

IN THE SUPREME COURT OF MISSISSIPPI

JUDITH R. WHEAT

APPELLANT

VERSUS

NO. 2008-CA-00476 **E**

JAMES M. WHEAT

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

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Respectfully submitted, on this the 1st day of October, 2009.



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CP - Clerk's Papers
T - Court Reporter's Transcript
Ex - Exhibits
RE - Record Excerpts

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STATEMENT OF THE ISSUES ON APPEAL

ISSUE ONE

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN INCLUDING THE SEVERANCE PACKAGE AS A MARITAL ASSET

ISSUE TWO

THE IRA MONEY, RECEIVED AS PART OF THE SEVERANCE PACKAGE, IS ALSO MARITAL PROPERTY.

ISSUE THREE

JIMMY'S INTEREST IN THE MERCHANTS AND MARINE BANK PENSION PLAN IS CLEARLY NON-MARITAL, AND THE CHANCELLOR DID NOT COMMIT REVERSIBLE ERROR IN SO RULING

ISSUE FOUR

JIMMY'S MERCHANTS AND MARINE BANK STOCK WAS NON-MARITAL PROPERTY. THE CHANCELLOR DID NOT COMMIT REVERSIBLE ERROR IN SO RULING

ISSUE FIVE

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ISSUE SIX

THE CHANCELLOR DID NOT COMMIT REVERSIBLE ERROR WHEN ADJUDICATING THE BALANCE ON THE HOME MORTGAGES AND IN ORDERING JUDY TO BE RESPONSIBLE FOR THE SECOND MORTGAGE/LINE OF CREDIT SECURED BY THE HOME

ISSUE SEVEN

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT ORDERED JUDY TO PAY \$750.00 PER MONTH IN CHILD SUPPORT

ISSUE EIGHT

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ADJUDICATING THE SEVERANCE PACKAGE AS A MARITAL ASSET, SUBJECT TO EQUITABLE DISTRIBUTION; NOR DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN ADJUDICATING THE AMOUNT OF CHILD SUPPORT FOR JUDY TO PAY

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This civil action was initiated by Judith R. Wheat (hereinafter Judy), who filed her Complaint for Divorce on April 6, 2005 (CP 1-6). She sought a divorce on the sole statutory ground of irreconcilable differences, and requested that the Court ratify and approve any property settlement and child custody and support agreement which "may be filed".

Thereafter, James M. Wheat (hereinafter Jimmy), filed a timely Answer with multiple affirmative defenses (CP 7-10). He also filed a Counterclaim, seeking, inter alia, a divorce on the ground of Judy's uncondoned adultery (CP 11-18). Jimmy sought custody of the parties' minor child, reasonable child support and health care insurance and benefits for the minor, the marital home (which was built on property owned by him prior to the marriage) his non-marital assets, an equitable division of all of the marital assets and liabilities, lump sum and periodic alimony, and reasonable attorney's fees and costs.

Judy failed to file a Reply or other response to the Counterclaim.

The matter came on for trial on November 15 and 16, 2006. The testimony was not concluded, and it was set for further hearing and conclusion on January 5, 2007, at which time, after the presentation of all evidence, both sides rested.

During the course of proceedings, the parties engaged in various forms of discovery, including the service of a Subpoena Duces Tecum by Jimmy upon Judy's employer (from which she resigned in May of 2005, a year and a half prior to trial). The service of that subpoena culminated in the issuance and entry of a Joint Protective Order on June 15, 2005 (CP 19-21). Judy's employer submitted the requested documents, but the Joint Protective Order provides that the Confidential Separation Agreement and General Release (essentially a severance package) which had been signed by Judy and her employer would not be published nor would any of the information contained in the agreement be disclosed to anyone except "as necessary amongst themselves for matters that arise within this cause of action...". The agreement also recites that nothing contained therein would prohibit Judy or her legal counsel from disclosing the terms or the fact of the agreement when required to do so by law, or by any Court ... of appropriate jurisdiction. (Ex 4).

On the first day of trial, Judy acknowledged that her Complaint alleged only the ground of irreconcilable differences, and that, because she did not have Jimmy's consent to proceed on that ground, as required by Section 93-5-2 of the Mississippi Code of 1972, she was unable to move forward on her Complaint. It was accordingly dismissed (T 4-5).

Jimmy then began his case-in-chief pursuant to his Counterclaim, with Judy admitting the ground of uncondoned adultery, and stipulating to it as the ground for Jimmy's divorce. Judy was called adversely as the first witness, and was then

tendered for cross-examination to her own lawyer, who reserved the opportunity to question until putting on her own case-in-chief. Jimmy then testified under direct examination on his case-in-chief, and cross-examination was completed by Judy's counsel. Jimmy then rested his case.

Judy testified under direct examination on her own case-in-chief, and a brief cross-examination of her was conducted by Jimmy's counsel. Both sides then rested.

During the trial, the following documents were admitted into evidence:

- Exhibit 1 - Jimmy's Financial Declaration;
- Exhibit 2 - Judy's Financial Declaration;
- Exhibit 3 - The December 11, 2005 appraisal of the marital home located at 3125 Campbell Street in Moss Point, MS;
- Exhibit 4 - (Under Seal) The Confidential Separation Agreement and General Release respecting Judy's former employment;
- Exhibit 5 - A closing list showing entitlement to a Mississippi Development Authority Net Grant related to damages sustained in Hurricane Katrina, which was in the amount of One Hundred Seventeen Thousand Four Hundred Forty Nine and 49/100 Dollars (\$117,449.49);

After trial, and by written instrument admitted as Exhibit 6, the parties stipulated that the grant check had been increased to

One Hundred Forty Six Thousand Eight Hundred Ninety Two and 96/100 Dollars (\$146,892.96). Judy endorsed the check over to Jimmy (CP 31).

