

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CATHY D. WISE

APPELLANT

VERSUS

NO: 2008-CA-02138

TIM WISE

APPELLEE

On appeal from the Chancery Court of Perry County, Mississippi

BRIEF OF APPELLEE

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney of record for Tim Wise certifies that the following listed persons have an interest in the outcome of this case. These representations are made for the purpose that the Justices of this Court may evaluate possible disqualification or recusal:

1. Plaintiff/Appellant, Cathy D. Wise
2. Defendant/Appellee, Tim Wise
3. David A. Pumford, Attorney for Tim Wise
4. Erik M. Lowrey, P.A. Attorneys for Tim Wise
5. Thomas W. Crockett, Attorney for Cathy D. Wise
6. Watkins, Ludlam, Winter & Stennis, P.A., Attorneys for Cathy D. Wise
7. James K. Dukes, Jr., former attorney for Cathy D. Wise
7. Samuel E. Farris, former attorney for Cathy D. Wise
8. Douglas L. Tynes, former attorney for Cathy D. Wise
9. Monte Tynes, former attorney for Cathy D. Wise
10. Hon. Sebe Dale, Jr., Chancellor

This the 9th day of September, 2009.

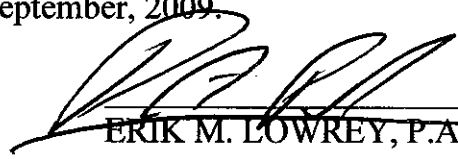


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WAIVER OF ORAL ARGUMENT

The Appellee submits that oral argument would **not** be necessary or beneficial to the resolution of this case, and submits that the record, exhibits, and brief should be sufficient for the Appellate Court to determine that the Chancellor should be affirmed.

TABLE OF AUTHORITIES

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<i>Armstrong v. Armstrong</i> , 618 So.2d 1278 (Miss. 1993)	3,5,6,
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STATEMENT OF THE ISSUES

1. **WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN ITS CLASSIFICATION AND VALUATION OF MARITAL PROPERTY FOR PURPOSES OF EQUITABLE DISTRIBUTION.**

2. **WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN FOLLOWING THE NET ASSET RULE FOR VALUATION PURPOSES.**

STATEMENT OF THE CASE
AND RELEVANT PROCEDURAL HISTORY

This case involves a divorce action and concerns matters principally of the equitable distribution of marital assets. The parties to this divorce are the Appellant, Cathy D. Wise (Cathy) and the Appellee, Tim Wise (Tim). A copy of the Chancery Court docket (CP 1-10) is contained in the Record Excerpts of Appellee (RE 9-18) as well as a copy of the Clerk's List of Papers. (RE 1-8) Also included in the Record Excerpts are the Final Judgment of Divorce and Memorandum Opinion of the Chancery Court as well a *Hemsley* summary of marital assets and liabilities, appraisals of the marital assets utilized by the Chancellor and relevant Orders of the Court throughout these proceedings. Throughout this Brief the transcript of Court proceedings shall be referenced "TR" by page number, the Clerks Papers are referenced "CP" and the Record Excerpts referenced "RE". Trial Exhibits are referred to as "EX".

The first Order entered in this cause was the Temporary Order entered on June 28, 2006. (CP 28) (RE 19) Subsequent to the entry of the Temporary Order Cathy obtained new counsel and an interim Order was entered on August 15, 2006, which clarified and expanded the existing Temporary Order. (CP 76) (RE 22) Though Cathy had initially requested an appraiser by motion, she withdrew her motion requesting the appointment of an appraiser on December 18, 2006. (CP 145) (RE 25) An Order for Appraisal and Evaluation was entered by the Court on February 15, 2007, appointing appraisers to value both the real property and

