SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO. 2008-CA-00476

JUDITH R. WHEAT — APPELLANT

VS.

JAMES M. WHEAT — APPELLEE

APPEAL FROM THE CHANCERY COURT
OF JACKSON COUNTY, MISSISSIPPI
CAUSE NO. 2005-0763 JB
HONORABLE JAYE BRADLEY, PRESIDING TRIAL JUDGE

BRIEF OF APPELLANT

ORAL ARGUMENT IS NOT REQUESTED

ATTORNEY FOR APPELLANT:

DEAN HOLLEMAN, MSB[redacted]
BOYCE HOLLEMAN & ASSOCIATES
1720—23rd Avenue-Boyce Holleman Blvd.
Gulfport, MS 39501
(228) 863-3142
Telefax (228) 863-9829

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO. 2008-CA-00476

JUDITH R. WHEAT — APPELLANT

VS.

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:

Judith R. Wheat (Dur), Appellant

James M. Wheat, Appellee

Dean Holleman, Boyce Holleman & Associates, 1720—23rd Avenue-Boyce Holleman Blvd., Gulfport, MS 39501, Attorney for Appellant

Gary Roberts, Post Office Box 237, Pascagoula, MS 39568, Attorney for Appellee

Honorable Jaye Bradley, Trial Judge

Respectfully submitted, this the 1st day of July, 2009.

DEAN HOLLEMAN
ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

Facts: Introduction

Judy and James were married on January 8, 1988. They had one son, James, born on October 12, 1989. Tr.112. The parties separated as husband and wife in February 2005 after 16 years of marriage. Tr.107. The Complaint for Divorce was filed by Judy (irreconcilable differences) on May 5, 2005.[1] James filed his Counter-Complaint for Divorce on the grounds of adultery. Following the trial in November 2006 and January 2007, the Court granted James a divorce upon the grounds of adultery.[2] The Court's Judgment, *inter alia,* addressed custody, child support and the equitable division of property. The findings of the Chancellor as to the classification of marital assets and the setting of child support are manifestly wrong and/or clearly erroneous as will be discussed herein below. From that Judgment, Judy perfected her appeal.

The Separation: End of Marital Relationship

Judy and James physically lived together as husband and wife from the date of their marriage in 1988 until their separation. Both parties had their separate careers throughout the marriage. Beginning with their separation in February 2005, they thereafter lived separate lives up through the date of the final judgment. Upon the separation, Judy removed herself from the marital home in which the parties had lived during the duration of the marriage. James and the parties' minor son continued to reside in the home through the trial. Tr.141.

---

[1] Judy was represented by other legal counsel through the trial of this case. Dean Holleman, of Boyce Holleman, P.A. was retained to handle the appeal of this case after the appeal was perfected.

[2] Due to the failure of a valuation being offered into evidence at trial on a retirement account belonging to James, the Court reopened the record in February 2008 and received the valuation. CP.82, RE.78.

After the separation, Judy and James began the process of beginning separate lives. They divided up the contents of the home, with Judy taking a loveseat, a television, some lamps, a bedroom set, a table and chairs, a computer, and a coffee table. Tr.34. Judy set up her own residence. She later purchased her own dishes, pots, pans, silverware, towels, sheets, linens, etc. and 'set up housekeeping' herself. Tr.35. She initially moved into the home of a friend, and then she rented her own apartment and paid her own rent. Tr.35-36. Judy spent some $22,000.00 of her money to set up her new home. Tr.39. Thereafter, Judy began a new business with four partners. She then purchased a condominium that had been renovated by the business, Tr.35,37.

The parties' finances were also separated. Judy had her own checking accounts, none of which James used.[3] Tr.41,45-47. Any checks or deposits on the accounts were her transactions. Tr.41. She had her own private health insurance. Tr.54. She had her own savings accounts. Tr.41. She paid her own car insurance and other incidentals. Tr.41-42. She had her own Christmas Club account. Tr.44. She purchased her own food and household supplies. Tr.75. She purchased her own clothes. Tr.77. She purchased her own medications. Tr.77. She provided support to their minor son of about $300.00 per month. Tr.78. She paid one half of the son's auto insurance premium. Tr.80. She paid for her own entertainment. Tr.78-79. She paid her own car note. As further evidence of their agreement to separate their finances and lives, she refinanced her car with a new note and she took the debt off of the marital home equity line of credit. Tr.80,208. She also had her own credit cards and paid her own monthly payments. Tr.81,143. She made her own personal loans at a credit union and paid the monthly note. Tr.82. She purchased her own gasoline. Tr.83.

---

[3] The parties separated themselves and their finances amicably and without the necessity of a hearing or temporary order.

After the Hurricane struck and damaged the home, she deferred to James the full control of the marital home. She relinquished to him the handling of the damages from Katrina and the related insurance and grant monies for those damages.[4] Tr.122.

James also handled his own affairs after the separation. He had his own bank accounts from which he paid his own expenses. Tr.130-131. He had Judy sign over Merchant & Marine stock to his name only. Tr.132,145-146. He paid his own truck insurance. Tr.152. Finally, they each paid their portion for the son's clothing. Tr.164. In short, there was absolutely no 'joint' accumulation of any assets or liabilities by the parties after they separated in February 2005.

The Parties' Employments

Both parties worked the entire marriage. Both had retirement accounts related thereto. When they separated, Judy and James were approximately fifty three (53) years of age. Judy was employed in Pascagoula, where she had worked for some thirty (30) years.[5] Her annual salary was approximately $120,000.00. (Exhibit 2, RE.96). James was a long time employee of Merchants & Marine Bank in Jackson County, Mississippi. His annual salary was approximately $91,820.00. (Exhibit 1, RE.96). Neither party had any health issues affecting his/her ability to be employed. Tr.1-8,106-109.

---

[4] The separateness of the parties is shown further by James' Motion for Emergency Relief filed on May 10, 2006, (for which an Order was entered) wherein he acknowledged the parties separated as of March 1, 2005 and that he had "exclusive use of the marital home", notwithstanding the absence of a temporary order awarding him such. CP.24, RE.26.

[5] As will be discussed herein below, this employment ended in May 2005, after the parties separated. The identity of the employer will not be revealed herein due to a confidential agreement reached between Judy and the employer. The identity of the employer may be found in Exhibit 4 and 4a which was introduced into evidence and sealed by Order of the Court. This exhibit has been since transmitted to the Supreme Court/Court of Appeals under seal.

