)

That all funds left, after the Special Master paid her fees and reimbursed herself for expenses, were found to be the sum of Forty five dollars ($45.00) and were deposited in the Master's account and were to be deposited into the Court registry on July 25, 2007.

On September 11, 2007, the Trial was held. The parties agreed to proceed on a divorce on the grounds of Irreconcilable Differences and a Motion to Withdraw Fault Grounds, an Order Dismissing Fault Grounds was entered into the Court Record and filed. (R. pgs. 79-82)

In addition, Bruce Penton's Financial Affidavit and full income tax returns for 2006 were filed in the record. (R. pgs. 83-102)

The trial lasted a day and the Master's Report was accepted by the Court.

The Judgment of Divorce was handed down by Judge James H. C. Thomas on the 27th day of September, 2007. The Court found that there were no issues involving custody or child support as all the children were over the age of twenty one (21). The Judgment went on to cite that Colette Oldmixon had been appointed as Special Master to inventory, value and manage the marital assets of the parties which consisted of several investments, interests in real property, personal property and ongoing business interests. Her report was entered into the record as Exhibit 1 and consisted of a composite of her total work and documentation.

The Court found that the martial assets of the parties consisted of the following:

1. One acre of land in Poplarville, Mississippi valued at Eight thousand four hundred dollars ($8,400.00)

2. Homestead at 458 White Chapel Road with a house valued at $214,000.00 with two mortgages totaling 99, 593.75 with equity of 114,406.25.

3. Crystal Clean Car Care, LLC. appraised value of 331,640.00 with an indebtedness of $113,227.41 to Hancock Bank allowing for the indebtedness to Hancock Bank which gave the car wash an equitable value of $218,412.59.

4. Pine Haven Mobile Home Park, in Carriere, Mississippi. This was a trailer park on which eleven trailers sat on 21.5 acres of real property jointly owned by the parties located with no indebtedness on the property at all. The appraised value of that piece of property was $264,500.00.

5. The home at 41 Minnie Penton Road was determined to be heirs' property and was not marital.

The Court listed nine items which were discussed in detail in the arguments. In the items of personalty the Court also listed Super Sara's Snowball, LLC, which the Court said was owned by the daughter, Crystal Penton; B& B Construction with numerous items of equipment itemized by the Special Master as Exhibit E. The Court found that this business whether or not it was still called B&B , at this time, was the Defendant's source of income and livelihood. Further, that Unlimited Numbers, a tax preparation business, operated as a sole proprietorship by Defendant, with numerous items of equipment as itemized by the Special Master as Exhibit F, was a source of

income for the Defendant. The Court found as per the Special Master's Report that there were other items of concern , being the actions of the parties in handling the joint fund after the separation. The Court found that the Special Master reported that Mr. Penton took seven thousand dollars ($7,000.00) in cash from the home of the parties and two thousand five hundred ($2,500.00) from a credit line account, totaling $9,500.00. The Court found that Mrs. Penton took Five thousand dollars in cash and sold items of joint property totaling $7,100.00. The Court also found that Mr. Penton had transferred a balance of ten thousand nine hundred dollars ($10,900.00) from two Chase credit cards to the Bank of America card in the Defendant's name. Finally, the Court found that Mr. Penton had received, but left unaccounted for, rental income of twelve thousand one hundred dollars ($12,100.00) from White Chapel Road joint property, following the separation.. Exhibit K. (R. p 106)

The Court found that the real property located at 214 Haugh Street was sold by the Special Master realizing proceeds of $20,338.84 to each party. The Court went on to find that Mrs. Penton had managed the trailer park property and utilized insurance monies as outlined in Exhibit L of the Special Master's report. The Special Master received funds from Allstate Insurance Company proceeds which were allocated and spent as detailed in Exhibit M. of her report. (R. p 106)

The Court found from examining the financial declarations of each party that Mr. Penton was primarily engaged in activities with B & B Construction as his source of income, making about $1,800.00 per month, and Mrs. Penton operated Unlimited

Numbers, her tax service business, with an annual income of $21,000.00. The Court also mentioned other income including rental incomes from the trailer park , and other matters. The Court found that both parties failed to accurately report to each other, to the Special Master or to the Court their financial dealings post separation and all that was left was a convoluted financial scene for division between the Plaintiff and Defendant. The Court further found that the parties had manipulated joint use of accounts following their separation, Exhibit N of the Special Master's composite Exhibit. (R. p 106)

The Court therefore found that an accounting was not practical in view of the use each has made of the accounts and not required in making an equitable distribution of the properties.

Finally, the Court found that each operated financially independent from the other at this point in time.

The Court found that the martial properties of the parties consisted of the marital home, the one acre of land, the trailer park, and the carwash with a total equitable value of $635,718.00. Also found to be marital property were a variety of old vehicles, equipment of various description, and other items associated with the businesses established by the parties. The Court found that each party is then entitled to a value of $317.859.00 in marital assets, subject to their post separation use of marital assets described below.

The Court found that the items listed in a. through l. above are marital properties, together with the numerous items of personalty associated with the operations of the

businesses of the parties as detailed in the Special Master's report.

The Court, accordingly, found that each party was entitled to an equal portion of the total accumulation of property subject to adjustments for their activities in accessing martial assets during the period after their separation when they each surreptitiously accessed marital assets

The Court then went on to state its findings as to deductions from the martial estate for the parties. According to the Court, Mrs. Penton took cash and sold items totaling $7,100.00, for which the Plaintiff is owed an accounting. In turn, the Court found that Mr. Penton took $9,500.00, and received rents totaling $12,100.00 unaccounted for. He then went on to find that Mrs. Penton would have been entitled to one half the rent or $6,050.00 which brings Mr. Penton's total to $15,550.00. The Court then went on to find that Mrs. Penton was entitled to a credit for $10,900.00 because Mr. Penton transferred to her credit card account bill from joint credit card accounts which she has to pay. The Chancellor then went on to say that, considering Mrs. Penton's use of the $7,100.00, she is entitled to an offset against Mr. Penton's interest in the marital assets of $19,350.00 giving Mr. Penton a total interest of $298,239.00, and the Defendant an interest of $336,939.00.