The Court took the case under advisement and began the preparation of Findings of Fact and Conclusions of Law. By letter dated March 7, 2007, the Chancellor, Hon. Jaye Bradley, advised the parties in writing that, while deliberating, a question had arisen regarding the value of Jimmy's interest in a pension plan through his employment with Merchants and Marine Bank (CP 32). A conference regarding that issue was scheduled thereafter, which resulted in an agreed Judgment entered on March 21, 2007 (CP 33-35). That Judgment, after referencing the Court's concerns, recites, in pertinent part, that the attorneys are to confer in an effort to determine the exact information each party wishes to obtain with respect to Jimmy's interest in the plan. The Judgment recites further that, when the information is obtained, the parties are to attempt to amicably resolve any issues with respect to the plan and Jimmy's interest, and that in the event a resolution of any such issues is reached, the parties are to prepare an appropriate stipulation and submit it to the Court Reporter as an additional exhibit to be admitted into evidence. In the event the parties are not able to resolve the issues with respect thereto, the Court agreed to re-open the record for the limited purpose of allowing each of the parties to present any appropriate evidence with respect to Jimmy's interest in that plan.

Thereafter, by Order dated September 25, 2007, the Court noted that the parties had agreed with respect to Jimmy's interest in the bank pension plan as evidenced by the correspondence received from each of the attorneys (CP 36-45). The agreement reflected that the parties valued Jimmy's interest at One Hundred Eighty Thousand Dollars (\$180,000.00) pursuant to a valuation report from an actuary for the pension plan administrator. The correspondence, with attachments, was admitted into evidence by agreement, and marked as Exhibit 6. It should have been Exhibit 7, instead of being the second Exhibit 6.

On October 2, 2007, the trial court issued its Findings of Fact and Conclusions of Law (CP 46-65). Pursuant thereto a Judgment was entered on October 10, 2007 (CP 66-74). By its terms, Jimmy was awarded a divorce on the ground of uncondoned adultery and the custody of the parties' minor son, Jamie, a male born October 12, 1989. Judy was awarded certain specified visitation rights and was ordered to pay Seven Hundred Fifty Dollars (\$750.00) per month in child support. She was also directed to pay half of Jamie's automobile insurance premium. Jimmy was ordered to maintain health insurance on Jamie through his employment, with Judy being directed to reimburse Jimmy for the cost of the premium. The parties were directed to share equally any uncovered medical or dental expenses. They were also ordered to share equally in any college expenses incurred by Jamie.

Jimmy was awarded the ownership of the Merchants and Marine Bank common stock he owned prior to the marriage, which was valued

at Thirty Four Thousand Seven Hundred Twenty Dollars (\$34,720.00), and a Morgan Keegan IRA which he owned prior to the marriage and which was valued at Fifty Seven Thousand One Hundred Sixteen Dollars (\$57,116.00).

Judy was awarded two retirement accounts from her employment totaling Sixty Four Thousand Nine Hundred Four Dollars (\$64,904.00), and Jimmy was awarded the 401(k) account at Merchants and Marine Bank worth Eighty Thousand Dollars (\$80,000.00). The Court determined that the pension was marital property, valued at One Hundred Eighty Thousand Dollars (\$180,000.00), but awarded it all to Jimmy.

Judy was awarded the sole ownership of the severance package that she received when she left her employment in May of 2005, a gross sum of Three Hundred Ninety Five Thousand Dollars (\$395,000.00) and a net sum to her of Two Hundred Fifty Seven Thousand Seven Hundred Seven and 50/100 Dollars (\$257,707.50). Judy was also awarded the sole ownership of a condominium she had purchased in Pascagoula after the parties' separation, along with all of the household goods, furniture and fixtures therein, and she was directed to be solely responsible for the debt thereon. Jimmy was awarded the ownership of the marital residence at 3125 Campbell Street in Moss Point, along with all of the Hurricane Katrina insurance proceeds, the grant money, and all of the household goods and furniture at that home. Jimmy was directed to be solely responsible for the debt secured by the home and real property (the

first mortgage), and Judy was ordered to take sole responsibility for the second mortgage. Each of the parties were awarded their respective vehicles (Judy got a 2003 Acura with the associated debt, and Jimmy got a GMC truck and the debt secured thereby).

Jimmy's request for alimony was denied and each party was held responsible for their own attorney's fees.

Thereafter, Jimmy filed a timely Rule 59 Motion for Reconsideration, New Trial, Alteration or Amendment of Judgment, or Relief from Judgment (CP 77-80). In that Motion Jimmy asserted that the Chancellor had incorrectly determined the nature and extent of Jimmy's non-marital property and did not divide the marital assets and liabilities equitably. One part of the Motion asserted that the Chancellor was in error when she concluded that the bank pension was marital in nature, and not Jimmy's non-marital property. Attached to Jimmy's Motion was the Affidavit of Royce Cumbest, President and Chief Executive Officer of the Merchants and Marine Bank, who stated that the Bank had not funded the pension plan since 1984 (years prior to the marriage), because the plan was fully funded at that time and no further contributions had been required nor made (CP 80). Judy conceded at the hearing that Jimmy's interest in the pension was his non-marital property (T 258-259).

Following a hearing on Jimmy's Motion, the Court entered its Supplemental Findings of Fact and Conclusions of Law (CP 82-85). After tracing the history to that point, the Chancellor noted that, prior to issuing her original Findings of Fact and Conclusions of Law, the Court needed a valuation figure for Jimmy's interest in

the defined benefit pension plan pursuant to the requirements of Ferguson v. Ferguson, 639 2d. 921 (Miss. 1994). The Court noted that "...there existed a possibility that contributions to this account were made during the marriage; therefore, the Court considered a portion of this asset to be marital property and thus subject to equitable distribution." (CP 82).