Judy's Employment Severance Agreement

Related to the breakdown of the marriage of Judy and James was a relationship which Judy had with a coworker at her employment. In May 2005, after the divorce was filed and the parties separated, Judy and her employer entered negotiations regarding her future employment and her relationship with her co worker. In order to avoid any conflict of interest which would arise because of the relationship, the decision was made that Judy would separate from her employment in exchange for the employer's agreement providing, *inter alia*, for an advance of the earnings she would have earned between May 2005 and her anticipated retirement in May 2007. Tr.51,57. The "Confidential Settlement Agreement" reached by Judy and the employer, provided, *inter alia*, as follows:

> 2.4 Judy has worked for the Company for more than thirty years and is approaching early retirement age. The Company has determined that it is in its best interest to offer her the benefits provided for in this Agreement *to help bridge her to early retirement*, in exchange for Judy's promise to abide by all of the terms of this Agreement.
>
> (Exhibit 4, RE.102, Referenced Paragraphs of "Confidential Settlement Agreement")[emphasis ours]

In order to provide Judy with what she would have earned had she worked from May 2005 until May 2007 (retirement age), the agreement provided further:

> 3.1 A lump sum payment of $395,000.00, representing the *approximate value of the pay and benefits Judy is foregoing by resigning before early retirement age*. This payment will be made, less applicable withholding, within ten business days following Judy's termination date as set forth in Section 4 of this Agreement.
>
> (Exhibit 4, RE.102, Referenced Paragraphs of "Confidential Settlement Agreement")[emphasis ours]

Pursuant to the Agreement, in May 2005 Judy received the aforementioned consideration of her advance pay. Taxes and social security were deducted with the net proceeds equaling $267,707.50. Exhibit 4A,RE.103. Judy placed these funds into her own account. After this

separation from her employment in May 2005, she began withdrawing a monthly amount from the funds as a substitute for the salary she would have earned had she remained employed through May 2007.[6] Tr. 19-20;44-45,47,95. At the time of trial in October 2007, the remaining balance of these funds was approximately $61,000.00 after her monthly withdrawals. Tr.95.

Also, in connection with the severance, the employer paid Judy an additional $52,448.35 for the contributions that would have been paid to her IRA between May 2005 and May 2007, had she remained employed. Tr.46. Judy placed these funds in a certificate of deposit and showed them on her financial declaration. Exhibit 1, RE.86.

The following are all of the assets and liabilities of the parties whether deemed marital or **non marital (in bold):**

ASSET	VALUE	REFERENCE
Marital Home	$130,000.00	CP.70,Tr.117
Marital 1st Mortgage	-$75,872.00	Tr. 117,150
Marital 2nd-Hancock Bank	-$40,816.00	Tr.117,208,150,2
Katrina Insurance Proceeds	$29,500.00	CP.71,Tr.121
Katrina Insurance Proceeds	$146,892.00	CP.71
James Merchants Stock	**$34,720.00**	CP.52,57-58,132,145
James Morgan Keegan IRA	**$57,116.00**	CP.52,57-58,133,246
James 401K	$80,000.00	CP.70,Tr.134
James Pension Plan	**$180,484.00**	CP.41-45, 52,70
James GMC Truck	$20,400.00	CP.71
James GMC Truck-Loan	-$16,127.00	Exhibit 1
James Checking	$360.00	Exhibit 1
James Savings	$11,120.00	Exhibit 1
James Furnishings etc	$29,450.00	CP.71,72

[6] On her financial declaration (Exhibit 2, RE.96) Judy shows "income" of $9,898.00 per month ["Until May 2007"] which was her monthly draw from her severance proceeds for May 2005 through May 2007. This money is taken from a money market account and deposited each month into a First State checking account from which she pays her expenses. She did not show the severance funds as an "asset". Tr. 44-45. Exhibit 2, RE.96.

Judy-Condominium	$85,000.00	Tr.37-38
Judy-Condominium-Mortgage	-$85,000.00	Tr.37-38
Judy Checking/Savings	$12,774.00	Exhibit 2.
Judy Stock-Individual	$54,569.00	Exhibit 2; Tr.49
Judy Stock-Long Term	$180,676.00	Exhibit 2.
Judy IRA Bridge-Severance[7]	$52,448.00	Exhibit 2; Tr.??????
Judy-Ingalls Retirement	$18,764.00	Exhibit 2; CP.70
Judy-Northrup Retirement	$46,140.00	Exhibit 2.
James Liabilities (w/o mtgs, auto)	-$10,300.00	Exhibit 1.
Judy Liabilities (w/o mtgs, auto)	-$51,672.00	Exhibit 2.
Judy Accura	$20,000.00	CP.71,Tr.29
Judy Accura Loan	-$19,465.00	Exhibit 2; Tr.29
Judy-Net Severance Package[8]	$257,707.00	CP.70,Tr.47; Exhibit 4, 4a.
TOTAL NET VALUE OF ALL ASSETS	$1,148,868.00	

The **bolded** assets in the above list indicate the assets which the Chancellor determined, erroneously, to be non marital and which are at issue as discussed herein below. Further, at issue herein will be the 2nd mortgage on the marital home, the IRA bridge severance, and Judy's net severance package from her employment.

Judgment of the Trial Court

Upon the conclusion of the trial and post trial supplementation and hearings the Chancellor made the following ruling for child support and division of property:

[7] This asset was accumulated outside the marriage in connection with Judy's severance agreement of May 2005 and was for future IRA contributions as discussed herein below.

[8] This asset was accumulated outside the marriage in connection with Judy's severance agreement of May 2005 and was for future IRA contributions as discussed herein below.

1. The Court ordered Judy to pay James child support of $750.00 per month, one-half of the child's auto insurance premiums, one-half of the child's health insurance premiums and non covered medical bills, and one half of college expenses; and

2. The Court awarded James the following assets and liabilities (Chancellor's marital or **non-marital** status noted): Marital home $130,000.00; 2nd Mortgage (-$75,872.00)[9]; Katrina insurance proceeds $29,500.00; Katrina grant proceeds $146,892.00; **James' Merchant & Marine Stock $34,720.00**; **James' Morgan Keegan IRA $57,116.00;** James' 401k $80,000.00; **James' Pension Plan-Merchants & Marine $180,484.00**; James' GMC Truck $20,400.00; James truck loan (-$16,127.00); James' checking account $360.00; James' savings account $11,120.00; James' furnishings $29,450.00; One half of Judy's Stock-Long Term $90,338.00; James' liabilities (-$10,300.00). James' net total is $708,081.00. If the **bolded** assets, which the Court deemed **non marital**, are deducted from this total his net total is $435,761.00, i.e. this is the value of the 'marital assets' awarded James as determined by the Court.

3. The Court awarded Judy the following assets and liabilities: Judy's condominium $85,000.00; Judy's condominium mortgage (-$85,000.00)[10]; Judy's checking/savings $12,774.00; Judy's stock/individual $54,569.00; One half Judy's stock-long term

---

[9] The Chancellor's finding that the first mortgage being assigned to James had a balance due of $116,688.00 was clearly erroneous. The amount recited by the Chancellor was the actual total of the 1st and 2nd mortgages combined. Thus, James' financial position was $40,816.00 better than as ordered by the Chancellor, i.e. less debt. CP.60, RE.59; Tr.117,150; Exhibit 1,2.,RE.86, 96

[10] Although this asset was purchased after separation and therefore accumulated outside the marriage, the value equals the debt, so there is no net effect.