The Court found that the distribution should be as follows: Mrs. Penton would be awarded the simple ownership of the Pine Haven Mobile Home Park with the trailers situated on same and the one acre of land in Popularville totaling a value of $272,900.00. That Mr. Penton was awarded the Carwash property with all personal items associated

thereto with equipment for a value of $218,412.00. Both parties were to assume all indebtedness on the their respective properties.

The Court went on to find that the homestead at 458 White Chapel Road shall be sold valued at $214,000.00. That after the debt and the expenses for the sale were deducted the Defendant was awarded the first $64,039.00 of the net sale proceeds , and the Plaintiff was awarded the balance . The Court then stated that this would round out the equitable distribution of the martial assets. (R. p 108)

Of the personal property items listed, a. through l. above, Mrs. Penton was awarded ownership of the 2002 Avalanche vehicle, Bo Penton was awarded the 1984 Mack truck, Crystal Penton, their daughter, was awarded the Winnebago and all items associated with Super Sara's Snowballs. Mr. Penton was awarded ownership of B & B Construction Company and all items of equipment associated therewith. Mrs. Penton was awarded ownership of Unlimited Numbers with all items of equipment associated therein. The 1994 KW W90 DS truck and other vehicles listed as i., above, were awarded to Mr. Penton. Finally, the Court found that each party is awarded all those items of personal property now in his or her possession. (R. p 108)

The Court found that the 1992 Harley Davidson motorcycle and the 1972 American Cam trailer were directed to be sold with the proceeds utilized to pay administrative costs of this Court action, including any unpaid costs of the Special Master and costs that the Clerk might encounter. The Court further found that the Clerk of this Court shall be directed to conduct the sale of the homestead property and the personalty

as provided for in a Sheriffs Sale in execution of judgments, Section 13-3-161 et. seq., Mississippi Code of 1972, as amended. Any funds remaining after the costs of the sale and payment to the Special Master shall be paid equally to the Plaintiff and the Defendant. No alimony was awarded, and the parties were to pay their own attorneys fees.

The Court finally found that the bonds of matrimony existing between the Plaintiff, Bruce H. Penton, and Defendant, Carol Annette Penton, are set aside and held for naught and the parties are divorced on the grounds of Irreconcilable Differences. (R. p 109)

On October 18, 2007, the Court entered an Order of Clarification in this matter. (R. p 110). In the Order for Clarification, the Court set out that the Judgment of Divorce was entered on September 17, 2008. That in addition to granting the divorce and dividing certain assets, the Court instructed the Chancery Clerk of Pearl River County, Mississippi, David Earl Johnson, to perform certain functions of the Court, pursuant to Section 13-31-61, Mississippi Code of 1972, Annotated. The Court then directed the Chancery Clerk of Pearl River County to conduct the sale of the marital homestead located at 458 White Chapel Road. The Court ordered that out of the sale price, less outstanding indebtedness, Carol Annette Penton is to be paid the first $64,039.00 and Bruce Penton is to receive the remaining balance, after again, outstanding indebtedness is paid and the cost of selling the martial home and the Clerk's fees if any. The Chancery Clerk of Pearl River County was then ordered to seize and to sell the 1992 Harley

Davidson motorcycle and the 1972 American Cam trailer, with the proceeds to be utilized as stated in the judgment. The Court authorized and ordered the Chancery Clerk of Pearl River County to execute any necessary documents to transfer title and ownership pursuant to this Judgment. (R. p 111)

On November 9, 2007, a Motion for Contempt was filed by Mrs. Penton stating that the 1972 American Cam trailer and the 1992 Harley Davidson motorcycle could not be seized. (R. p. 112) Although this would appear to be a post trial matter and not a subject of this appeal, the pleading were contained in the Record. The Notice of Appeal was filed on November 16, 2007. (R. p. 116-126)

Again, the pleading in the record may also be the subject of post trial motions which are presently not appealable. However, in the interest of the issues that have ensued and because these matters were contained in the record, Bruce Penton will mention that the sale was advertised in the paper as allowed by law to be sold on the 7th day of December, 2007, between the hours of 11:00 a.m. and 4:00 p.m. on the steps of the Pearl River County Courthouse in Poplarville, Mississippi. (R. p 127)

Finally in the record is contained a listing of the Report and Accounting of the Special Commissioner. Interestingly enough it sets out that cash received from the sale by the Special Commissioner for house and land was Six thousand dollars ($6,000.00) and was received on December 20, 2007. It does not state whether or not any of the indebtedness was paid on the marital home or what else might have ensued. Mr. Penton would state that these post trial matters have created some problems which we will

address briefly in this appeal and Appellant pursues same at the trial Court level

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ARGUEMENT

I. GENERAL STANDARD OF REVIEW

The Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous, or applied an erroneous legal standard. ***Flechas v. Flechas,*** 791 So.2d 295, 299(¶ 7) (Miss.Ct.App.2001). The Court has repeatedly stated : "We are required to respect the chancellor's findings of fact that are supported by credible evidence and not manifestly wrong. ***Sandlin v. Sandlin,*** 699 So.2d 1198, 1203 (Miss.1997). Nonetheless, if manifest error is present or a legal standard is misapplied, this Court will not hesitate to reverse. ***Tilley v. Tilley***, 610 So.2d 348, 351 (Miss.1992).

II. THE CHANCELLOR ERRED IN HIS EQUITABLE DISTRIBUTION OF THE MARITAL PROPERTY GENERALLY

A. FERGUSON GENERALLY:

Before the Court can equitably distribute the marital property, it must first determine what property is marital and what property is non- marital.

> For purposes of divorce proceedings, the marital estate consists of property acquired or accumulated by the parties during the course of the marriage. ***Hemsley v. Hemsley,*** 639 So.2d 909, 915 (Miss.1994). Marital property so defined is subject to equitable distribution at the time of divorce. ***Id.*** . . .. Assets which are attributable to one of the parties' separate estates prior to or outside the marriage is non-marital property and not subject to equitable division. ***Id.*** at 914.

