

SUPREME COURT AND COURT OF APPEALS
STATE OF MISSISSIPPI

NO. 2008-CA-01362

DRAKE L. LEWIS, APPELLANT

VERSUS

TONIA D. LEWIS, APPELLEE


APPEAL FROM

THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

HONORABLE CARTER BISE, PRESIDING TRIAL JUDGE

BRIEF OF THE APPELLANT

ORAL ARGUMENT IS NOT REQUESTED

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IN THE SUPREME COURT AND COURT OF APPEALS
STATE OF MISSISSIPPI

NO. 2008-TS-00750

DRAKE L. LEWIS

APPELLANT

VS.

TONIA D. LEWIS

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 Court may evaluate possible disqualifications or recusal.

1. Drake L. Lewis, Appellant.
2. Tonia D. Lewis, Appellee.
3. Dean Holleman, Boyce Holleman and Associates, 1720 23rd Avenue, Gulfport, Mississippi, Attorney for Appellee.
4. Honorable Carter Bise, Chancellor of Place One, Post Office Box 1542, Gulfport, Mississippi.
5. Thomas W. Teel, Perry, Murr, Teel & Koenenn, P.A., Post Office Box 7158, Gulfport, Mississippi, Attorney For Appellant.

Respectfully submitted, this the 10 day of February, 2009.


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TABLE OF CONTENTS

Certificate of Interested Persons.....	i
Table of Contents.....	ii
Table of Authorities.....	iii
Statement of the Issue.....	1
Statement of the Case.....	1
Statement of the Facts.....	5
Summary of the Argument.....	11
Argument.....	11
Conclusion.....	26
Certificate of Service.....	26

TABLE OF AUTHORITIES

<i>Bresnahan v. Bresnahan</i> , 818 So. 2d 1113 (Miss. 2002)	18, 21
<i>Brock v. Brock</i> , 906 So. 2d 879 (Miss. Ct. App. 2005).....	12, 13, 23
<i>Dorsey v. Dorsey</i> , 972 So. 2d 48 (Miss. 2008).....	13, 23
<i>Ferguson v. Ferguson</i> , 639 So. 2d 921 (Miss. 1994).....	12, 23
<i>Grantham v. Grantham</i> , 747 So. 2d 832 (Miss. Sup. Ct. 1999).....	13, 18
<i>Heigle v. Heigle</i> , 654 So. 2d 897 (Miss. 1995).....	14
<i>Hemsley v. Hemsley</i> , 639 So. 2d 909 (Miss. 1994).....	12, 18
<i>Henderson v. Henderson</i> , 703 So. 2d 262 (Miss. 1997).....	13
<i>Langdon v. Langdon</i> , 854 So. 2d 483 (Miss. Ct. App. 2003).....	18, 21
<i>MacDonald v. MacDonald</i> , 698 So. 2d 1079 (Miss. 1997).....	12
<i>Masłowski v. Masłowski</i> , 655 So. 2d 18 (Miss. 1995).....	18
<i>Tillman v. Tillman</i> , 716 So. 2d 1090 (Miss. 1998).....	14
Other Authorities:	
Deborah H. Bell, <i>Mississippi Family Law §6.03</i> (1 st Ed. 2005).....	12, 18

STATEMENT OF THE ISSUE

Appellant Drake Lewis asserts as follows:

The Court erred in its determination of marital assets and valuations; therefore, the Court erred in making an equitable distribution of assets and liabilities.

STATEMENT OF THE CASE

Drake and Tonia Lewis married in 1991, in Missouri, and separated in June 2006 in Harrison County, Mississippi. The parties had three children, ages, at the time of the divorce, 16,10, and 8.

On August 30, 2006, Appellee, Tonia D. Lewis (hereinafter "Tonia") filed her Complaint For Divorce and Motion For Temporary Relief against the Appellant, Drake L. Lewis (hereinafter "Drake"). (C.P. Volume 1, Pages 1-8)

After answers and pleadings and discovery, the trial was held on July 19 and 20, 2007, and this matter was taken under advisement, pending receipt of proposed findings and conclusions of law from both parties. (C.P. Volume 1, Page 9).

Court's Order

On January 11, 2008, the Chancery Court of Harrison County, First Judicial District, entered its Judgment Incorporating Findings of Fact and Conclusions of Law. (C.P. Volume 1, Pages 9-36) As a result of the Judgment of January 11, 2008, the parties assets were distributed as follows:

To Tonia Lewis, along with any debt associated with the particular asset:

<u>Asset</u>	<u>Value</u>	<u>Debt</u>	<u>Equity</u>
Home: 9021 Marina Avenue Ocean Springs, Mississippi	\$250,000 Ex.4,5A	\$146,000 Ex. 2a,4	\$104,000

Proceeds from sale of Lots 15, 16 Grasslands	\$93,000.00	n/a	\$93,000
Proceeds from sale of Richland Road, Columbia, MO	\$265,624	n/a	\$132,812
St. Martin 10 acres	\$200,000	n/a	\$200,000
4912 Kennesaw Dr. Shenandoah Baton Rouge, LA	\$250,000 Ex. 2, 4, 5	\$82,000 Ex. 2, 4	\$168,000
2003 Yukon	\$20,000 Ex. 2a	\$17,586	\$2,414
AIM 5256	\$2,304 Ex. 12	n/a	\$2,304
AIM 1916	\$3,141 Ex. 12	n/a	\$3,141
IRA (Drake)	\$5,300	n/a	\$5,300
IRA (Tonia)	\$2,950	n/a	\$2,950
Tax Refund	\$9,000	n/a	\$9,000
Lot 29 Hickory Hills Jackson County, MS	\$10,000	n/a	\$10,000
TOTAL NET VALUE TO TONIA:	\$855,7473.00 (as shown on Judgment, C.P. Volume 1, Page 31)		

To Drake Lewis, along with any debt associated with a particular asset:

<u>Asset</u>	<u>Value</u>	<u>Debt</u>	<u>Equity</u>
Suma Hills, Lot 7 Livingston, LA	\$190,000 Ex. 4, 29	\$142,000 Ex. 4, 29	\$48,000
Lot 13, Hickory Hills	\$10,512	n/a	\$10,512
Lots 1-4 Pinehurst Spec Homes	\$680,000 Ex. 5	\$421,000 Ex. 29	\$259,000

Swamp Road	\$30,000 Ex. 2	n/a Ex. 2	\$30,000
Tiger Bend Apartments Baton Rouge, LA	\$130,000 Ex. 5	\$33,505	\$96,545
2000 Corvette	\$27,000	n/a	\$27,000
2004 SK1	\$27,000	n/a	\$27,000
Loan to Legacy Holdings, LLC	\$156,555 Ex. 2a	n/a	\$156,555
Bayliner	\$5,000	n/a	\$5,000
Legacy Holdings, LLC	\$1,148, 270 Ex. 1, 4, 7		\$1,148,270

TOTAL NET VALUE TO DRAKE: \$1,807,882.00 (C.P. Volume I, Page 32)

First Post Trial Motions and Orders

After the court's ruling, both sides filed post trial motions. On January 22, 2008, Drake filed a Motion For Reconsideration wherein he alleged the judgment rendered in this cause dated January 11, 2008 is contrary to the overwhelming weight of the credible evidence and is contrary to Mississippi Law. (C.P. Volume 1, Page 37-38; also filed a second time inexplicably, C.P. Volume 1, Pages 66-67). Similarly, also on January 22, 2008, Tonia filed a Motion To Alter or Amend Judgment wherein she alleged the Judgment rendered in this cause dated January 11, 2008 contained errors concerning the distribution of the assets and asked that those errors be corrected, including but not limited to the error specifying the total amount of assets to be awarded to Tonia in the amount of \$865,733.00. (C.P. Volume 1, Pages 39-41)

However, before these motions were heard and also on January 22, 2008, the Court, on its own motion, entered an Order, modifying the judgment. The Court found that after the distribution

of martial assets that Tonia (Plaintiff) was capable of bearing her own attorneys fees and the portion of the Judgment awarding attorneys fees was vacated. (C.P. Volume 1, Page 65) .

Thereafter, on January 28, 2008, Drake filed a Second Motion For Reconsideration in order to reassert the motion filed prior to the Court's own modification in its Order of January 22, 2008. (C.P. Volume 1, Pages 68-69). Further, on March 24, 2008, Drake filed his Memorandum In Support of Defendant's Motion To Alter Or Amend Judgment. (C.P. Volume 1, Pages 70-76) In his Memorandum, Drake outlined findings of the Court contrary to the testimony and evidence presented.

On March 31, 2008, an Order Altering and Amending Judgment was entered, (C.P. Volume 1, Pages 77-78) wherein the Court altered its Findings of Fact and Conclusions of Law entered in this cause on January 11, 2008 as follows:

As to Page 23 of 28 (Paragraph 31)

Proceeds from sale of	\$265,624.00	n/a	\$132,812T
Richland Road,			\$132,182D
Columbia, MO			

And further, altered and amended to correct the total shown at the end of Paragraph 21 which is "\$855,7473.00" to correctly read \$865,733.00, which would include the total proceeds from the sale of the Richland Road, Columbia, Mo. (C.P. Volume 1, Page 77)

On April 1, 2008 an Abstract of Judgment was entered by the Chancery Clerk of Harrison County, Mississippi. (C.P. Volume 1, Page 79)

Second Post Trial Motions and Orders

On April 9, 2008, Drake filed his Motion To Alter or Amend Order of March 31, 2008 alleging that the Order filed on March 31, 2008 makes substantive changes to the ruling of the Court and which are outside of the Plaintiff's Motion to Alter or Amend the Judgment and which the

Defendant requests to be stricken from the Order of March 31, 2008. (C.P. Volume 1, Pages 80-81) On July 11, 2008, an Order On Post-Trial Motion of Defendant was entered (C.P. Volume 1, Pages 82-86) denying the Motions of Defendant, except as to amended of the Judgment pertaining to the obligation to pay for college tuition which ends upon the child reaching the age of 21.

Appeal

Your Appellant would assert that the errors complained of were not corrected and that the equitable division is still in error; therefore, being aggrieved with the Court's opinion, Drake Lewis has perfected this Appeal to this Court.

STATEMENT OF FACTS

Drake and Tonia Lewis married in 1991, in Missouri, and separated in June 2006, in Harrison County, Mississippi. The parties had three children, whose ages, at the time of the divorce, were 16, 10, and 8. At the time of the divorce, both parties had romantic interests other than their spouse (T. Volume 1, Pages 114-120; C.P. Volume 1, Page 17). Although the Court order addresses the various matters of the divorce, your Appellant will focus his Statement of Facts on just those facts relevant to the issues of this appeal.

During the parties marriage, they operated Legacy Holdings. The parties were in the property and construction business; however, Drake's family were well off and had provided for Drake, along with his siblings, trust properties. During the marriage, Drake would sell or take proceeds from trust properties and put into Legacy Holdings, which business he admitted was a marital property; further, he did receive other benefits from his family, such as the money to buy his corvette (T. Volume 2, Pages 221-222). At the time of the divorce, the parties had substantial holdings, but some were in trust and some were individually owned by both parties. There was extensive testimony about the

properties and the Court made decisions as to whether each was marital or non-marital, placed a valuation on the properties, and then made its equitable decision. The areas of concern for Appellant are the following.

Legacy Holdings.

Legacy Holdings was formed by Drake and Tonia Lewis in 2001 as a Mississippi Corporation which would buy property and build "spec" homes. The court made its determination about Legacy Holdings based on Exhibits 1, 4, and 7, all of which were offered by Plaintiff Tonia Lewis. Drake asserts that these three exhibits are contradictory, inaccurate, and unreliable; further, the document is purported to be "as of July 17, 2007", but Drake moved from the residence in June of 2007 (R.E. Exhibit 11, Page 64, Line 8-11).