$90,338.00; Judy's IRA Bridge Severance $52,448.00[11]; Judy's Ingall's Retirement $18,764.00; Judy's employment Retirement $46,140.00; Judy's liabilities (-51,672.00); Judy's Accura $20,000.00; Judy's Accura loan (-$19,465.00) and Judy's Net Severance Package $257,707.00 for a net total of $481,603.00. However, if the IRA Bridge Severance of $52,448.00 (Judy contends non marital) and Judy's Net Severance Package of $257,707.00 (Judy contends non marital) are both excluded, Judy's net total of 'marital assets' is reduced to $171,448.00 compared to James' $708,081.00, including his assets deemed non marital. Even if you exclude these 'non marital assets' his net total is still a hefty $435,761.00 compared to Judy's $171,448.00. Such an award is far from equitable as will be shown herein below.

SUMMARY OF ARGUMENT

Judy asserts that the Chancellor was manifestly wrong in its failure to establish a date or point in time to specifically identify the marital assets, in erroneously classifying assets accumulated outside the marriage as marital and in erroneously classifying assets to be non marital, when in fact they were all or partially marital assets. Finally, the Court erred in its awarding child support and the basis and methodology used to arrive at her award.

"Assets so acquired or accumulated *during* the course of the marriage are marital assets and are subject to an equitable distribution by the chancellor." *Hemsley,Supra.* Just as important is the holding in *Hemsley* that holds that **if** an asset is shown to be "associated solely with one party's estate prior to **or outside of marriage**" then the asset is subject to equitable distribution. Id. While marital property is defined as any and all property acquired or accumulated during the

[11] Again, this asset was accumulated outside the marriage in connection with Judy's severance agreement of May 2005 and was for future IRA contributions as discussed herein below.

marriage, assets attributable to a parties' separate estate or those accumulated outside the marriage are non-marital and should be classified as the separate property of the owner. *Hemsley,* Supra.

A trial court must determine what date will be considered as the date for identifying and valuing assets. By failing to specifically find this 'date of identification and valuation', the trial court's determination of what the marital assets will be is fatally flawed. See *Godwin,* Supra; *Hensarling*, Supra.

The Supreme Court in *Hensarling*, dealt with an investment account which was in existence during the marriage and at the time of the separation of the parties. *Hensarling* specifically stands for the proposition that any asset accumulation after the separation date of the parties ('separate lives' and 'outside the marriage') is the sole property of the spouse accumulating the asset. Id. At 591: "We now turn to the issue of the award of interest accrued **from the date of separation to the date of the Final Judgment**." Id. At 591. [emphasis ours]. The Supreme Court specifically focused upon and directed that the determination of the non-marital portion of the husband's account would be from the "date of separation to the date of the Final Judgment". Id.

There is no question that Judy and James' actions following the date of their separation in February 2005 support no other conclusion than that they began their separate lives, both physically and financially. Their date of separation was a clear 'line of demarcation' which the Chancellor, as a matter of fairness and equity, should have recognized and followed. As a result of not doing so, the Chancellor clearly erred in classifying Judy's assets from her severance agreement as marital assets.

Judy's severance agreement and monies received was accumulated outside the marriage and after the date of separation. The severance she received was for 'future' income and had nothing to do with the duration of the marriage. As a state adhering to the equitable distribution regime for property division, Mississippi has dealt only minimally with the question of whether severance pay in general is considered a marital asset and ultimately subject to equitable distribution. A severance package received for a period of past years of service rendered during the marriage has been held to be a marital asset by the Mississippi Court of Appeal. *Prescott*, supra. Judy's severance package was not accumulated during the marriage and was not attributable to the 'joint' efforts of the parties, and is not a marital asset. *Hensarling,* Infra. Also, included with the severance was a "bridge" IRA payment for what would have been paid to Judy's IRA had she remained employed from May 2005 through May 2007. The value of this asset is shown on Judy's financial declaration at a value of $52,448.00. This asset was accumulated after the parties separated as husband and wife and was not attributable to any contribution from the marital estate or the joint efforts of the parties. *Ferguson*, Infra; *Hemsley*, Infra; *Hensarling*, Infra.

Regardless of James' testimony that he was vested with his pension plan when he married Judy, the value of this pension was increased by his years of service during the marriage as shown by his own expert's report. The appreciated value of this pension accumulated during the marriage should have been included as a marital asset and to not include this value as a marital asset is error. The exclusion of the appreciation of some $170,000.00 as a marital asset was error and such rendered the distribution of assets as inequitable. *Ferguson*, Infra; *Hemsley*, Infra; *Hensarling*, Infra.

James' Merchants & Marine stock was valued at $34,720.00. The Chancellor concluded this stock was non-marital. This conclusion was based solely upon the testimony of James and notwithstanding the fact that the stock was in both parties name up to the date of their separation. There were no documents offered to support his testimony of a non marital status. Therefore, having failed to offer evidence of its non-marital status by more than a "mere demonstration", this asset should have been labeled as a marital asset. *Hemsley v. Hemsley*, 639 So.2d at 915; See also *A. & L. Inc. v. Grantham*, 747 So.2d 832 (Miss. 1999); *Pearson v. Pearson,* 761 So.2d 157 (Miss. 2000); *Johnson v. Johnson*, 650 So.2d 1281, 1286 (Miss. 1994).

James' Morgan Keegan IRA was valued at $57,116.00. The Chancellor concluded this IRA was non-marital. Again, this conclusion was based solely upon the testimony of James. James' testimony was there was some change in the law on IRA contributions prior to the marriage and he had made no contributions during the marriage. No documentation was offered to support when the IRA was originated or whether it was owned prior to the marriage. Therefore, having failed to offer evidence of its non-marital status by more than a "mere demonstration", this asset should have been labeled as a marital asset. *Hemsley v. Hemsley*, 639 So.2d at 915; See also *A. & L. Inc. v. Grantham*, 747 So.2d 832 (Miss. 1999); *Pearson v. Pearson,* 761 So.2d 157 (Miss. 2000); *Johnson v. Johnson*, 650 So.2d 1281, 1286 (Miss. 1994).

James was awarded the use, possession and ownership of the marital home. The first mortgage on the home had a balance of $75,872.00. The second mortgage balance was $40,816.00. In her ruling, the Chancellor awarded the marital home to James. However, in ordering James to be responsible for the first mortgage the Chancellor erroneously found the balance of this mortgage to be $116,658.00, when the correct balance was $75,872.00. Further, although the Court awarded the home to James, the Court burdened Judy with the responsibility

to pay the second mortgage on the home of $40,816.00. These were undisputedly marital debts. The Chancellor failed to equitably distribute the debts related to the home by failing to correctly determine the amount of the liabilities and ordering Judy to be responsible for the debt associated with this asset. *Ferguson*, Infra; *Hemsley*, Infra; *Hensarling*, Infra.