The Court then went on to note, however, that after a review of the valuation report of the actuary, Judy submitted a letter through her attorney relinquishing any interest in the account. In spite of that, the Court had continued to classify Jimmy's interest in the pension plan as a marital asset and considered Judy's letter to have been only a relinquishment of any marital interest that she might have, and not as a concession that the asset is Jimmy's non-marital property. However, to finally clarify and dispose of the matter, the Court noted that, during oral arguments on Jimmy's post-trial motion, Judy's counsel conceded that Jimmy's interest in the plan was in fact his non-marital asset (CP 83, T 258-259).

Accordingly, the Court then correctly reclassified Jimmy's interest in the account as being non-marital.

The trial court further noted that, when considering Jimmy's Motion, an additional account belonging to Judy, as determined by the evidence at trial, had not been taken into consideration when equitably dividing the marital estate. Specifically, Judy's Financial Security and Savings Plan (FSSP) with her former employer, valued at One Hundred Eighty Two Thousand Nine Hundred Seventeen Dollars (\$182,917.00), was not addressed in the Court's

original Ruling. The Chancellor noted, in continuing, however, that her notes, along with the trial exhibits, shows that the asset is in fact listed on Judy's Financial Declaration (Ex. 2). The Chancellor stated that this asset was inadvertently overlooked by the Court when considering the equitable division of the marital estate as reflected in her original Findings of Fact and Conclusions of Law, and that in light of that oversight, the Court found that the Ferguson factors needed to be re-weighted.

Thereafter, and consistent with the Court's intention to divide the marital assets equally, Judy was directed to prepare and execute a QDRO to award Jimmy half of the FSSP or the sum of Ninety One Thousand Four Hundred Fifty Eight Dollars (\$91,458.00), and to do so within sixty (60) days of the supplemental Ruling.

A Judgment so providing was thereupon entered on March 19, 2008 (CP 89-92).

In the interim, on March 12, 2008, Judy filed a Notice of Appeal (CP 86-87).

B. FACTUAL HISTORY

The trial Court had jurisdiction over the subject matter of this proceeding and the parties. Both of them have been residents of Jackson County for many years. They were married on January 9, 1988, and the separation occurred on or about March 1, 2005. (See Judy's Complaint (CP 1-6) and Jimmy's Counterclaim (CP 7-10, T 7, 106)). Judy's longstanding extramarital affair with Phillip Dur,

who was at the time, President of the shipyard where Judy was employed, caused the separation (T 138-141).

The parties are the parents of one child, a son James G. Wheat (Jamie), born October 12, 1989. Jamie continued to live with his father in the marital home since the separation (T 7 -8, 11, 112). The parties stipulated that they would have the joint legal custody of Jamie, with Jimmy being awarded his physical custody. Because of Jamie's age, Judy stipulated that her visitation rights would be worked out independently between her and Jamie (T 11-12).

Judy was 54 years of age at trial. She graduated from Ocean Springs High School in 1970, and spent approximately 30 years working at a shipyard in Jackson County. She started as a stenographer, progressing as a material analyst (both junior and senior grade), a material program analyst, and was later promoted into purchasing (T 8-10).

At the time she and Jimmy were married, Judy was a subcontract administrator. She only took a few months off from her employment in connection with the birth of Jamie. In approximately 1995, she moved into program management and later became deputy program manager for a ship construction project. At the time of the termination of her employment in May of 2005 she was a program manager for the deep water program. She had overall management responsibility for engineering, materials, construction and delivery.

Judy testified that she was told that, based on the personal and romantic relationship that she had developed with Phillip Dur,

an unwritten company policy prohibited both of them from working for the company in the same sector. She decided to resign since, according to her, her position was the less important of the two (T 63-71).

Judy has a son by a prior marriage, Christopher Ryan Oliver, who at the time of Judy's marriage to Jimmy was 14 years of age (T 10). Judy was divorced from Mr. Oliver's father in Jackson County in 1980. Until Ryan was 15 or 16, he lived alternately one week with his father and one week with Judy and Jimmy. Then Ryan's father moved, and Ryan lived with Judy and Jimmy continuously until he went to college.

At the time of trial, Judy was in good health, and testified that she is the managing partner for an entity called Updates, LLC, a recently created Mississippi limited liability company. According to Judy, this entity is comprised of five women who buy properties, do renovation work, then attempt to resell the properties for a profit. Judy serves as the managing partner, and the company began operating shortly after Judy's termination from the shipyard. She has not received any compensation, as the LLC is yet to be profitable (T 13-20).

Judy received a bonus of approximately \$29,000 shortly prior to her leaving the shipyard in connection with her final year of employment. Under the terms of the Severance Agreement, Exhibit 4 (under seal), Judy also received a gross lump sum payment of \$395,000.00. She voluntarily resigned her employment effective May 3, 2005 (her fifty-third birthday), and the money she received

represents the approximate value of the pay and benefits she elected to forego by resigning before the early retirement age of 55. Put differently, the \$395,000.00 severance payment is roughly equivalent to what Judy would have earned if she had not quit her job and instead had elected to work for two more years (T 48, 57-63). Additionally, when she reaches the age of 55, the company has agreed to provide Judy access to retiree medical benefits on the same terms and conditions as such benefits are offered to other employees who have taken early retirement (Ex 4).

Judy testified that her relationship with Mr. Dur began in approximately September/October 2004 and continues to the present. She stated that she is in love with Mr. Dur, who was also going through a divorce in Jackson County. They have taken numerous trips together and they have each purchased expensive gifts for the other. For instance, Judy has purchased cuff links for Mr. Dur that cost \$500.00, cognac glasses, and a \$300 ink pen, among other things. Mr. Dur has purchased Judy a tennis bracelet, a gold necklace, clothing, pottery, other jewelry and a television. He has paid for all of their trips, including travel to New Orleans, New York, Washington, Miami, South Bend, Destin, Phoenix, Hilton Head Island, San Francisco, and to London. In all, Judy referred to more than 20 trips that she has taken with Mr. Dur, and on each occasion he was responsible for air fare, ground transportation, all lodging and meals. Additionally, Judy testified that the couple eats out together at least a couple of nights each week at Mr. Dur's expense (T 20, 79, 88, 89, 98-105).