Hankins v. Hankins, 866 So.2d 508, 511 (Miss.App. 2004)

In the Penton's, case the Court stated in the Judgement that the marital property consisted of the marital home located on White Chapel Road and valued at $214,000.00 with equity of $114,406.25; the one acre of land located in Poplarville Mississippi, valued at $8,200.00; Crystal Clean Car Wash, LLC, with an appraised value of $331,640.00 and an equitable value of $218,412.59; and Pine Haven Mobile Home Park with a value of $264,500.00 . The Court found that the total value of these four items was $635,718.00 (R. pg 107(571))

The Court then went on to find that there was other marital property which consisted of old vehicles, equipment of various descriptions, other items contained in the Judgement, and many items associated with the businesses established by the parties. (R pg 107 (571) Finally the Court found that the business headed by Mrs. Penton, Unlimited Numbers, and the business headed by Mr. Penton, formerly B&B Construction, were not valued. (R. 104)

The only property that was not considered as marital property by the Court was the real property and house at 41 Minnie Penton Road, in Carrerre, Mississippi. Mr Penton had inherited a 1/3 interest in that house and property from his mother, and the rest was inherited by Mr. Penton's other two siblings. Mr. Penton has no quarrel with that portion of the ruling. (R. p 104)

Once the property has been classified, the Court must then equitably distribute the marital property based upon the Ferguson factors.

The Mississippi Supreme Court has outlined and firmly established the factors to

be considered when dividing marital property. ***Ferguson, vs Ferguson***, 639 So.2d at 928. Those factors are:

> 1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:
>
> > a. Direct or indirect economic contribution to the acquisition of the property;
> > b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage; and
> > c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.
>
> 2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.
>
> 3. The market value and the emotional value of the assets subject to distribution.
>
> 4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;
>
> 5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution;
>
> 6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;
>
> 7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and,
>
> 8. Any other factor which in equity should be considered.

Ferguson, 639 So.2d at 928. ***McGee v. McGee***, 726 So.2d 1220, 1223-24 (Miss.Ct. App.

1988)

The Court ruling appears to have only considered Ferguson factors 1 and 3.

B. FERGUSON FACTOR SIX , SEVEN AND EIGHT

When the Court is determining equitable distribution of marital property, factors six, seven and eight are to be considered and are important. They are:

> 6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;
>
> 7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity, and
>
> 8. Any other factor which in equity should be considered.

While the errors and issues Mr. Penton will argue both involve the distribution and manner of distribution of the marital assets and marital property, Mr. Penton will brief them separately.

III. THE CHANCELLOR ERRED IN THE MANNER IN WHICH HE VALUED AND DISTRIBUTED THE MARITAL PROPERTY WHEN HE DID NOT CONSIDER THE EARNING POTENTIAL OF PINE HAVEN TRAILER PARK AND CRYSTAL CLEAN CAR CARE, LLC., AS WELL AS THE RELATIVE EARNINGS OF THE PARTIES

Mr. Penton avers that the Court erred when equitably dividing the marital assets by not taking into consideration, as a factor, the income producing abilities of the Car Wash and the Trailer Park, along with each parties' relative income from other sources. When the Court determines the equitable distribution of the marital assets, as per the Ferguson

Factors, our case law states the Court should try ,among other things, to divide the marital property in such a manner that it gives each party as much economic stability as possible, under the circumstances. This has been termed an Income -based Approach (see Dunn v. Dunn, 911 So.2d 591, (Miss. App., 2005)

In ***Bumpous v. Bumpous,*** 770 So.2d 558, (Miss. App. 2000) the Court awarded Mrs. Bumpous the family restaurant that his family had started.

In that case the Court found that:

> even though Mr. Bumpous might have some understandable sentimental attachment to a business founded by his parents, the chancellor nevertheless was faced with making an equitable division of assets that would, insofar as possible, permit both parties to be financially independent of the other. *Id.* Mr. Bumpous was gainfully, and apparently securely, employed as a truck driver, earning substantial wages. On the other hand, Mrs. Bumpous had no readily-available means of earning a livelihood except in the restaurant business, where she had some experience and enjoyed a reasonable likelihood of future success. Id. at 560.

Mr. Penton argues that his situation is similar in that the asset he was awarded, Crystal Clean Car Care does not produce enough income to do anything but pay the note at Hancock Bank and his construction/dirt business is only making $1,800.00 compared to Mrs. Penton, the award of the Car Wash and the debt was inequitable and contrary to Ferguson factor 6, 7, and 8.

It is well settled that this Court will look to the chancellor's application of the ***Ferguson*** factors when reviewing questions of equitable distribution of marital property. ***Ferguson v. Ferguson***, 639 So.2d 921, 928 (Miss.1994); ***Wells v. Wells***, 800 So.2d 1239, 1242 . *Ferguson* also " stands for the proposition that fairness should be the prevailing

guideline in marital division." ***Id.*** at 929.

The records show that from the time the parties separated in November 2004 until August 2005, Mrs. Penton ran the car wash and reported the income and expenses. (Exhibit H. to the Special Masters Report Exhibit 1).

Mrs. Penton's accounting for the car wash is attached to the Special Master Exhibit and report Exhibit H (exhibit 1 .)

According to Mrs. Penton's accounting from the period of December 2004 until August 2005, the Car Wash's total income for that nine (9)month period of time was $25,653.00 and the Car Wash's Expenses for that same period was $27,689.90. In other words, the car wash lost $2036.90 during that period of time while it was being run by Mrs. Penton. So the Car Wash, while being value at $331,640.000, operated at a loss.

In his accounting, Mr. Penton was not quite as organized as Mrs. Penton, but he did adequately report the income and expenses from September 2005 until January 2007, pertaining to Crystal Clean Car Care, LLC. The income of the car wash for that eighteen (18) month period was $37,253.95 and the expenses were $69,0840.87. Again the car wash operated at a loss.