the business properties of the parties. (CP 176) (RE 27) The case came on for trial on March 5, 2008, at which time Cathy's second attorney in this matter was unavailable for trial and withdrew from the case. (CP 278-279) (RE 31-32) The Court ordered that the Court appointed appraiser update the appraisals and evaluations of the businesses in order that the Court know the most up to date information concerning the businesses. (CP 279) (RE 32) On motion of both parties an Order Dismissing Fault Grounds was entered on August 11, 2008 in order that the case proceed as an irreconcilable differences divorce. (CP 367) (RE36) The parties concurrently entered into a Consent for Divorce on August 11, 2008 leaving for the Court's determination the issues of the equitable distribution of assets and liabilities and whether either party should be awarded alimony or attorney fees. (CP 368) (RE 37) After a trial on the merits and post-trial briefing by counsel for both parties the Chancery Court entered a Final Judgment of Divorce and Memorandum Opinion on November 14, 2008. (CP 388-401) (RE 44-57) Cathy filed a Motion for Reconsideration on November 14, 2008 (from the Court's Memorandum Opinion which was later incorporated into the Final Judgment of Divorce entered on November 14, 2008.) (CP 380) (RE 39) Cathy did not raise any issues in her post-trial motion concerning the appraisal and valuation of the business assets, or concerning the net asset-valuation approach as utilized by the Chancery Court. (CP 380-384) (RE 39-43) An Order on Cathy's post-trial motions was entered on December 8, 2008 (CP 400) as well as on Tim's Motion for Direction. (CP 402) (RE 58)

The Chancellor made detailed findings of fact and conclusions of law and properly considered all of the familiar *Armstrong* factors in order to determine whether or not to

award periodic alimony, as well as the familiar *Ferguson* factors concerning the equitable distribution of marital assets. Cathy does not assign as error the Chancellor's decision not to award alimony, as this issue is not raised on appeal. The issues raised on appeal concern the equitable distribution of marital assets and the method utilized by the Chancery Court in valuing those assets.

STATEMENT OF THE FACTS

The Chancellor's Findings of Fact

The Chancellor heard this matter over a two day trial, at which over 60 exhibits were admitted into evidence, 57 of which were admitted by stipulation at the beginning of trial. (TR 9). The Chancellor heard the testimony of Cathy and four other witnesses on her behalf, as well as of Tim and three other witnesses on his behalf.

The Court found that Cathy and Tim are each 52 years of age and that neither had revealed any significant health problems, that they had been married to each other since 1973 and have two children, both of whom are emancipated and are self-supporting. (TR 11) Both adult children have been employed in the corporate business owned and operated by Tim and Cathy. The Chancellor noted that neither Tim nor Cathy had anyone legally dependent upon them for support. (CP 391) (RE47) The Chancellor found that neither party had been guilty of any significant waste or dissipation of marital assets, and that both enjoyed a standard of living commensurate of persons who were each receiving an annual income between \$60,000.00 to \$70,000.00 per year. (CP 391) (RE 47)

The Chancellor found that both parties had demonstrated the capacity to generate

business income, both before and after the establishment of the corporate business, in addition to the value of the assets received through equitable distribution. The Chancellor assessed a disproportionate amount of marital and business debts to Tim. The Chancellor concluded that as a matter of law and fact there was no basis or justification for an award of any form of alimony after the equitable distribution of marital assets had been accomplished. (CP 392) (RE 48)

The Chancellor made a classification of the assets as either marital or non-marital. The Chancellor found the majority of the parties' assets to have been accumulated during the marriage and therefore marital in nature, with the sole exception of a mobile home which was acquired by Tim after the separation of the parties and without any contribution from Cathy. (CP 392) (RE 48)

As requested by the parties, the Chancellor granted them a divorce on the ground of irreconcilable differences and without any consideration or assessment of fault or misconduct by the parties. (CP 391) (RE 47).

The Chancellor's Ruling

The Chancellor made detailed findings of fact and conclusions of law and properly considered all of the familiar *Armstrong* factors in order to determine whether or not to award periodic alimony as well as the familiar *Ferguson* factors concerning the equitable distribution of marital assets. The Chancellor declined to award alimony. Cathy does not assign as error to the Chancellor's decision not to award alimony as this issue is not raised on appeal.

The Chancellor first dealt with the equitable distribution of marital assets between the parties pursuant to *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994), *Hemsley v. Hemsley*, 639 So.2d 909 (1994) and their progeny. The Chancellor noted that upon classification of the marital assets pursuant to *Hemsley*, and upon equitable division of those assets pursuant to the factors set forth by the Mississippi Supreme Court in *Ferguson*, the Chancery Court then has the discretion upon dissolution of the marriage to award periodic and/or lump sum alimony, divide real and personal property, and may consider the future interests to be received by each spouse.