The Court ordered child support to be paid by Judy in the amount of $750.00 per month. In its reasoning, the Chancellor incorrectly found that Judy had a 'current adjusted gross income' in excess of $50,000.00 per year. However, the undisputed evidence is that Judy's stated "income" on her financial declaration was NOT income. She was separated from her employment in May 2005 by the severance agreement. The 'income' stated on her financial declaration was her way of showing her monthly withdrawal from her severance money to support herself. It was not "income". Additionally, the Chancellor specifically held "[t]here was nothing at trial presented to show that Jamie [son] had any extraordinary needs or expenses other than automobile insurance". The Chancellor went further to order Judy to pay, in addition to the $750.00 per month child support, one half of the child's automobile insurance, one half of the child's health insurance premium, one half of the non covered medicals and one half of college costs. The child support does not meet the criteria of the child support guidelines allowing a variance from the guidelines. To exceed the guidelines was error. *Hensarling*, Supra; *Vaughn*, Supra; Miss. Code Annotated Section 43-19-103.

Lastly, Judy's financial statement assumed income based upon her severance. Beyond May 2007 she would have nothing to draw from. However, she was charged with her value of the severance as her personal asset. As a result, the severance payment is included both as income and a marital asset. In essence, the Court has allowed for a "double-dip." James received the benefit of half the severance as a marital asset and concurrently received the

additional benefit of the severance package as Judy's income, via child support. As a result, James benefited twice from the double classification of the severance payment. Judy asserts that the Court erred in classifying her severance as both income and an asset. This is not only inequitable, but it is also manifest error on the part of the Court.

LEGAL ARGUMENT

Judy asserts that the Chancellor was manifestly wrong in its failure to establish a date or point in time to specifically identify the marital assets. Further, the Chancellor erred in her classification of assets as marital, when in fact they were accumulated outside the marriage and after the parties had separated both physically and financially. And the Chancellor held assets to be non marital, when in fact they were all or partially marital assets. Finally, the Court erred in its awarding child support and the basis and methodology used to arrive at her award.

Marital Asset Determination and Distribution

While the scope of review in domestic relations cases is limited by the substantial evidence manifest error rule, the Court may reverse a chancellor's finding of fact when there is no "substantial credible evidence in the record to *justify* [her] finding." *Henderson v. Henderson*, 757 So.2d 285,289 (Miss. 2000). The Chancellor's identification and classification of marital or non-marital assets is the first step in the equitable distribution of assets. *Stewart v. Stewart*, 864 So.2d 934 (Miss. 2003) (citing *Hemsley v. Hemsley*, 639 So.2d 909 (Miss. 1994).

The Supreme Court, in *Hemsley*, infra, provided the definition of marital property as used in the classification of assets. *Hemsley*, Infra at 914 ("any and all property acquired or accumulated *during* the marriage"). The Supreme Court further articulated, "Assets so acquired or accumulated *during* the course of the marriage are marital assets and are subject to an

equitable distribution by the chancellor." *Id.* However, just as important is the holding in *Hemsley* that holds that **if** an asset is shown to be "associated solely with one party's estate prior to **or outside of marriage**" then the asset is subject to equitable distribution. Id.; *Pearson v. Pearson*, 761 So.2d 157 (Miss. 2000).

Our courts have recognized that assets accumulated "outside of marriage", e.g. where a separate maintenance order has been entered the accumulating party's separate assets are not marital assets subject to equitable distribution. As shown herein, the Chancellor was clearly erroneous in recognizing certain assets as "marital" that were in fact "non marital assets" having been accumulated 'outside the marriage' after the parties' separation and in recognizing assets as "non marital" that were in fact comingled and/or contributed, directly or indirectly, during the marriage.

While marital property is defined as any and all property acquired or accumulated during the marriage, assets attributable to a parties' separate estate or those accumulated outside the marriage are non-marital and should be classified as the separate property of the owner. Such is why we call it "equitable" distribution, i.e. fairness. *Hemsley,* Infra. Mississippi courts have required that the distribution be consistent with the equities and all other relevant facts and circumstances. *Id.*; *Brown v. Brown*, 574 So.2d 688 (Miss. 1990) ("We have long recognized that incident to divorce, the Chancery Court has authority, where equities so suggest, to order fair division of property accumulated through the joint contributions and efforts of the parties.").

Before assets of a marriage, i.e. "marital assets" can be identified, a trial court must determine what date will be considered as the date for identifying and valuing assets. By failing to specifically find this 'date of identification and valuation', the trial court's determination of

what the marital assets will be is fatally flawed. See *Godwin v. Godwin*, 758 So.2d 384 (Miss. 1999).

In *Godwin,* Id., a separate maintenance order was entered and several years transpired with the husband's deferred compensation plan contributions continuing to be made after the parties' separation. His post separate maintenance order contributions were deemed his separate property. According to the Mississippi Court of Appeals there was "no evidence Barbara contributed to Bill's Deferred Compensation Plan" and thus the plan was not a marital asset. Id. at 386. The Court used the 'separate maintenance' order as the clear line of demarcation by which the parties separated themselves and their finances.

Since in most divorce cases there are long periods of time between the parties' separation and the final judgment of divorce, the date on which the trial court chooses to determine what the marital assets will be is of utmost importance and of utmost financial significance to the litigants. The litigants who are faced with the many delays in reaching the end of a divorce filing should be able to know when the accumulation of the marital assets ends. As a matter of law, the litigants and their attorneys in domestic relations cases should be provided a clear delineation of when a marital estate's joint accumulation ends. The most obvious and equitable date is the date upon which the husband and wife separate themselves and their finances as husband and wife, i.e. their lives become separate.[12] Such a suggestion is not much different from what the Mississippi case law has thus far reasoned.

[12] Surely, the equities involved will not punish two litigants, such as Judy and James, for amicably agreeing to separate themselves and their finances during their pending divorce without a court's intervention via a hearing or order? If two people "separate" whether by order or by agreement and actions, there is no difference.

In recognizing the act of separation of the parties from their marital relationship, the Mississippi Court of Appeals recognized in *Godwin*, Infra, an order of separate maintenance is a distinct end to marital property accumulation. *Id.* at 386. (holding "former husband's deferred compensation plan to which he started contributing several years after order for separate maintenance was his separate property"). In other words, assets that are accumulated "outside the marriage" after the parties separate are recognized as non marital assets. Such assets acquired after the parties' 'separation' date are non-marital and remain the separate property of the owner. *Id.;* see also *Hensarling v. Hensarling*, 824 So.2d 583 (Miss. 2002) (husband's contributions to savings account after the date of separation were his separate property).