At the time of trial, Judy's Financial Declaration (Exhibit 2) shows that she has total expenses of more than \$9,000.00 per month, including, according to her testimony, approximately \$3,600.00 per month that she pays in installments on her charge accounts. Her only income at the time of trial, and since she quit her job, has been to spend down, at the rate of almost \$10,000.00 per month, the \$395,000.00 severance package (T 20).

At the time of the trial, Judy was living in a condo which she and Phillip Dur purchased together from Updates, LLC at a cost of \$85,000.00. They have an interest-only loan with a balloon note in the summer of 2007 (T 13-19).

Judy owns a 2003 Acura which she asserts is worth approximately \$20,000.00, and has a loan balance of nearly the same (T 29-31). Almost all of the parties' other personal property was destroyed in Hurricane Katrina, and their jointly owned marital home on Campbell Street in Moss Point was likewise significantly damaged. Her Financial Declaration shows a total of \$354,807.55 in checking and savings accounts, and other investments (IRA's, stocks, mutual funds, and pension plans) (Ex 2).

Jimmy was 54 years of age at the time of the trial (T 107). His life long career has been in banking, exclusively at Merchants and Marine Bank, which he serves as a Vice President and Manager of the Moss Point branch. His gross monthly income, as revealed by his Financial Declaration (Exhibit 1), was \$7,585.00 with a net of \$4,932.00. That figure includes an \$823.00 per month deduction for his 401(k) plan with the bank. He lists monthly expenses for him

and Jamie in the total amount of \$5,412.00. He continues to live in the Campbell St. home and he drives a 2004 GMC pick up truck valued at just over \$20,000.00 with a loan balance just over \$16,000.00. Jimmy shows checking and savings account balances of a little more than \$11,000.00, and he has several other investments. This includes common stock in Merchants and Marine bank valued at just over \$34,000.00, (which he owned prior to the marriage and remains his separate property), a Morgan Keegan IRA worth over \$57,000.00, which he owned prior to the marriage, and which had no contributions made to it during the marriage, (and therefore also remains non-marital property) (T 132-134). His 401(k) plan with the bank is worth approximately \$80,000.00. Jimmy also has an interest in the Merchants and Marine Bank pension, a defined benefit plan. His account had a value of One Hundred Eighty Thousand Dollars (\$180,000.00) at trial. Since the plan was last funded by the bank in 1984, some four years prior to the marriage, Judy agreed that the pension is Jimmy's non-marital property (T 258-59). Both parties acknowledged that Jimmy owned the Campbell Street real property prior to the marriage, and that it was debt free (T 114, 115, 23). Judy estimated the pre-marital value at \$26,000.00, while Jimmy believed it was worth between \$40,000.00 and \$45,000.00.

SUMMARY OF THE ARGUMENT

In a shotgun approach, Judy raises multiple issues on appeal, arguing, essentially, that the trial court committed eight reversible errors. Six of those issues involve either the trial court's classification of assets (marital versus non-marital) or the equitable distribution of marital assets and liabilities. The remaining two issues focus upon the court's child support determination, and how the Chancellor calculated an appropriate amount.

By applying the appropriate standard of review with respect to each of the issues raised by Judy, the inescapable conclusion is that the Chancellor applied the law correctly to the facts at hand, and, where vested with discretionary authority, she was not manifestly in error and did not abuse her discretion.

ARGUMENT

STANDARD OF REVIEW

The scope of the appellate court's review of a Chancellor's decision in cases involving divorce and all related issues is limited by the substantial evidence/manifest error rule. R.K. v. J.K., 946 So.2d 764, 772 (Miss. 2007) (citing Mizell v. Mizell, 708 So.2d 55, 59 (Miss. 1998)). The appellate court will not reverse a Chancellor's Judgment unless the Chancellor was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. Particularly in the area of divorce and child support, the appellate court "must respect a chancellor's findings of fact which are supported by credible evidence and not manifestly wrong." Id. Manifest error means that error which is unmistakable, clear, plain, or indisputable. Magee v. Magee, 661 So.2d 1117 (Miss. 1995); Bell v. Parker, 563 So.2d 594 (Miss. 1990). It is not the function of an appellate court to substitute its judgment for that of the chancellor.

The trial judge is in the best position to view the trial. The trial judge hears the witnesses live, observes their demeanor and in general smells the smoke of the battle. By his very position he is far better equipped than an appellate court to make findings of fact that have the desired and needed reliability. Gavin v. State, 473 So.2d 952, 955 (Miss. 1985).

ISSUE ONE

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN INCLUDING THE SEVERANCE PACKAGE AS A MARITAL ASSET

Judy contends that the severance package is her non-marital property. Her entire argument on this issue is based upon two fallacious premises. First she states (Brief of Appellant, Page 18), that the \$395,000.00 severance money she received "...had nothing to do with years of service or past performance". Second she asserts that, since she actually received the severance package money after she left her husband for her lover, the money is, somehow, her non-marital property. The severance agreement itself (Ex. 4) as well as the evidence presented at trial, and the law of this State demonstrate the contrary.

The agreement recites that Judy and Mr. Dur have jointly determined that, for personal reasons, Judy will resign from her employment with the company (Paragraph 2.0). It notes that Judy has worked for the company for more than thirty years and is approaching early retirement. Further, it acknowledges the company's interest in offering her the benefits provided in the agreement, in exchange for Judy's promise to abide by all of the its terms (Paragraph 2.4). While Judy received a lump sum payment of \$395,000.00 by resigning prior to her normal early retirement age (Paragraph 3.1), in consideration for what she received, Judy released and promised not to sue the company for virtually any cause of action that she might otherwise have (Paragraphs 5.0

through 5.4). It includes any claims that Judy doesn't even know or suspect that she has.