The Court noted with regard to the classification of assets, as required by *Hemsley*, the majority of the parties' assets had been accumulated during the marriage and therefore were marital in nature, with the sole exception of a mobile home which was acquired by Tim after the separation of the parties and without any contribution from Cathy. (CP 392) (RE 48) The Court then moved on to an analysis of the following *Ferguson* factors:

Substantial Contribution to the Accumulation of marital assets

The Chancellor found that Cathy directly contributed to the accumulation of marital assets from the beginning of the marriage in 1973 until the initiation of the business, Tim's, later Tim's Inc, in 1990 by performing the usual and ordinary home-keeping activities of a wife and mother and caring for the children, with the exception of five years that Cathy was employed doing primarily office work from which she earned a gross income from \$4,000.00 to \$8,000.00 per year, with the exception of a couple of years when she earned slightly more than \$10,000.00. The Chancellor further noted that Cathy testified that she once inherited

\$23,000.00. The Chancellor found as a matter of fact that from 1998 through 2008 (the date of trial) Cathy received pay from the business, Tim's Inc., in the amount of \$607, 944.41. The Chancellor noted that Cathy's role in the business was primarily book-keeping and records maintenance. The Court further found that these were "fat" years and that the evidence at trial was that Cathy's hours and efforts concerning the business were considerably less than a full time employee. The Chancellor found that while the records indicated Cathy to be a 50% owner of the business (which was incorporated in 1997), her contributions were "substantially less" than a 50% owner and operator of and contributor to the business. (CP 393) (RE 49)

The Chancellor found as a matter of fact that Tim, in addition to being a father and husband, was full-time employed for working hours outside the home, working in the early part of the marriage in mercantile establishments, and for approximately 12 years prior to entering into the convenience store business in 1989, Tim had worked offshore seven days on, seven days off, making between \$23,000.00 and \$47,000.00 annually. The Court noted that in 1989 Tim purchased his first convenience store in Richton, Mississippi, a second convenience store in Beaumont, Mississippi, and later a third store in Richton, Mississippi.

The Chancellor further found as a matter of fact that the funds used to purchase the first store came primarily from Tim and likewise the second store. The Court noted that Cathy did not become involved in any way in the business operation until after the second store was acquired, where she began to assist with record keeping and participated on less than a full-time basis. The Chancellor made the following finding of fact regarding the

businesses: “There is no doubt in the Court’s mind that the primary operational control and decision-making and supervision as to all three stores was performed by Tim”. (CP 394) (RE 50)

The parties also owned some farm property, approximately 112 acres. The Chancellor found as a matter of fact that there was no evidence before the Court to persuade that Cathy had played any significant part in the acquisition of this farm property, or the day to day operation of that property, or reveal any specific knowledge of, or participation in, the sales and purchase of animals, or the daily operations of the farm. (CP 394) (RE 50)

The Chancellor found nothing in the record to indicate that Cathy had any significant role in the financial or managerial decision making actions in either the businesses or the farm, except as noted herein. (CP 394) (RE 50)

The Chancellor found as a matter of fact and law that upon a total assessment of the substantial contribution made by each party to the accumulation of marital assets that equal attributions not justified and that the greater attribution must be attributed to Tim. (CP 394) (RE 50)

Contribution to the Stability and Harmony of the Home and Family

The Chancellor found that these factors were equal to Tim and Cathy and that neither Cathy or Tim contributed significantly to the education or enhancement in earning capacity of the other. (CP 394) (RE 50)

Prior Division, Waste or Depletion of Assets

The Chancery Court found that there were only two instances in this category worthy

of note. Cathy advanced or disbursed cash payments to her brothers in the amount of \$23,050.00 without any benefit to Tim and that Cathy also incurred debt on a company credit card in the amount of \$844.34 for which the company received no benefit. The Court further noted that pursuant to the terms of the Temporary Order the business was to pay the salaries of Tim and Cathy and Cathy had received an over-payment of \$9,425.00. The Court further noted that Tim had paid the property taxes for the years 2006 and 2007 which were the obligation of Cathy to pay. Other than these specific observations the Chancery Court found both parties appeared equal with regard to the use of the assets during the marriage. (CP 395) (RE 51)

Market Value and Emotional Value of the Assets

The Court found that Cathy appears to have a greater emotional attachment to the residence property and Tim had a greater emotional attachment to the farm property. The Court found that though it was not as easy to ascertain the emotional attachment of the parties to the businesses, the Court noted that Tim had a greater role in the acquisition and overall management, physical presence, care taking, general concern and personal identity, making the business more of “his baby” and accordingly the Court assessed a greater emotional attachment to this asset to Tim. (CP 395) (RE 51)

Non-Marital Assets

The Court made no finding that either party had significant non-marital assets, finding almost all of the assets to be marital.