During the period that Mr. Penton operated Crystal Clean Car Wash, its income was less and its expenses were more than when it was operated by Mrs. Penton. Mrs. Penton's expenses for the 9 months were $27,689.90 and Mr. Penton expenses for 18 months were $69,084.08, a very close accounting, considering each person's time length.

In addition, there is still a debt on the car wash of $1,400.56 per month to

Hancock Bank.

On the other hand, Pine Haven Trailer Park is a different matter. There was no debt on Pine Haven..

When valuing and distributing the assets, the Court did deduct the mortgage from the appraised value. In its evaluation of assets, it looked only at the appraised value of the assets. Mr. Penton avers that the Court should have also evaluated the marital assets by looking at their value in terms of producing income. When potential income is factored into the evaluation, it becomes even clearer that the marital property division in the Pentons' case was inequitable. The note on Crystal Clean Car Care still exists each month, and although the car wash is making some money the records produced by Mr. Penton , Exhibit (I) show that the Crystal Clean Car Care, LLC is doing little more than paying the note to Hancock Bank

Turning to Pine Haven Trailer Park, the potential income of the Pine Haven Trailer Park should have been a factor which the Court considered when it made its determination as to how to value and divide the marital estate According to the Special Master's Report, Exhibit J , there are ten trailers on the property which could be rented each month and if fully occupied, would bring in around $3,070.00 per month. Each month the Trailer Park would also pay a note to Regions bank which was for the marital residence. In its Ruling, the Court found that the marital residence should be sold on the Courthouse steps and after all the debt and court expenses were paid, the money should be divided between the parties, with Mrs Penton receiving the first $64,000.00. Although

this is not exactly what transpired, as the residence only sold for $6,000.00. Exclusive now of the indebtedness (R. pg. 128), the note to Regions bank is no longer having to be paid by the Park, as the debt has been paid. The expenses that are incurred at the trailer park each month would greatly decrease while the net income would increase. If one looks at their income each month over the time when Mr. Penton was operating it, and then when Mrs. Penton began operating it, the note was the biggest expense. Now the expenses are considerably smaller each month, and there is a potential for making $3,000.00 per month, as there are 10 trailers that can be rented. (See Exhibit 1)

These facts should have been taken into consideration when the Court was determining how to divide and value the marital estate: the appraised value or asset value and the income value. ***Dunn v. Dunn***, 911 So.2d 591, (Miss. App., 2005)

In addition, it would appear that the Court did not take into account each parties' other sources of income.

Mrs. Penton financial affidavit is not in the record and no mention of her income, other than her income from Unlimited Numbers. The other marital assets appear to be in the record. As to Unlimited Numbers, all Mrs Penton provided was her 2005 income tax returns. There was little else. In addition, there is no financial affidavit found in the record, so there is no way of knowing what Mrs. Penton's income was when working for Attorney Rochelle Lumpkin.

The Court's Judgment does reflect that the Court reviewed a financial affidavit of Mrs. Penton, but there is no other information about what she made at her job for Ms.

Lumpkin The income taxes she provided also speak only to her income from Unlimited Numbers. However, the record is clear that Mrs. Penton also worked for a local attorney in Popularville, Rocehelle Lumpkin. What Mrs. Penton made at her job can only be guessed at, but it was surely as much or more than that which Mr. Penton reported that he made in his dirt business;s approximately $21,000.00 per year.

Mrs. Penton reported that her income at Unlisted Numbers was $21,000.00 per year, and with Pine Haven Trailer Park no longer having a debt, her figures show that she would have at least a $21,000.00 per year income from the Trailer Park. In addition, none of this included her income from working for Rochelle Lumpkin's Law Firm. As stated, there is apparently no financial affidavit for Mrs. Penton total income in the record. However, the Court should have taken her income into account, especially since the Court mentions in its Judgement that it " considered the financial affidavits of the parties". The record does not reflect whether or not Mrs. Penton included her income from Rochelle Lumpkins Law Firm.

Unless the affidavit turns up, this Court, in review, can only review what is of record. Although Mrs. Penton's additional income is not in the record, this Court surely has more than a passing knowledge of what an individual working in a law firm might earn today. Surely she made at least $20,000.00 per year. Based upon this figure, Mrs. Penton would be left, at the end of these proceeding, with a $20,000.00 yearly income from Rochells Lumpkin's Law Firm, a $21, 000.00 income from Unlimited Numbers and a yearly income of between $21,600.00 and $36,000.00 per year from a debt free Pine

Haven Trailer Park. Mrs. Penton therefore, would have a monthly income of between $5,216.00 and $6,3100.00 month, as per the Judgment of the Court in this case.

Mr. Penton would further argue, alternatively, that if the Court can not make that assumption, as there is no record as to what Mrs.Penton made at the law firm, then it also can not make the assumption, when the Court stated it had reviewed both financial affidavits of the parties, that the Court took into account what Mrs. Penton made working for Rochelle Lumpkin. If this is the case, then there is essential knowledge unavailable to this Court to make a determination as to whether or not the distribution of marital assets comported with the law and the Furgeron factors. Therefore, this case should be remanded for additional finding .

Mr. Penton, on the other hand, was awarded Clean Care Car Wash which had a debt of $1,400.00, more or less, per month and at this point in time, Mr. Penton reported that he was just making the note and usually operating at a lost. There was a debt of $110,000.00 to Hancock Bank. Furthermore, Bruce Penton, in his response to the Court's Order and the Special Master's requests, provided the Court with his income taxes for 2006 and his business schedule C, as well. As to the evidence in the record that pertains to both B&B and/or Mr. Penton's "dirt business " they are relatively the same. According to Mr. Penton's income tax returns and his financial affidavit, he was operating as a sole proprietorship and his business consisted of " Backhoe/Dozer Work." (Exhibit 3 to the record , R. P.) and his income was around $1,800.00 per month.

So at the end of the day, Mr. Penton argues that he was left with his $1,800.00 per

month dirt business, formerly known as B&B Construction, producing a yearly income of $20,000.00 per year. There is nothing in the record to indicate that Mr. Penton made more that $1,800.00 per month in his "Dirt Business" or when he operated it as B&B Construction. (Tr. T. pgs 83-102)

On the other hand, Mrs. Penton would be left with a monthly income of between $5,216.00 and $6,316.00, compared to Mr. Penton's income of $1,800.00. Surely this is not a fair distribution of marital assets.