First, Tonia Lewis failed to list certain properties on her Exhibit 4: (a) the marital home was not listed (T. Volume 2, Page 163, Line 27 thru Page 164, Line 8); (b) the Richland Road property was not listed as an asset (T. Volume 2, Page 164, Line 9 thru Page 165, Line 9). Additionally, Plaintiff also admitted that this document contradicts the value of the personal property listed in her own exhibit 1 (T. Volume 2, Page 165, Line 23 thru Page 167, Line 4) Finally, Plaintiff herself admitted that this document is unreliable (T. Volume 2, Pages 163-166) and not accurate (T. Volume 2, Page 165, Lines 20-22), as opposed to the un-refuted statement of Drake Lewis (R.E. Exhibit 2 and 2A).

Second, Tonia Lewis listed properties that either no longer existed as assets; however, she used the property values to promote an overall asset value. Tonia claimed the value of Legacy was \$1,148,270.48, but this figure was based upon Exhibit 7, which she also admitted was inaccurate (T. Volume 2, Pages 171-177):

(a) 17845 Satsuma Hills Rd. This property was partially gifted to the Lewis' from Mr. Lewis' father (T. Volume 1, Page 143) and was listed on Tonia's 8.05 Financial form(R.E. Exhibit 1, Page 5, as personal asset); however, she also listed this property as an asset of Legacy in the valuation of the company.

(b) 200 Elderbrook Drive. Tonia testified that this asset was the personal home that was built in Missouri (T. Volume 2, Page 171, Lines 13-17) and, prior to this, that the home had been a personal asset back in 2005 (T. Volume 1, Page 32, Lines 5-18). Regardless, this house had been sold prior to separation (R.E. Exhibit 11, Page 95), yet was used to determine the value of Legacy.

(c) 5037 Deborah. Tonia admitted the property was sold in 2004 (T. Volume 2, Page 172, Lines 9-11), but used the asset in determination of the value of Legacy.

(d) 7109 Pinehurst. Tonia admitted this property was sold in 2005 (T. Volume 2, Page 172, Lines 12-19). This asset was also used in determination of the value of Legacy.

(e) 10 acres St. Martin. Although Tonia testified that this property was a personal, not corporate asset (T. Volume 2, Page 173, Line 13 thru Page 174, Line 5) and she also listed this similarly on her 8.05 Financial form (R.E. Exhibit 1, Page 5,), this was used in determining the value of Legacy.

(f) Richland Road. Although the property was admitted to be a personal asset (T. Volume 2, Page 175, Line 17 thru Page 176, Line 10) and was listed on her 8.05 (R.E. Exhibit 1, Page 5,) as personal holding, this property was used in determining the value of Legacy.

(g) 9021 Marina, Ocean Spring, MS. (personal holding, marital home) this asset shown as Legacy asset is also listed as a personal holding on the Plaintiff's 8.05 (R.E. Exhibit 1)(T. Volume 2, Page 163 , Lines 27-29)

The aforementioned items have a combined value of \$1,803,996.00.

At trial, there were no deeds or titles produced showing one single asset of Legacy, which is consistent with the testimony of Drake Lewis. Drake Lewis testified that Legacy Holdings, Inc., was a marital asset, but that it holds no real property; further, that the company has one real asset, himself, and he operated it as a construction company (T. Volume 2, Page 272, Line 21 thru Page 273, Line 1, and Page 203, Lines 20-27). (See also, R. E. Exhibit 2-2A). There was no documentary, refuting proof that Legacy has any properties; further, Tonia was a full partner, had full access to the office documents and the CPA and produced no underlying documents of property ownership by Legacy.

Further, to be clear, Legacy Holdings did have some personal property, but meager: a Ford F 150 truck that “just sits” (R.E. Exhibit 7; but see, R. E. Exhibit 11, Page 102, Lines 8-16) ; the “road grader” was owned by Drake’s father (R. E. Exhibit 7, but see, R. E. Exhibit 11, Page 102, Line 16 to Page 103, Line 24); but, did own some trailers and tools (R. E. Exhibit 7; R. E. Exhibit 11, Page 103-4).

The Judgment notes that Legacy Holdings, LLC, had equity and value of \$1,148, 270, and then states that the net value to Drake, with Legacy added in, is \$1,807,882 (C.P. Volume 1, Page 32). If Legacy is deducted, the value would have been \$659,612.

Hickory Hills and St. Martin

The Judgment noted two properties, Lot 13, Hickory Hills and the St. Martin acreage (listed as both 9.65 acres and 10 acres) and treats them as separate existing properties. On the Judgment, the Court lists an asset named “Lot 13 Hickory Hills” and refers to Exhibit 19 to substantiate its existence, further, in the Judgment this property is valued at \$10,512 and awarded to Drake. The St. Martin property is valued at \$200,000 in the Judgment and awarded to Tonia. Actually, there is only one property, which both parties discussed. Drake Lewis explained that this was non-marital property

because he was personally given the Hickory Hills property in 2001 by the Drake Linuel Lewis Trust, a trust set up by his father. (T. Volume 2, Pages 206; T. Volume 1, Pages 142-143). This property was then traded for the St. Martin property (T. Volume 2, Pages 205-210; See also, Exhibit 19 and 20, T. Volume 1, Page 147, Lines 29 thru Page 148, Line 25 and T. Volume 2, Page 173, Line 17 thru Page 174, Line 5, and Page 205, Line 9 thru Page 206, Line 5). Hickory Hills Lot 13 was never represented as a current asset held by either party. This “1031 exchange “ or property trade, in January 2006 is unrefuted. Tonia is not on the property title; Tonia is not on the trust. Tonia admitted that the Hickory Hills acreage was placed in Drake’s name by the trust, that there was a 1031 exchange for the St. Martin property and, her name was never on the properties.(T. Volume 1, Pages 147-8) . Drakes states that there was no money exchange. (T. Volume 2, Pages 209-210). In fact, both properties were undeveloped and there were no documentation as to any monies being spent on the property (T. Volume 2, Page 175) Notwithstanding, the Court found the St. Martin property to be a marital asset and awarded it to the Plaintiff. (C.P. Volume 1, Page 32).