Tax and Other Economic Consequences of Specific Divisions

The Court noted no specific tax consequences to either party involved in the equitable distribution of the marital assets.

Extent to Which Distribution can Eliminate Future Periodic Payments

The Court found that it would be able to make an equitable and reasonable distribution of all marital property such that each party would have significant assets: "There does not appear to the Court any practical reason why the equitable division of the accumulated properties, based on fair market values and income producing potentials, cannot be utilized to provide each party with reasonable expectation for future financial security which would then be based solely upon the performance of each and without future friction between them or dependence by either upon the other." (CP 396) (RE 52)

Need for Financial Security, Considering Assets, Income and Earning Capacity

The Chancery Court found that because of the substantial amount of assets accumulated during the marriage, after a reasonable distribution Cathy will have an adequate amount of assets to sustain her financially. The Court found that neither of the parties had any physical or other impediment to prevent each from gainful employment, and that both had demonstrated the skills and abilities needed to make a living. (CP 396) (RE 52)

Based on these findings the Chancery Court made an equitable distribution of marital assets and liabilities as follows:

a. To Cathy:

1. The marital residence property, land and improvements,
located at 227 Cochran Road, Richton, MS 130,000

2. All personalty, jewelry, furniture, fixtures, appliances, tools, mower, etc.	60,000
3. 2001 Ford Excursion	13,700
4. 1989 Chevy Truck	500
5. 2002 Honda Recon	4,800
6. 2005 Honda Recon	7,000
7. Two ice makers at house, computer at house, (From Office: chair, 3 pictures, sofa table)	-----?
8. ½ AG Edwards joint account	2,500+
9. AG Edwards account, her name	17,412+
10. AG Edwards account, her name IRA	4,403+
11. AG Edwards account, her name IRA	12,854+
12. Hancock Bank CD, her name	33,166+
13. The BEAUMONT STORE, to the extent and manner set forth hereinafter in the list of allocation of property to Tim, with the express provision that should Cathy, at any future time when Tim is still in business in the Perry County area, propose to sell the Beaumont Store she shall first offer same to Tim at the same terms of sale proposed to others and he shall have first option to purchase same; and if such situation should occur all offer and response must be documented in writing signed by both parties.	

b. To Tim:

1. 100% of the shares of Tim's, Inc., a Mississippi LLC, and property thereof including all inventories, stock, equipment, tools, supplies, bank accounts of the corporation, accounts receivable, accounts payable, and

properties real or personal of the business known as Tim's, Inc., or other trade name; EXCEPTING, HOWEVER, THE FOLLOWING, TO-WIT:

The Beaumont Store, including its lease(s) pertaining thereto, its inventories, stock, equipment, tools, supplies, bank accounts, accounts receivables, accounts payable, and properties real or personal of the business known thereat as Tim's or other trade name, all of said Beaumont Store to be transferred and assigned in full unto Cathy Wise as her sole property with effective date of August 15, 2008, subject to the purchase option set forth above in the allocation to Cathy.

2. The farm property, located at 367 Cochran Road, Richton, MS	270,000
3. All farm equipment and all cattle	118,700
4. 2002 Chevy	10,450
5. 1989 GMC	1,400
6. All bank accounts, checking, savings, CDs, IRA, or by any other designation, whether individual or farm or business, including AG Edwards accounts or any other investment firm standing in the name of Tim Wise, Peter Tim Wise, or Tim's, Inc.	57,000+
7. ½ of AG Edwards joint account with Cathy Wise	2,500+
8. 1995 Yamaha Timberwolf	500
9. 2003 Honda Recon	5,000
10. All guns	-----?
11. Large wedding portrait of Catherine Wise Chandler	-----?