If in fact Judy had any claim against her employer (as a result of the unwritten company policy which would not allow both her and her paramour to work in the same sector), it is a claim that would clearly be marital in nature, since so much of Judy's employment with the company occurred during the marriage. Moreover, even her resignation took place during the marriage and more than a year and a half prior to the commencement of trial. These factors alone well justify the Chancellor's discretionary determination that the severance money is marital property.

The fact that Judy actually received the severance package money after she left her husband is also of no moment, for at least two reasons. First, there is no hard and fast rule that requires a Chancellor to treat money received after a separation as non-marital funds. For instance, see Pittman v. Pittman, 791 So.2d 857 (Miss. Ct. App. 2001) and Sullivan v. Sullivan, 990 So.2d 783 (Miss. Ct. App. 2008). The Chancellor is afforded wide discretion in determining the exact date upon which the joint accumulation of marital assets actually ceases. Such a determination is committed to the discretion and conscience of the Court, considering all of the equities, facts and relevant circumstances. Chamblee v. Chamblee, 637 So.2d 850 (Miss. 1994). A Chancellor's discretionary authority when dealing with matters of equitable distribution is exceedingly broad. Chamblee, supra, at 864 (emphasis added).

Second, and perhaps much more importantly, Judy had been employed with the company for a period in excess of thirty years, a great majority of which occurred during her marriage to Jimmy. For Judy to suggest that the severance money is non-marital because the amount she received equates roughly to two future years worth of salary and benefits, is just as disingenuous as the contingency fee Plaintiff's lawyer who, makes a similar claim after working on a case for many years during the marriage, but actually receives a large fee after the separation.

In Striebeck v. Striebeck, 5 So.3d 450 (Miss. Ct. App. 2008), such a scenario did in fact occur. Bill Striebeck, an attorney, contended on appeal that the Chancellor erred in concluding that certain attorney's fees he got paid were marital property. Following the appeal, the Mississippi Court of Appeals affirmed. Even though Bill Striebeck and his wife had already separated while Bill was earning the contingency fee at issue, the Court of Appeals opinion notes that Bill still performed the legal work earning the fee during the period of the actual marriage. There was no temporary support order entered prior to the actual receipt of the contingent attorney's fee. Likewise, in the instant case there was no temporary support order in place prior to Judy receiving the severance money. In the face of these facts, the Court of Appeals concluded "...there is no doubt that the fees from the [case at issue] were marital property." Striebeck, supra at 454. Such a ruling is entirely consistent with well established Mississippi

law. Marital property includes "...any and all property acquired or accumulated during the marriage." Hemsley v. Hemsley, 639 So.2d 909, 915 (Miss. 1994); Owen v. Owen, 928 So.2d 156, 160 (Miss. 2006).

In support of her argument, Judy cites Prescott v. Prescott, 736 So.2d 407 (Miss. Ct. App. 1999). It indeed deals with a severance package, but it does not hold, as Judy would suggest, that money received in a severance package after the date of separation is non-marital in nature. In fact, Prescott specifically stands for the opposite proposition, i.e., that a severance package awarded to a terminated employee of long standing, is in fact a marital asset, specifically because of the many years of past service rendered.

Judy also turns to Pennsylvania, California, and Ohio for purported authority. While Jimmy does not take issue with what the law may be in those States, the logic in Mississippi law is certainly compelling. If in fact the law in Mississippi is as Judy tries to persuade this Court it should be, every severance package case that arises in the future will contain a self-fulfilling prophecy and will essentially tie the hands of every Mississippi Chancellor. Put differently, every separated employee will simply require, before accepting any severance package that the agreement itself recites that the money being paid is for the purpose of awarding the employee future income, and is not for years of devoted service as an employee. If such language were controlling, what employee would do otherwise?

The answer, simply put, is that the law, at least in the State of Mississippi, is that the Court should and will look to the totality of the circumstances and to the substance of the agreement reached. See Chamblee, supra. Equity demands such. In the instant case, Judy agreed to release her employer from virtually any and all causes of action that she might have by virtue of her termination. Surely if she had been fired, rather than voluntarily resigning with the severance package, she would not be arguing that her cause of action against the company for wrongful termination is non-marital in nature. Particularly is this true when considering the fact that the cause of Judy's termination was her extramarital affair with the company president.

The Chancellor correctly concluded that the severance package was marital in nature. Judy cannot credibly argue that the Chancellor was manifestly in error in so ruling.

ISSUE TWO

THE IRA MONEY, RECEIVED AS PART OF THE SEVERANCE PACKAGE,
IS ALSO MARITAL PROPERTY.

Judy's argument here is identical to the proposition she advances in Issue 1. She focuses on some \$52,448.00 shown on her Financial Declaration (Ex 2) which she received in conjunction with the severance payment. She refers to it as a bridge IRA payment for the sum of money that would have been paid to her IRA if she had remained employed with the company through the date of her early retirement, some two years later.

Once more, Judy's only real argument is that she actually got the money after the parties separated. She cites no other authority in support of her argument.

Again, her argument must fail. If this Court agrees with Judy, every future employee in Mississippi who negotiates a severance package will simply include language to the effect that the money is being paid only in consideration of the loss of future income. Such agreement might as well specifically recite that the money being paid is the non-marital property of the terminated employee.

Furthermore, if this Court is persuaded by Judy's logic, it would strip Chancellors of vested discretionary authority and require them to ignore the equities, the facts and the relevant circumstances they are, as trier's of fact, obligated to consider.