The Supreme Court in *Hensarling*, Id., (citing *Godwin v.* Godwin, 758 So.2d 384 Miss. 1999) dealt with an investment account which was in existence during the marriage and at the time of the separation of the parties. *Hensarling* specifically stands for the proposition that any asset accumulation after the separation date of the parties ('separate lives' and 'outside the marriage') is the sole property of the spouse accumulating the asset. Id. At 591. To emphasize this proposition consider the following language from the Supreme Court in *Hensarling*:

> We now turn to the issue of the award of interest accrued **from the date of separation to the date of the Final Judgment**. Id. At 591. [emphasis ours]
>
> We find that the interest accrued **from the date of separation to the date of the Final Judgment** should be awarded only as to that portion of the funds which were originally marital assets. If Ken has added any money to either of these accounts since the date of separation, this amount will be considered separate property and any interest accrued on it will be the sole property of Ken unless the money added to the accounts has already been classified as marital assets. We hold that this issue should be remanded in order to determine the exact total of the marital funds used to set up the account [prior to separation] and the amount of additional funds [added after separation], if any, contributed after the date of separation. Hensarling, at p.592 [emphasis ours].

Even though there was an 'agreed temporary order' in *Hensarling* at p. 586, the Supreme Court specifically focused upon and directed that the determination of the non-marital portion of

the husband's account would be from the "date of separation to the date of the Final Judgment". Id. There was no focus whatsoever upon the date of the "agreed temporary order". Therefore, the Chancellor is charged with the responsibility to look extensively to when the parties separate their lives, discontinue to jointly contribute to an asset and any other factors in attempting to establish a consistent and fair moment of accumulation cessation. While courts and legislatures have attempted to utilize a variety of cutoff dates, several states have found it most equitable to cease the accumulation of marital property at the time of separation. See *Waggoner v. Waggoner*, 531 N.E.2d 1188 (Ind.Ct.App.1988) ("Property acquired after final separation date should not be included in 'pot' of divisible marital assets."); *Dietz v. Dietz*, 436 S.E.2d 463 (Va.App. 1993) ("For property acquired after separation to be classified as marital, the party so claiming will have the burden of proving that it was acquired while some vestige of the marital partnership continued or with marital assets."); *King v. King*, 481 (A.2d 913 (Pa.Super.Ct. 1984) ("The Legislature did not intend that property acquired after separation be treated as marital property."); *Price v. Price*, 355 S.E.2d 905 (Va.Ct.App. 1987).

There is no question that Judy and James' actions following the date of their separation in February 2005 support any other conclusion than that they began their separate lives, both physically and financially. Their date of separation was a clear 'line of demarcation' which the Chancellor, as a matter of fairness and equity, should have recognized and followed. As a result of not doing so, the Chancellor erred in classifying Judy's assets from her severance agreement as marital assets. Additionally, the Chancellor erred in its finding that James' bank stock, which had been jointly owned, was non marital and that his pension plan was totally non marital. Each asset is addressed herein below.

I. IDENTIFICATION AND CLASSIFICATION OF MARITAL ASSETS

ISSUE ONE: THE COURT ERRED BY INCLUDING AS A MARITAL ASSET JUDY'S MAY 2005 SEVERANCE AGREEMENT PROCEEDS WHICH COVERED WHAT SHE WOULD HAVE EARNED BETWEEN MAY 2005 AND HER EARLIEST RETIREMENT DATE OF MAY 2007 A PERIOD AFTER THE DATE OF SEPARATION.

The Chancellor erred in holding there was 'no dispute' that Judy's severance package was a marital asset subject to equitable distribution. Judy's testimony and the severance agreement itself, specifically establish the asset was accumulated outside the marriage and after the date of separation. The severance she received was for 'future' income and had nothing to do with the duration of the marriage.

It must be remembered that Judy's severance agreement paid her 'future' earnings and benefits she would have earned, had she remained employed from May 2005 through May 2007. The package she received was NOT an asset, but a supplant of what she would have received in the future. It had nothing to do with years of service or past performance.

As a state adhering to the equitable distribution regime for property division, Mississippi has dealt only minimally with the question of whether severance pay in general is considered a marital asset and ultimately subject to equitable distribution. A severance package received for a period of past years of service rendered during the marriage has been held to be a marital asset by the Mississippi Court of Appeal. *Prescott*, supra. However, what is the status of a severance package received after the date of the parties' separation (where they separate physically and financially as did Judy and James) and which only includes compensation for the party's future period of employment? The logical and equitable answer is such a severance package is not accumulated during the marriage and is not attributable to the 'joint' efforts of the parties, and is not a marital asset. *Hensarling,* Infra; *Hemsley*, Infra.

In *Prescott*, the Mississippi Court of Appeals reviewed whether a husband's severance payment for a period of past service should be considered part of the marital estate. *Prescott v. Prescott*, 736 So.2d 409 (Miss. App.1999). The Court, in looking specifically to the justification for the payment, affirmed the chancellor's determination that "what controlled was the period [i.e. past] of employment that earned the benefit, not the date on which the benefit was created. *Id.* at 413. The severance package in *Prescott* was based upon a period of thirty eight years of past service, seven of which were during the marriage. Therefore, only a portion of the package was considered marital. *Id.* at 412. As a result, the vast majority of the benefits arising under the severance package were allocable to the period before the marriage, and thus, the wife was awarded only a portion of the severance based upon the seven years during which the parties were married. *Id.*

While the issue of severance payment as a marital asset has been examined only minimally in Mississippi, "the majority of states that have considered the issue have concluded that the touchstone of the classification of severance pay for spousal support purposes is *whether* the severance pay was intended to compensate an employee for efforts made during the marriage or to replace post-separation earnings." [as is the case with Judy's severance] *Berry v. Berry*, 898 A.2d 1100 (Pa. Super. 2006) (classifying husband's severance pay awarded after separation as income, not marital property); See also *Franklin v. Franklin*, 859 P.2d 479 (1993) (affirming trial court's determination that $62,864.16 lump sum severance payment compensated husband for future earnings and was his sole and separate property). Virginia, also an equitable distribution state, has encountered facts much similar to those in the present case. In *Luczkovich*, the Virginia Court of Appeals classified a husband's severance pay as separate property because he negotiated the amount almost two years after the parties separated, and the amount did not

compensate him for services rendered during the marriage. *Luczkovich v. Luczkovich*, 496 S.E.2d 157 (Va. App. 1998). The Virginia Court of Appeals held, "Severance pay compensates the wage earner for the economic exigencies and detriments resulting from permanent separation from service without fault and is intended primarily to alleviate the consequent need for economic readjustment and to compensate for certain losses attributable to dismissal." *Id.* at 709.