While the Court did not grant any alimony to either party, all the income and expenses for the parties should have been examined by the Chancellor. If the facts are not sufficient, then this Court should remand this case back to the Chancellor for further finding., and at least alimony possibly considered for Mr. Penton. ***Armstong v. Armstong***, 618 So.2d 1278, 1280 (Miss 1993)

Once the Court has equitably divided the marital property, then it looks to the parties' non-marital property to see if one party is left with insufficient or disparate funds. As almost everything that the parties had was marital property, Mr. Penton argues that, by the manner in which the Court divided the property, he was awarded insufficient funds and a disparate income from that of Mrs. Penton.

Mr. Penton argues that the Court should have awarded Mr. Penton the Pine Haven Trailer Park which is now debt free and, according to the records, could now bring in between $1,800.00 to $3,000.00 per month. (Exhibits 1 & 3) when added to his "Dirt Business" his monthly income would be around $3,200.00 per month.

Mrs. Penton's income from Rochelle Lumpkins can only be guessed at, but assuming argumendo that the income was at least $20,000.00 per year, she would derive a monthly income of $1,666.00. Unlimited Numbers made around $21,000.00 per year, according to the Court and the records (Exhibit N). That would give her a monthly income from that business of $1,750.00. Adding the incomes together, without any income from the Car Wash, Mrs. Penton would make, at the very least, $2,410.00 per month.

If the Court had awarded Mr. Penton the Pine Haven Trailer Park, the incomes that the parties each earned would have been more equitable and both parties would have been left with nearly equal financial security, especially in light of what happened at the sale on the Courthouse steps of the marital residence at White Chapel. (R pg 128)

One must also not lose sight of the fact that Mrs. Penton was also awarded the one acre of land in Popularville, Mississippi, valued at eight thousand four hundred dollars ($8,400.00).

In ***Owen vs Owen***, 950 So2d 202, (Miss App. 2006) the Court reversed the Chancellor's distribution of marital property and assets. The Court said "the chancellor in this case addressed some, but not all, of the ***Ferguson*** factors in distributing the marital estate.. . . Notably, the chancellor neglected to address altogether the factor relating to the parties' income and ability to provide for themselves." Id. at page The Court stated that, on remand, the Chancellor should address this factor and discuss his findings as to the implications of this

Mr. Penton agues that the above, taken as a whole, clearly demonstrates that there was error in the Chancery Court's judgment and finding.

IV. THE CHANCELLOR ERRED IN THE MANNER AND CRITERIA USED TO GIVE CREDITS TO, AND DEDUCTIONS FROM, THE VALUE OF THE PARTIES' MARITAL INTEREST IN THE PROPERTIES AND IN THE MANNER IN WHICH THE COURT DETERMINED WHAT EFFECT THE ABOVE WOULD HAVE ON ULTIMATE DISTRIBUTION OF THE ASSETS.

In its Judgement, the Court found that both parties manipulated the monies in and out of their bank accounts and the businesses they were each running. However, the Court found that Mr. Penton should be penalize and have $19,350.00 in value deducted from his distribution of martial property and Mrs. Penton should get the $19,350.00 credited to her distribution of marital property interest.

As to the specific deductions from the martial estate the Court found that Mrs. Penton took cash and sold items totaling $7,100.00, for which Mr. Penton is owed an accounting. In turn, the Court found that Mr. Penton took $9,500.00 and received rents totaling $12,100.00 which were left unaccounted. The Court went on to find that Mrs. Penton would have been entitled to one half the rent or $6,050.00, which brings Mr. Penton's total to $15,550.00. The Court then went on to find that Mrs. Penton was entitled to a credit for $10,900.00 because Mr. Penton transferred monies owed from another credit card account to Mrs. Penton's credit card account. The Court went on to state, considering Mrs. Penton's use of the $7,100.00, that she is entitled to an offset

against Mr. Penton's interest in the marital assets of $19,350.00 giving Mr. Penton a total interest of $298,239.00, and the Defendant an interest of $336,939.00. (R. p. 106)

Mr. Penton will demonstrate that there was value that was not deducted from Mrs. Penton's interest, which should have been deducted. Mr. Penton asserts that the amount of the value deducted from his marital interests, if any, should not have been deducted to the extent that it was deducted.

The Court found that Mrs. Penton should receive a credit of approximately $6,000.00 because Mr. Penton received $12,000.00 in rent from the White Chapel property which was rented to Mr. Dunnaway. Mr. Penton states that he received $7,200.00 from Mr. Dunnaway, (see Exhibit 3 Tr. T. pg.14)

Mr. Dunnaway, after being subpoenaed for a deposition, gave an unsworn statement to the Special Master that he had paid $9,200.00 and $1,600.00 for a deposit on the property, for a total of $10,800.00 .(Exhibit 3 of the Masters Report) This is not $11.200.00 as the Master states in her report, nor is this figure $12,000.00, as stated by the Court, in the Judgement. Furthermore, there is no documentation by either party, except their statements, to actually prove how much money was given by Mr. Dunnaway to Mr. Penton, and they are both equally credible.

Mr. Penton states that the rent that he received from the marital property was part of the Eighteen thousand dollars ($18,000.00) that he put into Crystal Clean Car Wash. (Exhibit 3). This statement is not contradicted by any evidence or testimony in the record. Therefore, why should Mrs. Penton be given a credit to be added to her portion of the

equitable distribution.

The Court then when on to state that Mrs. Penton was entitled to a credit of $10,900.00 because Mr. Penton transferred monies to her credit card account from a joint credit card account, which she has to pay.