Tigerbend

In the Court’s division of assets, the Court granted Drake the Tigerbend Apartments in Baton Rouge, Louisiana, which is valued at \$130,000, with a \$33,505 debt and a net value of \$96,545. Historically, the parties both admitted that Tigerbend Apartments was part of the trust property given Drake by his father. (T. Volume 1, Page 43, Lines 16-20; T. Volume 2, Pages 217-218). Documents clearly shows the property, 1/5 in the name of “The Drake Linuel Lewis Trust” not Drake Lewis individually. (R. E. Exhibit 22). The Court treated this as if marital property.

Loan to Legacy Holdings

In regards to the personal loan to Legacy Holdings, the court has attempted to treat this as both asset and income for the Defendant. The validity of the loan, and Tonia’s prior knowledge of

it, was testified to by the Appellee (T. Volume 1, Page 141, Lines 8-10). Tonia also testified to prior knowledge of large amount of monies from the sale of trust properties in Drake's name being loaned to the company (T. Volume 1, Page 144, Line 24 thru page 145, line 9; see also, T. Volume 1, Page 175, Lines 1-4). Tonia did not list this asset on either of her proffered 8.05 financial statement (R. E. Exhibit 1). However, loans to the company were treated as assets in the judgment.(C.P. Volume 1, Page 22 and 32)

The Chancery Court granted Tonia temporary relief after the divorce was filed and Drake's 8.05 showed income of \$4,300 from Legacy; however, the Court granted the Wife Tonia support that totaled \$4,883. (C.P. Volume 1, Page 15). Thereafter, Drake had Legacy repay loans made to Legacy. (C.P. Volume 1, Pages 15-16) The Court noted that the loan on Exhibit 2A was \$156,555.10, but also that same loan on Exhibit 7 is \$147,855. The Court stated this was a martial asset (C.P. Volume 1, Page 16), even though Drake was already paying his entire salary to Tonia for temporary support. Thereafter, the Court granted child support of \$1,606 per month, as "22% of his net income". Drake's 8.05 shows gross income of \$4,730 and net income of \$3,300.(R. E. Exhibit 2); whereas his net income computed extrapolated from the child support is \$7,300 (\$1,606 divided by 22 equals 1%, multiplied by 100). Therefore, the Court used the loan as both an asset and as income.

Names Of Companies

After the separation, in September, 2006, Drake Lewis started Legacy Builders to continue construction work in his own name.(R. E. Exhibit 11, Pages 39, 43). Further, there is some confusion in the record: there is only one Legacy Holdings; moreover, it is sometimes referred to as LLC by Mr. Holleman and the Court, but was clearly denoted as Legacy Holdings, Inc. (T. Volume 2, Page 282, Lines 12-19)

Judgment

In the Court's Judgment Incorporating Findings of Fact and Conclusions of Law, the Court notes the claims as to non-marital properties. (C.P. Volume 1, Pages 21-22). Thereafter, the Court lists the assets awarded Tonia and valued those at \$855,733.00 (C.P. Volume 1, Page 31, as corrected in C.P. Volume 1, Pages 77-78). The Court also listed the assets awarded Drake and valued those at \$1,807,882. (C.P. Volume 1, Page 32), of which \$1,148,270 is Legacy Holdings.

Appellant filed post trial motions and, unable to have the matter corrected, filed this appeal.

SUMMARY OF ARGUMENT

The Chancery Court was manifestly wrong and erred in its equitable distribution of assets because (a) The Court placed a value on a business that had no assets; (b) The Court incorrectly found property gifted to the husband from a trust to be marital property, (c) The Court treated a previously owned property as a existing asset, and (d) the Court treated a loan as both income and an asset. Further, the Court was manifestly wrong in certain fact findings, as evidenced in documents and testimony; moreover, certain rulings on the facts are not consistent with the rules as to non-marital property and commingling; therefore, the equitable distribution was manifestly wrong and in error.

ARGUMENT

Appellant Drake Lewis asserts that the Chancery Court of Harrison County was manifestly wrong in its equitable distribution and asserts that the Court erred in including Legacy Holdings as a valued asset, erred in finding certain assets marital, erred in including a non-existent property as an asset, and treated loans as assets. These errors effected the overall value of the parties' marital estate and therefore made the overall equitable division of assets wrong and outside the scope of case law.

1. The Equitable Distribution

Mississippi's rules as to equitable distribution are general, but with clear intent. The supreme court has set up a number of guidelines for chancellors to follow during equitable distribution. The chancellor must: (1) classify the parties' assets as marital or separate, (2) value those assets, and (3) divide the marital assets equitably. *Ferguson v. Ferguson*, 639 So.2d 921, 928 (Miss.1994). (emphasis added) Marital property generally consists of assets acquired or accumulated during the course of the marriage. *Hemsley v. Hemsley*, 639 So.2d 909, 915 (Miss.1994). Separate property consists of property acquired before or outside of the marriage. *MacDonald v. MacDonald*, 698 So.2d 1079, 1083 (Miss. 1997). (emphasis added) All assets acquired during the course of the marriage are presumed to be marital. *Hemsley*, 639 So.2d at 915, but there are a number of exceptions. For instance, one writer, Deborah H. Bell, *Mississippi Family Law*, § 6.03 (1st ed. 2005), notes exceptions where gifts, inheritances, income and appreciation from separate property, with personal injury awards, worker's compensation awards, certain loan proceeds, life insurance proceeds, trust income and others. *Id.* at § 6.06. As the Court has stated, "fairness is the prevailing guideline in marital division." *Ferguson v. Ferguson*, 639 So.2d 921, 928 (Miss. 1994).