Other states have considered a severance package analogous to an early retirement incentive plan and subsequently found the post-separation payments under those plans to be separate property. *See McClure v. McClure*, 647 N.E.2d 832 (Ohio App. 1994); see also *Boger v. Boger,* 103 N.C.App. 340, 405 S.E.2d 591 (1991) (payment under early retirement incentive plan is separate property). Further, states have also compared a severance payment to separation pay upon involuntary discharge from a military order. *In re Marriage of Kuzmiak*, 176 Cal.App.3d 1152 (1986). Similar to the underlying purpose of most severance payments, separation pay "does not serve to compensate for past services." *Id.* at 646. As such, payment is intended to provide a source of support in light of a loss in future income. *Id.* (holding "separation pay as a severance benefit upon involuntary discharge from military is separate property of the service member").

Unlike in *Prescott*, where the husband's severance package was proportional to the total number of years employed, in the present case, a reading of the severance agreement readily discloses that the intent of the agreement is to "represent the approximate value of the pay and benefits [Judy] was foregoing." (See Severance Agreement, Exhibit 4,RE.102) Accordingly, it was not intended to compensate her for work previously rendered, but rather, to replace her post-separation earnings for the two years until her retirement. The severance payment represented

future earnings that, if received, would have been earned after her divorce and certainly constituting separate property. An award of a portion of her severance package to James is analogous to awarding him as a marital asset a portion of her income post-divorce, which is not reflective of the equitable distribution the court sought to make. In light of the rationale for providing Judy's severance payment, any claim of joint accumulation through contribution by James would be unfounded, as the payment was based solely on future earnings, not on any consideration of past employment. Furthermore, the payment was not received until May 2005, after the parties separated.

Valued at $257,707.00 (after withholding), the Chancellor erred in holding the severance package as a marital asset. [The Chancellor incorrectly refers to this in her findings as a 'monthly benefit received by Judy pursuant to the terms of the severance package of May of 2007]. On its face, this asset was a non marital asset accumulated after the date of separation and without any contribution from the marital estate or from any 'joint' efforts of the parties. The record is undisputed that these funds were an advance payment to Judy by her employrer for what she would have earned from May 2005 through May 2007, being her early retirement age. Exhibit 4, RE.102; Tr.48-49. Judy's resignation was some three months after the parties separated as husband and wife, i.e. 'outside' the period of time the couple were living together as a married couple. The consideration she received for the resignation, as shown in the Agreement, was not in any way attributable to any 'joint efforts' of Judy and James. The consideration was not in any way related to Judy's years of service, but was directly related to what her future earnings would have been through May 2007 and what would have been paid into her IRA ("bridge"). This asset was not a marital asset and the Chancellor erred in including the asset as marital. *Hensarling, Infra.* Further, the record is clear that Judy used these funds to

support herself between the separation in February 2005 and the trial, with only $61,000.00 remaining at the time of trial. Tr.19-20. The Chancellor not only included the severance as an asset, but it also based the child support awarded upon the fact that she showed her monthly draw from her severance money as 'income' on her financial declaration. Such is 'double dipping' and error. CP.49,55-56. *Ferguson*, Infra; *Hemsley*, Infra; *Hensarling*, Infra.

ISSUE TWO: THE COURT ERRED BY THE INCLUSION AS A MARITAL ASSET OF THE "BRIDGE" IRA ACCOUNT RECEIVED BY JUDY IN CONNECTION WITH HER SEVERANCE AGREEMENT OF MAY 2007 REPRESENTING THE AMOUNT OF CONTRIBUTION SHE WOULD HAVE RECEIVED HAD SHE REMAINED EMPLOYED FROM MAY 2005 AND MAY 2007.

This asset falls under the same argument and reasoning as set forth under Issue One, herein above. Judy received a "bridge" IRA payment with her severance package for what would have been paid to her IRA had she remained employed from May 2005 through May 2007. The value of this asset is shown on Judy's financial declaration (Exhibit 2, RE.96) at a value of $52,448.00 [mislabeled under "Other Investments" as "grant balances"]. Exhibit 2, RE.96;Tr.46. These funds were received by Judy at the time she received her severance pay in May 2005 and the purpose was to be a 'bridge to the IRA' as she described it. Tr.46. This asset was accumulated after the parties separated as husband and wife and was not attributable to any contribution from the marital estate or the joint efforts of the parties. *Ferguson*, Infra; *Hemsley*, Infra; *Hensarling*, Infra.

ISSUE THREE: THE COURT ERRED IN THE EXCLUSION AS A MARITAL ASSET THAT PORTION OF JAMES' M&M PENSION PLAN WHICH WAS ATTRIBUTABLE TO THE YEARS OF SERVICE THAT OVERLAPPED THE 16 YEARS OF MARRIAGE UP TO THE SEPARATION OF THE PARTIES IN 2005.

The Chancellor erroneously held Judy conceded James Pension Plan was not a marital asset. CP.83, RE.79. However, as will be shown herein below Judy and her attorney were

specifically referring to *that* portion of the plan which was vested and contributed to prior the marriage and she was NOT relinquishing her right to have the appreciated value of that pension plan attributable to years of service during the marriage deemed a marital asset.

This pension plan was valued by an expert after the initial trial and the record was supplemented. The expert's valuation dated April 10, 2007, shows the value of this plan at the time of the marriage to be $7,298.00, the value as of December 31, 2006 to be $178,246.00, and the value as of March 20, 2007, to be $180,484.00. CP.41-45, RE.40-44.

While no contributions were made to this plan during the marriage, it is most important to note the plan appreciated in value some $170,000.00 during the marriage. This appreciation in value is directly related to James' years of service and employment during the marriage. The expert's valuation does in fact include in its calculation the number of years of service and average salary which James earned, with almost half of those years being during the marriage. CP.41-45, RE.40-44; Tr.43-45. Regardless of James' testimony that he was vested when he married Judy, the value of this pension was increased by his years of service during the marriage. The appreciated value of this pension accumulated during the marriage should have been included as a marital asset and to not include this value as a marital asset is error. *Hemsley*, infra.

James will also argue that Judy relinquished any claim to this pension plan. However, before such a conclusion can be made one must look to the entire sequence of the record to understand what Judy was relinquishing claim to. That record shows as follows:

Judy's testimony at trial:

Q. Are you asking the Court to make an equitable division of any retirement accounts that James has through his place of employment?

A. No. But what I would like to do is for him to keep his retirement and for me to keep mine.

Tr.212.

This testimony only deals with who gets what, not if the retirements are marital or not. Following the conclusion of the testimony, the Chancellor requested a valuation be performed on the pension plan by an expert. This valuation was done. CP.41, RE.40. In connection therewith, Judy's attorney sent the following letter to James' attorney dated 9/13/07 addressing the pension plan and valuation:

"I have checked with Mrs. Wheat concerning James's retirement from M & M Bank. She is agreeable that James can keep his retirement which is estimated at $180,000.00" CP.40.