Mr. Penton said that he transferred a ten thousand dollars ($10,000.00) balance that was on two of his Chase Credit cards to a Bank America Card that was only in Mrs. Penton's name because Mrs. Penton had created the debt, so he believed she should be responsible for the debt. (Exhibits B, C & T. Tr. Pg. 31) Mrs. Penton should not receive a credit for this transfer as it was to pay off debt that she accrued, and there appears to be no other evidence to the contrary. Mrs. Penton even admits in her testimony that she does not know who accrued the debt from the two Chase credit cards. Mr. Penton testified that the charges on the two Chase Card were Mrs. Penton's debt, and the debt was not used for marital purposes. The credit card statements are not in the Record. Marital debt is debt incurred while the parties were married and debt used for marital purposes or debt benefitting both parties. They are subject to equitable distribution. ***McLaurin v. McLaurin***, 853 So.2d 1279, 1285 (Miss.App. 2003)

In the alternative, the credit card debt had to have been accrued during the marriage and it was on credit cards. More likely than not, it was marital debt, so, at the very least, Mrs. Penton should have been responsible for half of the debt of Five thousand four hundred dollars ($5,450.00) and a fairer distribution of marital assets as to the Ten thousand nine hundred dollars ($10,900.00) might have been to either place Five

thousand four hundred dollars ($5,400.00) on both sides of the ledger or to consider the two debts to cancel one another out and the Court not concern itself with that matter. In no event should the entire ($10,500. 00) be deducted from Mr. Penton share of the marital property.

Perhaps Mr. Penton should receive credit for having to put Eighteen thousand dollars ($18,000.00) into Crystal Clean Car Wash, when he took it over after the separation. (Exhibit 3) (T Tr.14.)

In addition, in (T. Tr. pg 31), the Special Master testified that there was a 1981 Tidewell 14 x 65 trailer located on Lot 1 of the Trailer Park. That it was sold on February 21, 2004 for the sum of Three thousand five hundred dollars ($3,500.00). The two thousand dollar balance owed was received in February or March of 2005 by Mrs. Penton. Mrs. Penton states that she used the money to pay the car insurance. However, the only proof that the two thousand dollars was used for purpose lies in her unchallenged statement. Once again, Mrs. Penton was not asked to account for that two thousand dollars in any documented form, and monies were deducted from Mr. Penton.

Another issue which the Court did not take into account, as pertains to Mrs. Penton, was the insurance check for twelve thousand five hundred forty two dollars and fourteen cents ($12,542.14). The Special Master testified that a insurance company check was issued for damage to the Mobile Homes in the Trailer Park. The insurance company issued the check on October 10, 2005, as payment on three trailers damaged in Katrina. The total amount was Twelve thousand five hundred forty two dollars and

fourteen cents ($12,542.14). The check was made payable to Bruce or Annette Penton. Mrs. Penton received the check and deposited the proceeds into the couples joint checking account at Hancock Bank. The next day she withdrew the monies from the joint account and deposited it into funds in a Regions Bank account which she opened and began to use as her money. The accounting for those monies is attached to Exhibit L. At the time the Special Master did the accounting in February 2007, there was seven dollars and sixty eight cents ($7.68) in Mrs. Penton's account, left over from the $12,542.14. Mrs. Penton's use of this money or her right to same was disregarded by the Court.

Furthermore, the Special Master testified that Mrs. Penton took Five thousand dollars ($5,000.00) from the safe, which the Court recognized. (T.Tr.. pg 27)

In addition to the above, Mrs. Penton admits to selling for Five hundred dollars ($500.00) a mixer, and she applied same to her Sears charge account. She also admits to selling a 22 foot dump trailer for One thousand five hundred dollars ($1500.00). There is also the question of the Reflex check of Five thousand six hundred dollars ($5600.00) which was sent, and according to the Special Master, put into the couple's joint checking account. There is proof that the deposit was made, but the only proof that Mr Penton may have gotten the money was Mrs. Penton's testimony that the money was sent directly to Mr. Penton. There is no proof that he received the money, and he testified that he did not receive this money. The Court applied and gave Mrs. Penton credit for a cash advance taken by Mr. Penton of two thousand five hundred dollars ($2500.00) for a credit line at Regions Bank, and the Special Master testified that she could not determine how the

money was used. (T Tr.. pg 30)

As to the nine thousand five hundred dollars ($9,500.00), the Court states that Mr. Penton took in its Judgment (R .pg.) There is nothing in the record, and no documentation to support Mrs. Penton's verbal claim. The Special Master also say Mr. Penton took $2,500.00 from the credit line, but again this is accepted on face value, alone.

In the Court's decision contained in the Judgement, the Court found, after all was said and done, that the marital property or value thereof that was to be distributed consisted of the one acre lot located in Popularville ; the marital residence located at White Chapel Road, the Pine Hills Trailer Park, and Crystal Clean Car Wash. The Court found that each party was entitled to ½ of the value of the marital assets. The parties were each entitled to ½ of the value of marital assets, excluding unlisted numbers and B&B construction (the Penton's "backhoe/dirt business" and the personal property of the parties' in each of there possession. (R. Page 107-108)

The Court found that the total value of the marital estate at issue was $635,718.00. Therefore the Court found that each should be entitled the value of assets worth $317,859.00.

However the Court then went on to find that Mr. Penton should have money deducted from his share and that Mrs Penton should receive a credit. In its calculation, the Court found that Mrs. Penton should have $7,100.00 deducted from her share, but that, at the end of the day, the Defendant was entitled to a $19,350.00 credit and Mr.

Penton was to have $19,350.00 deduction from his share.

If the Court was going to make deductions to the value of the martial property granted each party, based on the criteria the Court used, then there were amounts of money (value) which should have been deducted from Mrs. Penton marital values which was not deducted. Alternatively, when the Court decided, as it did, that since there was fault on all sides, nothing should be deducted from either party's share, and the Court should have granted the parties an equal value of the marital property. The Chancellor had already made the decision that the property should be equally divided when he stated in his decision that the value to be granted each party was $ 336, 939.00. It was shown in the testimony, in the Special Master's Report, and in the exhibits of the Master and the parties, that the Penton's marriage was long term (24 years) , the parties had amassed considerable assets, the property which was being distributed, and which the Court determined would be considered for division, was clearly marital properly, and there was no Temporary Order. Arguably, although the parties separated in November of 2004, and the trial on the merits did not occur until September 2007, all the actives that occurred by the parties, whether from the Car Wash , the trailer park, the bank accounts, the businesses, and the debts, could have been determine to involve marital assets. Therefore, the Court should have either considered all of the various disputed financial actives of both parties, or considered none of them, as both sides had their problems and issues. Even the respective businesses that the parties had, Unlimited Numbers and B&B Construction, were marital assets.