Although there is a presumption as to marital, the Courts have not rigidly set any rules, looking at reasonable and practical considerations. In *Brock v. Brock*, 906 So. 2d 879 (MS COA 2005), the wife had received a house in her name alone by deed from her father, and even though it was the marital home for some period of time and the husband had paid some taxes and insurance on the property. The Court noted the arguments of commingling and transmutation and stated:

¶50. J.D. also argues that he had an equitable interest in the property because he paid taxes and made repairs to the home. He argues that, in doing so, Robin's gift, intended as separate property, transmuted into marital property, subject to equitable distribution.

Henderson v. Henderson, 703 So.2d 262, 264(¶16) (Miss.1997). We disagree. "When separate property and marital property are mixed to such a degree that the elements cannot be distinguished, i.e., that the separate element cannot be traced, then the entire property is considered marital property: the separate property has transmuted by commingling into marital property. Consequently, the key to determining when there has been transmutation by commingling is whether the marital interests can be identified, i.e., can be traced." Laura W. Morgan & Edward S. Snyder, 18 J. Am. Acad. Matrim. Law 335, 341 (2003). In the present case, J.D. made a minimal number of repairs to the house, and his contributions to the home by paying property taxes are readily traceable.

Similarly, in *Dorsey v. Dorsey*, 972 So. 2d 48 (MS. 2008), the Court again confronted whether a transfer to one spouse by their family during a marriage was mingled property. The Court stated:

¶ 12. Additionally, Lot Six was conveyed to Billy on January 15, 2003, by his brothers. The chancellor found that the land donation met all the requirements of an *inter vivos* gift under the guidelines in *Hankins*. *Id.* Kelli asserted at trial that the property had transmuted into marital property since the children rode across the lot on four wheelers and since marital funds were used to pay the property taxes. However, the chancellor noted that Billy had held title of the property for one year at that time. Further, the chancellor recognized that Kelli offered no proof that marital funds were used to pay the taxes, nor did Kelli offer corroborating testimony establishing the frequency and extent to which the children used the land in question. "When separate property and marital property are mixed to such a degree that the elements cannot be distinguished, i.e., that the separate element cannot be traced, then the entire property is considered marital property: the separate property has transmuted by commingling into marital property." *Brock v. Brock*, 906 So.2d 879, 888(¶ 50) (Miss.Ct. App.2005). Here, the contributions Kelli may have made by paying one year of property taxes are both minimal and easily traceable. As such this Court cannot find the Chancellor committed manifest error by determining that Lot Six was Billy's separate property.

Thus, the burden of proving non-marital character as in *Grantham v. Grantham*, 747 So. 2d 832, (Miss. Sup.Ct. 1999) is modified by the fairness concept of *Ferguson* and by the totality of the circumstances. As stated in *Tillman*, "[T]he chancellor's decision regarding the division of

marital property should be viewed as a whole in determining whether he abused his discretion."

Tillman v. Tillman, 716 So.2d 1090 (Miss. 1998).

2. The Properties and Assets

Appellant Drake Lewis asserts that the Chancery Court erred in its findings as to marital and non-marital assets.

(a) Legacy Holdings:

The Court Placed a Value on a Business That Had No Assets

Legacy Holdings, Inc., a Mississippi Sub chapter S company, was formed by Drake and Tonia Lewis in 2001. Legacy Holdings, Inc. bought and sold property and built houses. In July 2007, when the court made its decision, Legacy Holdings was not in operation; however, the court made a determination about Legacy Holdings based on Exhibits 1, 4, and 7, all of which were offered by Tonia Lewis. Using these exhibits, the Court found that this company had a value of \$1,148, 270.

There was no real evidence of any value attaching to Legacy Holdings, Inc. There were no deeds or titles produced showing one single asset of Legacy. The parties joint taxes returns were in evidence, showing all income and sources of income (Exhibit 3). Drake Lewis testified that Legacy Holdings, Inc., was a marital asset, but that it holds no real property; further, that the company has one real asset, himself, and he operated it as a construction company (T. Volume 2, Page 272, Line 21 thru Page 273, Line 1, and Page 203, Lines 20-27; See also, R. E. Exhibit 2-2A)

What Tonia produced was a computer balance sheet of "Legacy Builders" (R. E. Exhibit 7), which the Court allowed into evidence over objection, noting that Drake's objections go to "weight than to admissibility." (T. Volume 1, Page 68). However, examination of the document by Tonia

revealed that the document was not accurate or correct:

(1) The document is, of course, not of Legacy Holdings, Inc., but of a general name Legacy Builders;

(2) The marital home at 9021 Marina, Ocean Springs is not listed on Exhibit 7 (T. Volume 2, Page 163, Lines 27-29);but Tonia remarked that it would be considered Legacy Holdings, but says she does not know and would be assuming (T. Volume 2, Page 164, Lines 18-22); however, her own financial affidavit lists the homes as titled in Drake and Tonia Lewis (R. E. Exhibit 1), not Legacy Holdings or Legacy Builders;

(3) the Richland property is listed on Exhibit 7 (T. Volume 2, Pages 175-176; R.E. Exhibit 7); however, Tonia admits that this is incorrect, that the property is in the parties personal names.

(4) that the personal property value is not accurate (T. Volume 2, Pages 166-167);

(5) there is a mention of "AR Lewis", which is "A.R. Lewis Management", Drake's father's company for which neither Drake or Tonia received money, but on Exhibit 7 lists income (T. Volume 2, Page 170);

(6) Exhibit 7 lists 718 Suma Hill property as an asset; however, Tonia admits that on the date listed on the "Legacy Builders Balance Sheet as of July 17, 2007", Legacy had a home there, but Exhibit 1 list this property (there called Satsuma Hill) as titled in joint names of Drake and Tonia Lewis;

(7) Exhibit 7 listed homes at 5037 Deborah and at 7109 Pinehurst as of July 18th, but Tonia admitted that the properties were sold and should not be listed as assets on that date (T. Volume 2, Page 172, Lines 9-19);

(8) Exhibit 7 list ten acres in St. Martin, but Tonia admits that this property was not an asset of the company but was in Drake's name and that the property is not ten acres but 9.65 acres (T. Volume 2, Page 172, Lines 20-29; Pages 173-174);

(9) Exhibit 7 also list debts which are not debts of Legacy Holdings, Inc. or "Legacy Builders", such as the marital home note (Volume 2, Page 177, Line12) and the Richland note (T. Volume 2, Page 177, Line 19).