Again, this is consistent with Judy's testimony quoted herein above. She wanted each party to keep his/her own retirement. Such had nothing to do with whether the retirement was marital or not.

Thereafter, a hearing on James' Motion for Reconsideration was conducted with *only* the attorneys present and the following exchanges occurred concerning James' pension plan that was valued by the expert and Judy's wishes:

THE COURT: I mean, I understand what you're saying, but it could be looked at both ways. I can't read her mind, all I can do is read what is in the letter [Tisdale]. And the letter stated she did disclaim any interest. <u>That doesn't mean she's agreeing that it's not a non-marital asset</u>. [emphasis ours].

MR. ROBERTS: Right.

THE COURT: And I can't read that into it. And the other thing in my mind is: <u>certainly, during the course of the marriage that plan increased in value. And would that not be part of the marital estate also to considered? [emphasis ours].</u>

> MR. ROBERTS: Well, it would not be under existing case because that's passive income. If he had an interest in an IRA from prior to the marriage, and made no contributions to that IRA during the marriage, and he gets divorced that IRA is his. It's all non-marital and including the passive earnings on that account. And that's exactly what happens with respect to the $180,000.00 in the pension. And in fact, Your honor's original findings of fact and conclusions of law indicate you are troubled by the fact that some of the pension is marital and some of it is non marital....
>
> Tr.240-241

James' attorney's reference to "passive income" as the basis for the appreciation in value is not accurate and a misstatement of what is contained in the expert's methodology in valuing the pension plan. The methodology specifically includes the consideration of James' years of service, most of which included the years of marriage. CP.41-45, RE.40-44. Unlike an account that is existence prior the marriage which only earns interest during the marriage (e.g. an IRA account) and increases in value, the value of the pension plan was directly affected by the years of service AND the average income James realized during the marriage. Such correlation in value is a marital asset subject to equitable distribution. James' attorney's representation of what the plan's value represented was incorrect. The plan was further discussed on the record as follows:

Regarding a submitted affidavit from James' employer that stated the pension plan was vested on a date prior the marriage and that no other contributions were made after that point in time the following exchange took place:

> THE COURT: What is your position on Mr. Cumbest's post-trial affidavit?
>
> MR. TISDALE: I don't remember what the affidavit says, but is that the one where he says the M&M retirement stopped being funded prior to the marriage?
>
> THE COURT: Right.
>
> MR. TISDALE: The wife conceded *that*. She conceded that that was non-marital property. [*the vested value at the time of the marriage!*]

It must be noted Judy's attorney did not remember what the affidavit said. His inquiry was correct that the affidavit established there was no funding during the marriage. The Chancellor confirmed this to him. However, the ONLY thing conceded here is that whatever was James' prior the marriage remained his separate property. According to the expert, that value in 1988 was $7,298.00. Obviously, the years of service and average earnings since then (all during the marriage) are attributable to the marriage duration. *"That" as referred to by Judy's attorney refers to nothing other than what is stated in the affidavit: the plan was vested prior to the marriage and no other contributions were made thereafter".* The exclusion of the appreciation of some $170,000.00 as a marital asset was error and such rendered the distribution of assets as inequitable. *Ferguson*, Infra; *Hemsley*, Infra; *Hensarling*, Infra.

ISSUE FOUR: THE COURT ERRED IN THE EXCLUSION AS A MARITAL ASSET JAMES' MERCHANT & MARINE STOCK WHICH HAD BEEN COMINGLED AND JOINTLY OWNED BY THE PARTIES DURING THE MARRIAGE.

James Merchants & Marine stock was valued at $34,720.00. The Chancellor concluded this stock was non-marital. CP.57-58, RE.56-67. This conclusion was based solely upon the testimony of James. Tr.132. James' testimony was he 'owned the stock prior to the marriage'. Tr.132. There was no documentation offered to support when the stock was purchased or whether it was owned prior to the marriage. If fact, James' testimony was that at some point during the marriage the stock was titled in Judy's name and James' name: "At some point in time. I had some of the shares that were in there reissued in both names....Just felt like that there, you know, were we are husband and wife, if something happened to me, it would be easier for her to do if she needed to cash in a stock or do what she wanted to without having to obtain a court order or anything". Tr.132-133,145-146. He further testified after the separation they discussed the stock and Judy signed the stock back over to him. Tr.133. There were no

documents offered to support his testimony. Therefore, having failed to offer evidence of its non-marital status by more than a "mere demonstration", this asset should have been labeled as a marital asset. *Hemsley v. Hemsley*, 639 So.2d at 915; See also *A. & L. Inc. v. Grantham*, 747 So.2d 832 (Miss. 1999); *Pearson v. Pearson,* 761 So.2d 157 (Miss. 2000); *Johnson v. Johnson*, 650 So.2d 1281, 1286 (Miss. 1994).

ISSUE FIVE: THE COURT ERRED IN THE EXCLUSION AS A MARITAL ASSET JAMES' MORGAN KEEGAN IRA THERE WAS NOT SUFFICIENT EVIDENCE BEYOND A MERE DEMONSTRATION THAT SAID ASSET WAS ACCUMULATED PRIOR TO OUR OUTSIDE THE MARRIAGE.

James Morgan Keegan IRA was valued at $57,116.00. The Chancellor concluded this IRA was non-marital. CP 57-58, RE.56-57. Again, this conclusion was based solely upon the testimony of James. Tr.133. James' testimony was there was some change in the law on IRA contributions prior to the marriage and he had made no contributions during the marriage. Tr.133. No documentation was offered to support when the IRA was originated or whether it was owned prior to the marriage. Therefore, having failed to offer evidence of its non-marital status by more than a "mere demonstration", this asset should have been labeled as a marital asset. *Hemsley v. Hemsley*, 639 So.2d at 915; See also *A. & L. Inc. v. Grantham*, 747 So.2d 832 (Miss. 1999); *Pearson v. Pearson,* 761 So.2d 157 (Miss. 2000); *Johnson v. Johnson*, 650 So.2d 1281, 1286 (Miss. 1994).

ISSUE SIX: THE COURT ERRED FINDING THE FIRST MORTGAGE ASSUMED BY JAMES HAD A BALANCE OF $116,658.00 AND IN ORDERING JUDY TO BE RESPONSIBLE FOR THE SECOND MORTGAGE/CREDIT LINE LIABILITY OF $40,816.00 ON THE MARITAL HOME

James was awarded the use, possession and ownership of the marital home. The first mortgage on the home had a balance of $75,872.00. The second mortgage balance was $40,816.00. Tr. 117-118. In her ruling, the Chancellor awarded the marital home to James.

However, in ordering James to be responsible for the first mortgage the Chancellor erroneously found the balance of this mortgage to be $116,658.00, when the correct balance was $75,872.00. CP.60; Tr.117,150. Further, although the Court awarded the home to James, the Court burdened Judy with the responsibility to pay the second mortgage on the home of $40,816.00. These were undisputedly marital debts. The Chancellor failed to equitable distribute the debts related to the home by failing to correctly determine the amount of the liabilities and ordering Judy to be responsible for the debt associate with this asset. *Ferguson*, Infra; *Hemsley*, Infra; *Hensarling*, Infra.