ISSUE THREE

JIMMY'S INTEREST IN THE MERCHANTS AND MARINE BANK PENSION PLAN IS CLEARLY NON-MARITAL, AND THE CHANCELLOR DID NOT COMMIT REVERSIBLE ERROR IN SO FINDING

On appeal, Judy now contends that a portion of Jimmy's interest in the Merchant and Marine Bank Pension Plan is marital. She is estopped from making that argument on appeal, as it is clear that, at the trial level, she agreed it was non-marital in nature. She is precluded by law from raising this issue on appeal for the first time. Aron v. Reid, 850 So.2d 108 (Ms. Ct. App. 2002); Read v. Southern Pine Elec. Power Ass'n, 515 So.2d 916, 921 (Miss. 1987).

Moreover, the evidence unmistakably established that the pension plan was and remains non-marital in character. A careful reading of the entire record confirms this.

On pages 134 and 135 of the Transcript, Jimmy was asked on direct examination about his interest in that Plan. He noted that he never contributed to the Plan, and that the Bank made all of the contributions prior to the parties' marriage. More importantly, he stated

- A. You have to have five years of service to be totally vested in the plan, and you have -- your vesting also includes up to 15 years where you, once you have been there 15 years you are eligible for the maximum benefits at retirement time.

Q. So you were vested in that well before you even got married?

A. Correct (T 135).

Thus, Jimmy was entitled to the maximum benefits from the plan before he and Judy actually were married. Years of marriage to Judy did not enhance the benefit he will receive when he finally does retire.

Additional evidence in support of Jimmy's position was presented at the post-trial Motion hearing, in response to the Court's request for more information regarding the value of the Plan. Jimmy filed an M.R.C.P. Rule 59 Motion because the Chancellor's original Ruling correctly valued Jimmy's interest in the Plan as being approximately \$180,000.00, but improperly adjudicated it to be marital, rather than non-marital property. Attached to the Motion is the Affidavit of the Bank President, verifying that the pension plan had not been funded by the Bank since 1984, years prior to the Wheat marriage. Accordingly, no further contributions thereafter were made. Since Jimmy's fifteen years of service with the Bank prior to marriage entitled him to the maximum monthly benefit upon his retirement, no genuine argument can be made that the account is marital.

The Mississippi Supreme Court has adopted the active/passive test to determine whether the appreciation of a non-marital asset is marital or non-marital. In Carrow v. Carrow, 642 So.2d 901, 906 (Miss. 1994), our Supreme Court held that the appreciated value of a husband's Corvette collection was marital because the couple

performed renovation and repair work to the vehicles which is what caused the increase in value. The converse is also true. For example, income produced by a husband's separate investments remains separate, specifically because no active effort was involved in its growth or appreciation. Franks v. Franks, 759 So.2d 1164, 1166-68 (Miss. 1999). Further, in Haney v. Haney, 788 So.2d 862, 865-66 (Miss. Ct. App. 2001), the appreciation on a husband's investment accounts during the marriage was deemed to be non-marital upon his divorce.

Finally, Jimmy's interest in the Merchants and Marine Bank Pension Plan is non-marital for the simple reason that Judy so stipulated. This is abundantly clear, in spite of the fact that Judy now attempts to withdraw her stipulation, or assert that the Court misunderstood exactly what she was stipulating to. A quick look at the record belies Judy's argument, and it clears up any misunderstanding, if indeed there had been one up to that point. Beginning on page 253, Jimmy's counsel specifically takes issue with the trial court's original determination that the Pension Plan was marital in nature. Counsel's argument focuses specifically upon the reasoning cited above, emphasizing that the approximate \$180,000.00 interest should have been classified as Jimmy's non-marital property. Even though the original Judgment awarded all of the plan to him, it awarded Judy a corresponding \$180,000.00 worth of other marital assets, so that the marital estate would be divided nearly equally. Thus, if it was the Court's intention to divide the marital estate equally, it is of the utmost importance

that Jimmy not be penalized by having the \$180,000.00 interest in the pension plan classified as being marital. If nothing else, that issue is abundantly clear from the testimony at the post-trial motion hearing. When specifically asked about that, Judy's counsel candidly stipulated

"MR. TISDALE: The Wife conceded that. She conceded that that was non-marital property." (T 259)

Under these circumstances, for all of the above and foregoing reasons that the Merchants and Marine Bank Pension Plan belongs solely to Jimmy. Judy had no marital interest in the plan. The Chancellor cannot be found in error by so ruling.

ISSUE FOUR

JIMMY'S MERCHANTS AND MARINE BANK STOCK WAS NON-MARITAL PROPERTY. THE CHANCELLOR DID NOT COMMIT REVERSIBLE ERROR IN SO RULING

The Chancellor adjudicated that the Merchants and Marine Bank stock, valued at \$34,720.00 was Jimmy's non-marital property. In her Brief on appeal, Judy states, "this conclusion was based solely upon the testimony of James" (Brief of Appellant, Page 26). Judy has forgotten, or conveniently overlooked her own testimony. Concerning those shares, during cross examination, she was specifically asked:

Q. You consider those shares of stock whatever they are to be his separate property?

A. Yes (T. 224).

Even if some of the shares were at one time made marital by Jimmy's action in placing both names on them (neither party knew exactly how many shares), they were made non-marital once again when Judy placed those shares back solely in Jimmy's name. In Mississippi, property acquired by gift belongs to the individual owner. Ferguson v. Ferguson, 639 So.2d 921, 928 (Miss. 1994). Accordingly, if Judy acquired a marital interest in an unknown number of Merchant and Marine Bank stock shares by way of a gift from Jimmy, they were re-acquired by Jimmy, as his non-marital property, when Judy conveyed them back.

For both of these reasons, either of which is sufficient when standing alone, Judy's argument here has no merit.