If the Court were to go though the Exhibits and all of the bank accounts and attempt to apportion fault for each and every financial transfer either party disputed, then the Court might never have been able to find an end to it all. The discrepancies on both sides were too numerous, and some were in the exhibits but not even mentioned by the parties or the Court. In the end, Mr. Penton would assert that the equitable thing may have been for the Court to penalize neither party as to the value of the martial assets to be divided. In any event, Mr Penton argues that the solution that the Court found was inequitable and that the Court should have used consistent standards. From the totality of the record, the Chancellor's decision as to who should be given a credit or a debit and what should have been debited and what should have been credited was arbitrary and in error.

V. THE CHANCELLOR ERRED IN THE MANNER IN WHICH HE VALUED AND DISTRIBUTED THE MARITAL PROPERTY WHEN HE DID NOT CONSIDER THE LACK OF DEBT ON PINE HAVEN TRAILER PARK, AND THE DEBT ON CRYSTAL CLEAN CAR CARE, LLC..

Although the Court did consider the debt in that it deducted the debt from the appraised value of the property, it did not give any weight when dividing the martial property as to one property being debt free and one property not being debt free.

The Chancellor awarded Mr. Penton Crystal Car Care, LLC, which had a debt to Hancock Bank of $110,000.00. (R 109) This marital debt was never address by the Court other than in passing.

The Court stated in ***Hemsley*** that all property acquired during the marriage is marital property as is the debt , ***Hemsley vs Hemsley*** , 639 So2d 909, 914." See ***Schoffer vs Schoffer*** ,909 So.2d 1245 (Miss. Ct. App. 2005).

Marital debt is debt incurred while the parties were married and debt used for marital purposes or debt benefitting both parties. They are subject to equitable distribution. ***McLaurin v. McLaurin***, 853 So.2d 1279, 1285 (Miss.App. 2003)

In ***Schoffer vs Shoffer*** ,909 So.2d 1245 (Miss. Ct. App. 2005), the Chancellor found that certain credit card charges were for the benefit of the marriage. The Courts in this state have consistently held that expenses incurred for the family, or due to the actions of a family member, are marital debt and should be treated as such upon dissolution of the marriage. The Chancellor in that case deemed those debts to be marital debts and required both parties to assume the debt. See also ***Bullock vs. Bullock***, 699 So2d 1205,1212 (Miss 1997).

Essentially, Mr. Penton was left with almost all the marital debt. The only debt left would have been the debts that each had in relation to the business they were awarded. The debt on the trailer park was paid in post Judgement proceedings, and in its Ruling, the Court clearly intended the trailer park debt to be paid, as it was debt secured by the marital residence. The Court ordered the marital residence sold on the Court House steps and the debts (mortgages) paid first, which would include the debt on Pine Haven Trailer Park. Mr. Penton argues that this was not only inequitable but was error in the Court's distribution of the martial property, contrary to the Ferguson Factors. .

VI. THE COURT ERRED WHEN IT AWARDED MRS. PENTON ALL OF THE PERSONAL PROPERTY SHE SET OUT IN THE EXHIBITS FOR UNLIMITED NUMBERS, AND DID NOT AWARD MR. PENTON ALL OF THE PERSONAL PROPERTY THAT WAS USED BY HIM IN B&B CONSTRUCTION (THE BACKHOE/DIRT BUSINESS)

All of the errors cited by Mr. Penton are errors which fall into the errors involving application of the Ferguson factors.

The Special Master made several comments during her testimony that Mr. Penton was not forthcoming with the correct numbers for B & B Construction and that she had no proof of what Mr. Penton was actually doing with the property listed for B & B Construction. She did not determine who should get the equipment but commented that the Court should take this into account if it were true that he was using same. All that Mrs. Penton produced to prove that she needed all the assets for Unlimited Numbers is found in Exhibit F where she listed the property in summary and she attached her income tax returns. As to Mr. Penton's proof that he needed all the equipment listed for the dirt business formerly known as B & B Construction , he produced his income tax returns and a list of the equipment similar in form to the list Mrs. Penton produced, listing the equipment she needed from Unlimited numbers (See exhibit 3). and (Special Master's testimony T. Tr. 23-38).

Mr. Penton avers that he did not actually get all of the property associated with his business formerly known as B&B Construction. However, the Court gave Mrs. Penton all of the personal property associated with Unlimited Numbers listed by Mrs.

Penton.

Although the Court gave Mr. Penton some of the property associated with B&B Construction, the Court excluded several important items with Mr. Penton listed on his Exhibit list (Exhibit 3) . None of the items Mrs. Penton listed were excluded.

Mr. Penton avers that his list of his property in connection with his business, whether it was a LLC or a DBA, was questioned and was disregarded in some aspects. (TT. pg 38)

Mr. Penton avers that the Court erred when it gave Mrs. Penton all of the personal property she listed as associated with Unlimited Numbers, no matter where it was located, and did not give Mr. Penton all of the personal property associated with B&B Construction (the Dirt Business) listed in his exhibit 3. (R. pg 105-108).

Specifically , the 1972 American Cam trailer, 1992 Harley Davidson motorcycle, 1996 Dodge Ram pickup truck, Track hoe, 1984 K W W90 DS truck, 1978 Mack dump truck, 1979 International, 1984 Kentworth truck, 1979 Ford 350, 1970 White dump truck, eighteen vehicles of various description identified by the Special Master as acquired by one or both of the parties and then sold or being presently stored "in the weeds" at various locations, and B & B Constructions, LLC, a Subchapter S Corporation, operated by Plaintiff, with numerous items of equipment itemized by Special Master.