II. CHILD SUPPORT

ISSUE SEVEN: THE COURT ERRED IN ORDERING JUDY TO PAY CHILD SUPPORT IN THE AMOUNT OF $750.00 WHEN SAID AMOUNT WAS NOT BASED UPON JUDY'S ACTUAL ADJUSTED GROSS INCOME, SAID SUPPORT EXCEEDED THE STATUTORY GUIDELINES AND THE SAME WAS AWARDED NOTWITHSTANDING THE COURT'S FINDING OF THE ABSENCE OF ANY EXTRAORDINARY NEEDS OR EXPENSES

The parties agreed and James was awarded custody of the parties' son. CP.53,67, RE.52,66. The Court ordered child support to be paid by Judy in the amount of $750.00 per month. CP.55,68, RE.54,67. In its reasoning, the Chancellor incorrectly found that Judy had a 'current adjusted gross income' in excess of $50,000.00 per year. CP.55, RE.54. However, the undisputed evidence is that Judy's stated "income" on her financial declaration was NOT income. She was separated from her employment in May 2005 by the severance agreement. The 'income' stated on her financial declaration was her way of showing her monthly withdrawal from her severance money to support herself. It was not "income". Exhibit 2,RE.96, Tr.19-20;44-45;94-95. Further, the Chancellor noted that there was no evidence to show what Judy's income would be in May 2007, when the severance monies would be exhausted. CP.55-56, RE.54-55. Additionally, the Chancellor specifically held "[t]here was nothing at trial presented

to show that Jamie [son] had any extraordinary needs or expenses other than automobile insurance". CP.56, RE.55. The Chancellor when further to order Judy to pay, in addition to the $750.00 per month child support, one half of the child's automobile insurance, one half of the child's health insurance premium, one half of the non covered medicals and one half of college costs. CP.56, RE.55. The child support award alone was in excess of the statutory guideline, was not based upon actual income, and was not warranted beyond the guidelines. The Chancellor's error is compounded by the additional award of 'other' child support, i.e. automobile insurance premium, ½ of the health insurance premium, etc. This award does not meet the criteria of the child support guidelines allowing a variance from the guidelines and to exceed the guidelines was error. *Hensarling v. Hensarling* 824 So.2d 583 (Miss. Sup. 2002); *Vaughn v. Vaughn* 798 So.2d 451 (Miss. 2001); Miss. Code Annotated Section 43-19-103.

ISSUE EIGHT: THE COURT ERRED IN FINDING JUDY'S SEVERANCE PACKAGE AS AN ASSET SUBJECT TO EQUITABLE DISTRIBUTION AND ALSO USING THE MONTHLY WITHDRAWALS FROM SAID FUND AS THE BASIS FOR ORDERING CHILD SUPPORT.

As mentioned previously, Mississippi courts are inclined to apply the same rules governing the division of pensions to other future employment benefits, including severance packages, and Mississippi appellate courts have upheld equitable division of such benefits. *See* Deborah H. Bell, BELL ON MISSISSIPPI FAMILY LAW (2005). However, classification of pensions is based upon the presumption that pensions are not acquired in one transaction which, while most frequently, is not always the case. See *Draper v. Draper*, 627 So.2d 302 (Miss. 1993). Nevertheless, the Mississippi Supreme Court has likened these benefits and has held that pensions should be considered either as income or property, not both. See *Brown v. Brown*, 574 So.2d 688 (Miss. 1990). Most frequently recognized in alimony determination, retirement

benefits are regarded by the Courts as "part of the stream of income the chancellor may consider." *Id.* at 691; See also *Brennan v. Brennan*, 638 So.2d 1320 (Miss. 1994).

While the *Brennan* case provides considerable authority and insight regarding the classification of pension as income, it also confronts the problematic double-dip issue which arises in situations requiring division of pensions and other financial benefits. *Id.* Once an asset has been deemed 'property' for purposes of division and distribution, it should not also be classified as 'income' for the determination of periodic alimony." *Id.* In Brown, the Supreme Court acknowledged the probability of double-dipping on the part of one spouse in the event that the Court awards alimony based upon all of the assets available to the other spouse and subsequently allows interest in retirement pay. The Court expressed concern that "the lump-sum alimony awarded had been fixed by reference to all of the assets available to the party and that to allow Mrs. Brown now to obtain rights in Mr. Brown's retirement pay would likely be double dipping." *Brown* at 691. The Court reasoned that it would ultimately, in providing the wife with an interest in the pension, "be giving her rights in property the value of which was considered in establishing alimony." *Id.* ("At the time of the divorce decree in 1982, the parties were aware of Ralph's entitlement to military retirement pay. In the proceedings below, the Court expressly found that it was considered part of the parties' net worth.")

Judy's financial statement assumed income based upon her severance. Beyond May 2007 she would have nothing to draw from. However, she was charged with her value of the severance as her personal asset. As a result, the severance payment is included both as income and a marital asset. In essence, the Court has allowed for a "double-dip." James received the benefit of half the severance as a marital asset and concurrently received the additional benefit of the severance package as Judy's income. As a result, James benefited twice from the double

classification of the severance payment. Judy asserts that the Court erred in classifying her severance as both income and an asset. This is not only inequitable, but it is also manifest error on the part of the Court.

CONCLUSION

The Chancellor was manifestly wrong in its failure to establish a date or point in time to specifically identify the marital assets and was clearly erroneous in classifying assets accumulated outside the marriage as marital assets. Further, the Chancellor erred in classifying assets to be non marital, when in fact they were all or partially marital assets. Finally, the Court erred in its awarding child support and the basis and methodology used to arrive at her award. The Final Judgment should be reversed and/or rendered in these respects.

Respectfully submitted, this the 1st day of July, 2009.

JUDITH R. WHEAT, APPELLANT

BOYCE HOLLEMAN & ASSOCIATES

BY: _____

DEAN HOLLEMAN

CERTIFICATE

I, DEAN HOLLEMAN, do hereby certify that I have on this date forwarded a true and correct copy of the above and foregoing document to Honorable Jaye Bradley, Chancellor, Post Office Box 998, Pascagoula, MS 39568 and Gary Roberts, Post Office Box 237, Pascagoula, MS 39568, by United States Mail, postage prepaid.

DATED, this the 1st day of July, 2009.

DEAN HOLLEMAN

DEAN HOLLEMAN, MSB[redacted]
BOYCE HOLLEMAN & ASSOCIATES
1720—23rd Avenue-Boyce Holleman Blvd.
Gulfport, MS 39501
(228) 863-3142
Telefax (228) 863-9829