ISSUE FIVE

THE TRIAL COURT CORRECTLY CONCLUDED THAT JIMMY'S IRA WITH MORGAN KEEGAN WAS NON-MARITAL PROPERTY

Jimmy's Individual Retirement Account (IRA) with Morgan Keegan was valued at \$57,116.00, and the Chancellor adjudicated it to be his non-marital property. Jimmy testified that the account was in his name only, and it existed prior to his marriage to Judy. Moreover, he made no contributions to the account after the marriage (T 133-34). Nowhere did Judy dispute any of this. Now, however, Judy tries to convince this Court that Jimmy's uncontradicted testimony, which was accepted by the Chancellor, was not sufficient to support the trial court's conclusion that the IRA was indeed Jimmy's non-marital property.

Judy notes that "no documentation was offered to support when the IRA was originated or whether it was owned prior to the marriage". (Brief of Appellant, Page 27). She seems to be saying that, in order for the Chancellor to believe Jimmy's testimony, there must somehow be some documentary evidence to corroborate it. Had Judy even raised the issue at trial, or questioned Jimmy's testimony on the subject, perhaps it would have been possible for Jimmy to retrieve some records, which by then would have been twenty or more years old. It is not appropriate for Judy to argue on appeal that Jimmy made a "mere demonstration" of the non-marital nature of the IRA, when Judy did not even question it, much less

dispute it. And it is certainly not reasonable to require of Jimmy that he produce twenty year old records to verify his sworn, undisputed testimony, particularly when he lost virtually all of his personal property in an intervening hurricane.

Regardless, it is still well established that appreciation on a non-marital investment makes the appreciated value non-marital. See Franks v. Franks, supra and Haney v. Haney, supra. This is precisely because no active effort was involved in obtaining the growth or appreciation.

ISSUE SIX

THE CHANCELLOR DID NOT COMMIT REVERSIBLE ERROR WHEN ADJUDICATING THE BALANCE ON THE FIRST AND SECOND HOME MORTGAGES AND IN ORDERING JUDY TO BE RESPONSIBLE FOR THE SECOND MORTGAGE/LINE OF CREDIT SECURED BY THE HOME

Judy's argument consists of one brief paragraph. She contends the Chancellor failed to equitably distribute the debt on the marital home. She is apparently aggrieved by the fact that the Chancellor directed her to be responsible for the \$40,816.00 still due and owing on the home at the time of the trial.

Again, a Chancellor's discretionary authority when dealing with matters of equitable distribution is exceedingly broad. Chamblee v. Chamblee, 637 So.2d 850, 864 (Miss. 1994) (emphasis added). In making an equitable distribution, a Chancellor is first directed to classify assets and liabilities as being either marital or non-marital. The Chancellor should then value the asset, using expert testimony if necessary, and then divide the asset and liability equitably, based upon factors set out in Ferguson v. Ferguson, 639 SO.2d 921, 925 (Miss. 1994). This is precisely the procedure that was followed by the Chancellor and is embedded in the Court's Findings of Fact and Conclusions of Law. (CP 46-65)

In fact, the Court could have found even greater justification for requiring Judy to be responsible for much more of the marital debt than the \$40,816.00 assigned to her. Jimmy testified that, prior to his marriage to Judy, he was the sole owner of the real property located on Campbell Street where the parties built the marital home. He estimated its value at \$40,000.00 to \$45,000.00,

and it carried no debt (T 114, 115). Judy did not dispute Jimmy's pre-marital ownership, although she opined that the real estate was worth \$26,000.00 prior to the marriage (T 23). She also acknowledged that it was debt free at the time of their marriage (T 224-25). Since some assets may have both marital and non-marital components, the Court, in dividing such an asset, is required to take into account the non-marital interest held by the party bringing that asset into the marriage. Drumright v. Drumright, 812 So.2d 1021 (Miss. Ct. App. 2001); Bullock v. Bullock, 699 So.2d 1205 (Miss. 1997).

Put differently, the Chancellor could have given credit to Jimmy for bringing at least \$26,000.00 worth of real property into the marital fold (and perhaps as much as \$45,000.00 worth). If she had done so, it could just as easily have been the Chancellor's discretionary determination that Jimmy's pre-marital equity should be restored to him, and perhaps even restored with reasonable appreciation upon Jimmy's non-marital portion. Jimmy does not raise this issue on appeal, but merely points out that, when using a manifest error/abuse of discretion standard required for reversal on appeal, Judy's argument is totally untenable.

ISSUE SEVEN

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT ORDERED JUDY TO PAY \$750.00 PER MONTH IN CHILD SUPPORT

With Judy's Financial Declaration (Ex 2) affirmatively showing almost \$10,000.00 per month in gross income and more than \$6,000.00 per month in adjusted gross income, it is difficult to understand how she can argue that the Chancellor "incorrectly" found that Judy had an adjusted gross income in excess of \$50,000.00 per year (Brief of Appellant, page 28). Judy essentially states on appeal that this money, which she reported to the Court as monthly income, is not "really" income. Judy's argument actually begs the underlying fundamental question, i.e., what her child support obligation should be.

Calculating child support in the instant case created an interesting paradox. On the one hand, Judy was claiming \$6,087.63 per month in adjusted gross income on her Financial Declaration. Such figure does not reflect the true definition of adjusted gross income, as it includes, as a deduction, the \$861.00 Judy was paying monthly for her health insurance, which is not legally mandated. See Section 43-19-101, et seq. of the Mississippi Code of 1972, as amended. Accordingly, her true adjusted gross monthly income was actually \$6,948.63. Even though this clearly exceeds the \$50,000.00 per year in adjusted gross income referred to in the statute, following the guideline rotely would dictate a child support obligation for Judy of \$972.80 per month ($\$6,948.63 \times .14$).