Tonia offered no documents to substantiate what she proposed: that Legacy Holdings, Inc., had over two million dollars of assets. However, after noting numerous times the various inaccuracies of the document she promoted as company assets and valuations, she noted it was just not accurate (see, e.g., T. Volume 2, Page 165, Lines 20-22, Page 176, Lines 7-10). Irrefutably, there are no deeds showing any of the assets on Exhibit 7 are in any names other than Drake or Tonia Lewis. Irrefutably, some of the assets she promotes with Exhibit 7 did not exist at the time the document purportedly was made. Irrefutably, debts noted on Exhibit 7 were debts of the parties.

Clearly, Exhibit 7 is not reliable. As noted, Drake Lewis testified that Legacy Holdings, Inc., was a marital asset, but that it holds no real property (T. Volume 2, Page 272, Line 21 thru Page 273, Line 1, and Page 203, Lines 20-27; See also, R. E. Exhibit 2-2A). Moreover, Drakes' statements are clearly supported by Tonia's admissions.

Reviewing the evidence, it is clear that the Court confused the actual company, Legacy Holdings, Inc., with the working title of the Quickbook page , “Legacy Builders”, which must obviously be a mishmash of what was owned by Drake Lewis individually, Drake and Tonia Lewis jointly, the trust that Drake was a beneficiary on, and the working construction projects. Further, it is clear that Legacy Holdings, Inc. did not own any properties, as the parties owned these in their personal, not corporate, names. Therefore, when the Judgment notes that Legacy Holdings, LLC, had equity and value of \$1,148, 270, and then states that the net value to Drake, with Legacy added in, is \$1,807,882 (C.P. Volume 1, Page 32), the Court places a non-existent asset in his hands.

Taking the court’s numbers, if Legacy is deducted, the value to Drake would have been \$659,612., while the assets to Tonia are \$865,733.00.

(b) Trust Properties:

The Court Incorrectly Found Property Gifted to the Husband from a Trust to Be Marital Property

In the Court’s division of assets, the Court granted Drake the Tigerbend Apartments in Baton Rouge, Louisiana, which is valued at \$130,000, with a \$33,505 debt and a net value of \$96,545. The Court notes that the non-marital claim (C.P. Volume 1, Page 22), but states there is no proof that this was a gift. (C.P. Volume 1, Page 51).

Historically, both Tonia and Drake admitted that Tigerbend Apartments was part of the trust property. (T. Volume 1, Page 43, lines 16-20; T. Volume 2, Page 217-218). Documents clearly shows the property, 1/5 in the name of “The Drake Linuel Lewis Trust” not Drake Lewis individually. (R. E. Exhibit 22; R. E. Exhibit 11, Page 77). Tonia admitted that Drake has a 1/5th interest in the property and prior to that it was in a trust “having to do with his father”. (T. Volume 1, Page 43,

Lines 1-20). Tonia does not claim that this was a purchase by them, nor does she have any documents. Clearly, the evidence established that this property came into Drake's hands just as he stated, a gift.

The Court, however, put Drake to a higher test. Citing *Heigle v. Heigle*, 654 So.2d 897 (Miss. 1995) and *Maslowski v. Maslowski*, 655 So.2d 18 (Miss. 1995), the court notes that non-marital property can be commingled and become marital. Here, there was no evidence of commingling. The income was claimed on joint tax returns, but that alone is not commingling: income can be commingled in bank accounts while the asset remains private, as trust accounts, personal injury payments, disability checks, Social Security checks and a host of other income producing assets. Thereafter, the Court, citing *Grantham v. Grantham*, 747 So. 2d 832 (Miss. Sup. Ct. 1999) and *Hemsley v. Hemsley*, 639 So. 2d. at 915, asserts that Drake must prove beyond "a mere demonstration" that the assets was a gift.

Drake would show that he met his burden. First, an interest in such a trust is generally considered non-marital. See, Deborah H. Bell, Mississippi Family Law, § 6.06 [9][b] (1st ed. 2005). He asserted the gift, he produced documentation, and it was admitted. At that point, it was the burden of Tonia to prove commingling, which she did not do. She did not even prove minor amounts of commingling as in *Bresnahan v. Bresnahan*, 818 So. 2d 1113, 1117-1118 (Miss. 2002). This is more like *Langdon v. Langdon*, 854 So. 2d 485 (MS.CO.A 2003), where the Court stated:

29. Assets acquired during the marriage are presumptively marital assets subject to equitable distribution. *Hemsley*, 639 So.2d at 914. In this instance, the vacant lot was acquired during the marriage, giving rise to the presumption that it was a marital asset. However, an asset may be classified as non-marital if it is purchased with one spouse's separate funds, such as gifts or inheritances. *Ferguson*, 639 So.2d at 929. Here, the evidence reflects that Helen's father gave Helen the house for the sole purpose of facilitating her purchase of the lot. The use of the house was a gift to Helen that Helen used to procure the mortgage on the lot. There was no evidence that Helen made a down

payment on the lot that could have come from marital funds, and no evidence of commingling. There was no evidence that Kent expended efforts that resulted in the lot's appreciation in value. Carrow v. Carrow, 642 So.2d 901, 906 (Miss.1994). We find that there was substantial evidence to support the chancellor's finding that the net proceeds from the sale of the lot were Helen's separate asset. Moreover, the chancellor found that the asset had been depleted by its use to pay off a marital debt and to support Helen and the children. This issue is without merit.