Mr Penton concedes that he did review items of business property as per the Judgement , but that it was not the list that Mr. Penton provided to the Court and the Special Master . The list Mr. Penton provided contained 93 separate items of business

property for the business formerly known as B&B Construction (Exhibit C) Consequently much was left off and as a result he had no order to in which to claim his items of personalty.

VII. THE COURT ERRED IN ALLOWING THE MARITAL PROPERTY TO BE SOLD IN THE MANNER IT WAS SOLD, WITHOUT ANY PROVISIONS TO MAKE SURE THE DISTRIBUTION OF THE PROCEEDS FROM THE SALE WERE PROTECTED AND DEBTS ON THE PROPERTY PAID BY THE SALE, AND/ OR NOT GIVING THE PARTIES ANY OTHER ALTERNATIVE TO SALE THE RESIDENCE OTHER THAN ON THE "COURTHOUSE STEPS".

In the Chancellor's Judgment of September , 2007, it was stated that the homestead at 458 White Chapel Road was valued at $214,000.00 was to be sold. That after the debt and the expenses for the sale were deducted, the Defendant was awarded the first $64,039.00 of the net sale proceeds , and the Plaintiff was awarded the balance . The Court then stated that this would round out the equitable distribution of the martial assets. (R. p 108)

On October 18, 2007, the Court entered an Order of Clarification in this matter. (R. p 110). In the Order for Clarification, the Court instructed the Chancery Clerk of Pearl River County, Mississippi, David Earl Johnson, to perform certain functions of the Court, pursuant to Section 13-31-61, Mississippi Code of 1972, Annotated. The Court then directed the Chancery Clerk of Pearl River County to conduct the sale of the marital homestead, located at 458 White Chapel Road. The Court ordered that out of the sale price, less outstanding indebtedness, Carol Annette Penton is to be paid the first

$64,039.00 and Bruce Penton is to receive the remaining balance after, again, outstanding indebtedness is paid and the cost of selling the martial home and the Clerk's fees if any. The Court authorized and ordered the Chancery Clerk of Pearl River County to execute any necessary documents to transfer title and ownership pursuant to this Judgment. (R. p 111)

On December 20, 2007, after the Notice of Appeal had been filed, a Report of Accounting of the Special Commissioner was file in the Record, page 128, in which it showed that the marital residence of the parties located at White Chapel Road, valued at $214,000.00 was sold for $6,000.00, exclusive of the debts.

Although this may be a subject for the trail Court to grapple with; for Mr. Penton, it raises what happened as error.

What happened in the recent case of Parker vs. Parker is essentially what happened in the Penton's case.

The Court in that case ordered a Judicial Sale. The Chancellor in the Pentons' case, without impute from the parties at the hearing, ordered a judicial sale of the marital residence. Mr. Penton avers that this was a drastic measure without giving the parties an opportunity to reach their own decision on how to sell the property. Furthermore, the Chancellor himself should have ordered a much less drastic method of selling the property. Finally, there is a question as to whether or not a judicial sale was ordered under the correct circumstances..

In ***Parker v. Parker,***2008 WL 1724072 (Miss. App.) Mr. Parker claimed that the

Chancellor erred in ordering a judicial sale of the marital property. In the Parkers' case, as it may well be in the Pentons' case, the argument was moot because the property had already been sold.

The Pentons' property has also been sold, and as stated, this may be an issue for the trial court. However, like Mr. Parker, the sale had a very negative impact on the Pentons, as well. As the facts are a little different, Mr. Penton would like the Court to issue direction.

The Court, in ***Parker , supra*** stated

> The Mississippi Supreme Court has stated that partition in kind is the preferred method of partitioning jointly-owned property. ***Fuller v. Chimento***, 824 So.2d 599, 601(¶ 8) (Miss.2002). Furthermore, a partition sale is appropriate only where (1) doing so is better for the parties involved than a partition in kind, or (2) the property is incapable of being equally divided. Id. at 601-02(¶ 9). Notably, "a court has no right to divest a cotenant landowner of title to his property by sale over his protest unless these conditions are fully met."*Id.* at 602(¶ 9) (citing ***Shorter v. Lesser,*** 98 Miss. 706, 711-12, 54 So. 155, 156 (1911)). ***Id.***

In Mr. Penton's case, he asserts, as the Court stated in Parker vs Parker, that "nothing in the record indicates that a partition sale was in the parties' best interest."

Also, as in Parker, the Chancellor did not address either of the above when ordering a judicial sale of the property; rather, he simply ordered it be sold by Judicial Sale.

The Chancellor in his discretion could have ordered the parties to put the property up for sale, order the parties to buy the other out within a prescripted period of time, given the parties a period of time to come up with their own solution, or at the very least, put a guaranteed minimum price for which the property could be sold. A judicial sale, while

legal, almost always bring the lowest price, which it surely what it did in this case.

Mr. Penton avers that the case of ***Ferro vs Ferro***, 871 So.2d 753(Miss. Ct. App.2004) is a good example of how the Court generally deals with the marital homestead.

In ***Ferro***, the Court ordered the sale of the parties' homestead, which had no mortgage on it. "The Court also allowed the wife to occupy the home for six months free of any liability, but that after that time, she would be asserted rent at the rate of $800.00 per month. The home was assessed at $152,000.00 and the parties were ordered to split the proceeds from the sale of the home." ***Ferro vs Ferro*** at 871 So.2d 753, 756(Miss. Ct. App.2004)

Mr. Penton, therefore, asks the Court to set aside the sale, if possible, or to at least give direction to the trial Court.

CONCLUSION

For all of the foregoing reasons and law, as set out above in his Brief, Appellant, Bruce H. Penton asks this Honorable Court to find that the Chancellor erred and to reverse his decisions and rulings and/or remand the matter back to the lower Court for further determinations consistent with the law and equity.

Respectfully submitted this the 2nd day of June, 2008

BRUCE H. PENTON

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, Betsy Walker, Esq., attorney for Appellant Bruce H. Penton , certify that I have this day served a copy of th Appellant's Brief via the United States mail with postage prepaid on the following persons at these addresses:

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