On the other hand, Judy received a gross severance package of \$395,000.00, and a net severance package of \$257,707.50. As she described it, the package represents the value of the pay she would have received had she elected to remain employed for two more years, and then taken early retirement. If she had decided to keep her job, rather than to voluntarily resign, Judy would have netted, after legally mandated deductions, \$10,737.81 each month over the course of the twenty-four month period from her resignation until her eligibility for early retirement at age 55. Application of the guideline to such a figure would produce child support in the amount of \$1,503.29 per month ($\$257,707.50 \div 24 \text{ months} \times .14$).

At the time of trial, Jamie was 17 years of age and a junior in high school. Jimmy's Financial Declaration (Ex 1) shows that, exclusive of housing, utilities, clothing, vehicle transportation and vehicle insurance, Jamie has \$600.00 per month in out-of-pocket expenses. Adding back to that figure a reasonable sum for the proportionate share of Jamie's housing, utilities, truck note and car insurance easily justifies a conclusion that, from both parents, Jamie clearly needs at least \$1,500.00 per month to meet all of his regular monthly expenses, or at least \$750.00 per month from both parents.

Moreover, Judy, at the time she quit her job with the shipyard, was making significantly more than Jimmy. It would certainly justify an adjudication that she should be responsible for more than half of Jamie's regular monthly expenses.

All of these things being considered, Judy cannot plausibly argue that \$750.00 per month is an excessive amount of child support for a woman of Judy's means.

Further, a trial court is justified in imputing income based upon earning capacity rather than actual income. White v. White, 722 So.2d 731 (Miss. Ct. App. 1999); Bredemeier v. Jackson, 689 So.2d 770 (Miss. 1997); Masino v. Masino, 820 So.2d 1267 (Miss. Ct. App. 2002); Smith v. Smith, 614 So.2d 394 (Miss. 1993).

It is difficult to imagine how Judy can logically assert that the Chancellor abused her discretion in requiring \$750.00 per month toward the support of her 17 year old son. This is all the more astounding when considering Judy's assertion that the \$395,000.00 severance package she accepted represents what she would have earned with the shipyard if she simply had not elected to quit her job. Her argument carries no weight.

ISSUE EIGHT

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ADJUDICATING THE SEVERANCE PACKAGE AS A MARITAL ASSET, SUBJECT TO EQUITABLE DISTRIBUTION; NOR DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN ADJUDICATING THE AMOUNT OF CHILD SUPPORT FOR JUDY TO PAY

Judy's final argument is, simply put, a re-statement of arguments made by her earlier. She states that the trial court committed error in determining that the severance package was a marital asset subject to equitable distribution, and that the trial court was also in error for using that money as a basis for ordering child support.

It is not necessary, nor would it be productive to re-hash here Jimmy's argument with regard to the marital character of the severance package. Arguments made by him heretofore are adopted and incorporated herein by reference.

Nowhere does the trial court's Findings of Fact and Conclusions of Law support Judy's assertion that Jimmy is "double-dipping". In fact, Jimmy could make a quite plausible argument that the Chancellor failed to properly consider the fact that, from May of 2005 up until November of 2006 (the time from when the severance package was received until the commencement of the trial), Judy had spent about 75% of the gross severance package, amounting to an incredible dissipation by Judy of a marital asset. If Jimmy had quit his job, instead of Judy quitting hers, shortly after the separation, Judy would most assuredly be arguing that she should receive her fair share of the marital pie based upon its

value prior to Jimmy spending it down. She would also most assuredly argue that Jimmy's child support determination should be based not on what Jimmy actually had coming in from his employment, but what it could have been if he had not voluntarily quit his job.

The Chancellor has wide discretion to deal with matters of this sort. She should not be, and cannot be, reversed on appeal unless this Court, without substituting its own Judgment for that of the Chancellor, believes that her discretion was abused. In looking at the totality of the circumstances surrounding this particular issue, and including, among other things, the extravagant lifestyle led by Judy with her paramour, it is well within the Chancellor's discretion to set the child support where she did, at \$750.00 per month. The child's needs, and Judy's income-generating ability justify nothing less.

CONCLUSION

This tragic case exists because of Judy Wheat's poor, but voluntary, decision-making.

In the fall of 2004, she began an extra-marital affair with the President of the company where she had worked for nearly thirty years.

In March of 2005, just a few months later, she elected to leave her husband of more than seventeen years, so that she could pursue a more permanent relationship with her lover.

In April of 2005, although she had no real ground, she sued her husband for divorce, citing "irreconcilable differences".

In May of 2005, she quit her six-figure-a-year job, because, as she put it, her lover's job was more important than her own.

Without even looking for a job, she started a new business that, by the time of trial, more than eighteen months later, had not generated one cent of profit. Yet, she spent more than \$200,000.00 of a severance package that was paid to her when she separated from her employment.

In the face of these circumstances, Jimmy Wheat selected the only course of action available to him, i.e., to legally protect himself and the parties' teenage son.

A trial ensued, and Jimmy was awarded a divorce based upon Judy's uncondoned and continuing adulterous conduct. Judy was

awarded approximately fifty percent of the marital pie. She now complains, however, that the trial court not only treated her unfairly, but with such indifference that the Judge abused her legal discretion.

The facts of this case abundantly demonstrate the opposite. The Chancellor, who had very broad, discretionary decision making authority, could have been far less generous to Judy under the laws of this state. She certainly did not commit legal error in awarding Judy approximately half of the parties' net assets, and in requiring her to pay reasonable support for her son.

The Judgment of the Jackson County Chancery Court should be affirmed in all respects.

Respectfully submitted,

JAMES M. WHEAT

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CERTIFICATE OF SERVICE

I, GARY L. ROBERTS, do hereby certify that I have mailed by U.S. Mail, postage prepaid and properly addressed, a true and correct copy of the above and foregoing **Brief of Appellee** to counsel opposite, Dean Holleman, Esq., and hand delivered a true and correct copy to the Trial Judge, Hon. Jaye Bradley, on this the 1st day of October, 2009.



GARY L. ROBERTS