Therefore, Drake asserts that, without refutation or sufficient refutation, Tiger Bend should have been deemed non-marital.

Moreover, this error effected the overall disparity in the equitable distribution. Drake's 1/5th share of Tiger Bend Apartments was valued at \$130,000, with a debt of \$33,505, and a net equity of \$96,545. Taking the court's numbers, if Tiger Bend is rightfully found to be non-marital, then this value would be deducted from Drake's net after deducting Legacy (\$659,612.), Drake would then have been awarded assets at \$563,067 , while the assets to Tonia are \$865,733.00.

Tonia was aware of the trust and understood that if the trust deeded property only in Drake's name, it was the trust intention to only deed it to him and not her. (T. Volume 1, Page 144, Lines 17-29). Like Hickory Hills, above, a similar situation exists with relationship to the Shenandoah property and the Swamp Road property in Baton Rouge. Swamp Road, for instance, is undeveloped property valued at \$30,000. This property was originally owned by Drake's parents, then was gifted to the children, with Drake getting a 1/2 interest. (T. Volume 2, Page 228, Line 19, to Page 229, Line14). There is no indication that Tonia's name was ever on the property, which is listed in Drake's name even on her financial statement (R. E. Exhibit 1, Page 6) and is not listed on her Exhibit 7. The Shenandoah property was also in the trust and then transferred to Drake Lewis only (T. Volume 2, Page 148, Line 26, to Page 149, Line 25).

(c) Hickory Hills and St. Martin:

The Court Treated a Previously Owned Property as a Existing As

The Judgment noted two properties, Lot 13, Hickory Hills and the St. Martin acreage (listed as both 9.65 acres and 10 acres) and treats them as separate existing properties. Drake Lewis would show that this was error. On the Judgment, the Court lists an asset named "Lot 13 Hickory Hills" and refers to Exhibit 19 to substantiate its existence, further, in the Judgment, this property is valued at \$10,512 and awarded to Drake. The St. Martin property is valued at \$200,000 in the Judgment and awarded to Tonia. Actually, there is only one property, which both parties discussed.

In his testimony, Drake Lewis explained that the particular Hickory Hills lot was non-marital property because he was personally given the property in 2001 by the Drake Linuel Lewis Trust, a trust set up by his father. (T. Volume 2, Page 206; T. Volume 1, Pages 142-143). This property was then traded for the St. Martin property (T. Volume 2, Pages 205-210; See also, Exhibit 19 and 20, T. Volume 1, Page 147, Lines 29 thru Page 148, Line 25 and T. Volume 2, Page 173, Line 17 thru Page 174, Line 5, and Page 205, Line 9 thru Page 206, Line 5). Hickory Hills lot 13 was never represented as a current asset held by either party. (See, R. E. Exhibit 1, Page 6) as it was traded for another property. (T. Volume 1, Pages 147-148). However, in the equitable distribution, Drake was awarded this property with a value of \$10,512, a property that no longer existed.

This "1031 exchange ", where the Hickory Hills property was traded for the St. Martin acreage in January 2006, is unrefuted. (T. Volume 1, Pages 147-148) Tonia is not on the property title; Tonia is not on the trust. Further, Tonia admitted that the Hickory Hills acreage was placed in Drake's name by the trust, that there was a 1031 exchange for the St. Martin property and, her name was never on the properties before or afterwards (T. Volume 1, Pages 147-148) . Drakes states that there was no money exchange. (T. Volume 2, Pages 209-210). In fact, both properties were

undeveloped and there were no documentation as to any monies being spent on the property (T. Volume 1, Page 175). Tonia makes one off hand statement that she thought money was spent for a survey, but had no documentation. *Id.*

Drake asserts that this is non-marital property, just like the Tiger Bend property noted previously. Again, it was trust property, gifted to Drake, then exchanged for other property and all property remained in Drake's separate name. (See, R. E. Exhibit 1, Page 6). Again, this is not unlike the situation in *Bresnahan* and *Langdon* as regards mingling property ownership.

Notwithstanding the documentation and the testimony, the Court found the St. Martin property to be a marital asset and awarded it to the Plaintiff. (C.P. Volume 1, Page 31). Again, this further skewed the equitable distribution as Drake was taxed in two different ways: (a) he was given a non-existent asset with a value of \$10,512; (b) he lost a non-marital asset, he St. Martin property valued at \$200,000.

(d) Loan to Legacy:

The Court Treated a Loan as Both Income and an Asset.

Drake Lewis asserts that the Court erred in using the repayment of a loan from Legacy to him as both income and as asset. The validity of the loan, and Tonia's prior knowledge of it, was testified to by the Appellee (T. Volume 1, Page 141, Lines 8-10). Tonia also testified to prior knowledge of large amount of monies from the sale of trust properties in Drake's name being loaned to the company (T. Volume 1, Page 144, Line 24 thru page 145, Line 9; see also, T. Volume 1, Page 175, Lines 1-4). Tonia did not list this asset on either of her proffered 8.05 financial statements (R. E. Exhibit 1). However, loans to the company were treated as assets in the judgment.(C.P. Volume 1, Pages 22 and 32)

Although Drake contends that the loans were, as noted above, from the sale of non-marital property, the monies were paid into Legacy Holdings, Inc., which is a marital asset. As there were no loans or notes and were mingled into a joint account of the business, Drake does not argue that the loans are non-marital. However, Drake asserts that the repayment should not be considered both assets and income.

The Chancery Court granted Tonia temporary relief after the divorce was filed and Drake's 8.05 showed income of \$4,300 from Legacy; however, the Court granted the Wife Tonia support that totaled \$4,883. (C.P. Volume 1, Page 15). Thereafter, as that sum was his entire income, Drake had Legacy repay loans made to Legacy by him. (C.P. Volume 1, Pages 15-16) The Court's Judgment noted that the loan on Exhibits 2a was \$156,555.10, but also that same loan on Exhibit 7 is \$147,855. The Court stated this repayment was a marital asset, subject to division (C.P. Volume 1, Page 16). However, the Court then used that repayment as income: the Court granted child support of \$1,606 per month, as "22% of his net income"; while Drake's 8.05 shows gross income of \$4,730 and net income of \$3,300.(Exhibit 2); yet, his net income extrapolated from the child support amount would be \$7,300 (\$1,606 divided by 22 equals 1%, multiplied by 100), which sum adds into his income the loan repayment.

Drake asserts that the Court erred in using the loan repayment as both income and asset. As asset, the court should split it equitably. As income it should be used to compute child support. However, the court double-dipped. Here, Tonia gets the benefit of half the asset plus an additional 22% of the loan repayment through child support. This is inequitable and manifest error.

3. The Equitable Distribution

Mississippi's rules as to equitable distribution are general, but with clear intent.. Our courts impose equity and fairness and, without stating such, reasonableness on the division of these assets. See, e.g., *Fegurson, Dorsey and Brock, supra*.

Drake clearly stated that the business, the home, and certain properties were marital.(T. Volume 2, page 251 , Lines 16-21) Drake clearly stated that the St. Martin, Shenandoah, Tiger Bend, and Swamp Road properties were non-marital. (T. Volume 2, page 251 , Lines 14-15); further, as shown above, there is no dispute that these properties ultimately derived from a trust set up by Drake's parents. If not fully separate, the Court should have classified them as mixed and set aside whatever marital investment in taxes or minor costs which were made. Therefore, Drake would assert that the following should be considered separate or, if not, the court should remand for a determination as to their being "mixed" and, if so, to what extent:

<u>Non marital assets</u>	<u>value</u>	<u>debt</u>	<u>equity</u>
4912 Kennesaw Dr. Shenandoah Baton Rouge, LA	\$250,000	\$82,000	168,000
St. Martin 10 acres	\$200,000	n/a	200,000
Tiger Bend Apts Baton Rouge, LA	\$130,000	\$33,505	\$96,545
Swamp Road Baton Rouge, La.	\$30,000	n/a	\$30,000
Subtotal	610,000	115,505	494,495

Noteworthy here is that all of these properties are in Louisiana.

Drake asserted at trial court that other assets were non-marital; however, rather

than delve into matters about his car, for purposes of this appeal, Drake would show that the remaining assets that would be marital are as follows:

<u>Marital Assets</u>	<u>Value</u>	<u>Debt</u>	<u>Equity</u>
Home: 9021 Marina Avenue Ocean Springs, MS	\$250,000	\$146,000	\$104,00
Proceeds of Lots 15, 16	\$93,000.00	n/a	93,000
Grasslands Proceeds Richland Road, Columbia, MO	\$265,624	n/a	132,812
2003 Yukon	\$20,000	\$17,586	\$2,414
AIM 5256	\$2,304	n/a	\$2,300
AIM 1916	\$3,141	n/a	\$3,141
IRA (Drake)	\$5,300	n/a	\$5,300
IRA (Tonia)	\$2,950	n/a	\$2,950
Tax Refund	\$9,000	n/a	\$9,000
Lot 29 Hickory Hills Jackson County, MS	\$10,000	n/a	\$10,000
Suma Hills, Lot 7 Livingston, LA	\$190,000	\$142,000	\$48,000
Lots 1-4 Pinehurst Spec Homes	\$680,000	\$421,000	259,000
2000 Corvette	\$27,000	n/a	\$27,000
2004 SK1	\$27,000	n/a	\$27,000

Bayliner	\$5,000	n/a	\$5,000
subtotal	1,593,019	\$726,586	\$866,433
subtotal with Legacy Holdings, LLC		20,000	20,000

Here, a more accurate rendition of the assets is set forth. Legacy Holdings is reduced to the value of trailers and tools as it had no property assets, as such properties are the other individually owned properties of the parties already listed.

In the Court's "Judgment Incorporating Findings of Fact and Conclusions of Law," the Court notes the claims as to non-marital properties. (C.P. Volume 1, Pages 21-22). Thereafter, the Court lists the assets awarded Tonia and valued those at \$855,733.00 (C.P. Volume 1, Page 31, as corrected in C.P. Volume 1, Pages 77-78). The Court also listed the assets awarded Drake and valued those at \$1,807,882. (C.P. Volume 1, Page 32), of which \$1,148,270 is Legacy Holdings. The total assets of both parties in the court order are \$2,663,615 (C.P. Volume 1, Pages 30-31), but in reality should be reduced by Legacy Holdings, the loan, and Hickory Hills Lot 13. Thus, the overall asset valuation was in error.

Basically, the Court skewed the equitable division by several particular actions: (a) The Court placed a high value on a business, Legacy Holdings, that had no large properties or large assets; (b) The Court incorrectly found property gifted to the husband from a trust to be marital property, (c) The Court treated a previously owned property, Hickory Hills lot 13, as a existing asset, and (d) the Court treated a loan as both income and an asset.

CONCLUSION

Appellant Drake Lewis submits that the Chancery Court was manifestly wrong in certain fact findings, as evidence in documents and testimony; moreover, certain rulings on the facts are not consistent with the rules as to non-marital property and commingling; therefore, the equitable distribution was manifestly wrong and error. Appellant Drake Lewis asserts that this Court should do the following: reverse and render; or, remand with instructions as to the equitable distribution.

RESPECTFULLY SUBMITTED, this the 10th day of February, 2009.

DRAKE LEWIS, APPELLANT

BY: 

THOMAS WRIGHT TEEL

CERTIFICATE OF SERVICE

I, Thomas Wright Teel, Attorney for the Defendant/Appellant, do hereby that I have on this date filed this Brief of Appellant with the Clerk of this Court, and have served a copy of this Certificate of Service by United States Mail with the postage prepaid on the following:

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SO CERTIFIED this the 10 day of February, 2009.


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