(CP 396-398) (RE 52-54)

The Chancery Court made an equitable distribution of marital liabilities as follows:

- a. Indebtedness in bank loans evidenced by promissory notes and/or secured by deeds of trust ATTRIBUTABLE TO TIM'S, INC., or business debts however titled, stated at \$175,000.00:
- | | |
|-------------------|-----|
| Assessed to Tim | 80% |
| Assessed to Cathy | 20% |
- b. Real property allocated to Cathy shall be free and clear of encumbrances by deed of trust, and Tim shall take appropriate action to hold Cathy harmless with respect to any and all such encumbrances;
- c. To the extent of the 20% business indebtedness assessed to Cathy as her responsibility, she shall hold Tim harmless as to any possible lien or liens claimed or existing therefor as to the property identified as the Beaumont Store, and as assurance of Cathy's hold harmless obligation in that regard Tim shall be subrogated by equitable lien against her said interest in said Store;
- d. Cathy is absolved of responsibility of replacement or restitution with respect to claims for Tim's payment of ad valorem taxes on the residence property, the unauthorized charge to American Express, the averred withdrawal without authority of \$23,050.00, and the overpayment of wages during the period of the Temporary Order, and said credit, or absolution, extended her with regard to all of these are considered and declared by the Court as being full satisfaction to her for any claimed lump settlement of cash to which she asserted claim by whatever title or right she may have asserted such;
- e. The charges for or costs incurred by the court appointed Evaluators, Nicholson & Company, and the real estate Appraiser, Mike Garvey, shall be assessed to and borne equally by Tim and Cathy; and any other evaluators and/or appraisers utilized in this litigation shall be assessed to and borne by the party who employed and/or called such person or persons or entities.
- f. All general costs of court shall be borne equally by the parties.
- g. All fees and charges for attorneys for the parties shall be borne by the party employing such attorney or attorneys. In this regard the Court is cognizant of the fact the parties each chose their respective attorneys, and the fact that Cathy incurred the substantially increased expense of several different attorneys can only be attributed to her actions. Further

consideration is given to the fact that this divorce is effected upon agreement, hence there is no consideration nor is there assumption of fault on the part of either party. Further, Cathy is not without the ability to bear her own attorney expense, and attention is further recalled to consider that she has experienced at the hands of the Court a “windfall” by its election to relieve her of accounting or restitution with regard to those “self-help” receipts pretermitted in paragraph “d” above.

(CP 398-399) (RE 54-55)

SUMMARY OF THE ARGUMENT

The equitable division of assets and liabilities employed by the Chancellor was equitable and just as required by Miss. Code Ann. § 93-5-23 (2004). The Chancery Court did not abuse its discretion, was not manifestly wrong, clearly erroneous and did not apply an erroneous legal standard in its ruling on the classification, valuation and equitable distribution of marital assets and liabilities. The Chancery Court did not abuse its discretion, was not manifestly wrong, clearly erroneous and did not apply an erroneous legal standard in utilizing the net-asset value approach in the valuation of the parties’ business assets for purposes of equitable distribution in this divorce action, and the same was entirely consistent with prior precedent in this State.

STANDARD OF REVIEW

The scope of review in domestic relations matters is strictly limited. *Brawdy v. Howell*, 841 So.2d 1175, 1178 (Miss. Ct. App.2003); *Montgomery v. Montgomery*, 759 So.2d 1238, 1240 (Miss. 2000). The findings of a Chancellor will not be disturbed by the reviewing Court unless the Chancellor was “manifestly wrong, clearly erroneous or an erroneous legal standard was applied.” *Id.* “Our familiar standard holds that, absent an

abuse of discretion, we will uphold the decision of the Chancellor. To disturb the factual findings of the Chancellor, this Court must determine that the factual findings are manifestly wrong, clearly erroneous or the Chancellor abused his discretion.” *Hollon v. Hollon*, 784 So.2d 943, 946 (Miss. 2001). In matters of equitable distribution and alimony, the Court enjoys only limited powers of review. Chancellors are afforded wide latitude in fashioning equitable remedies in domestic relations matters, and their decisions will not be reversed if the findings of fact are supported by substantial credible evidence in the record. In other words, “[t]he Court will not disturb the findings of a Chancellor unless the Chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.” *Henderson v. Henderson*, 757 So.2d 285, 289-90 (Miss. 2000) (citations omitted). The trial court is presumed to be correct unless the record shows otherwise. *Myers v. Miss. Farm Bureau Mut. Ins. Co.*, 749 So.2d 1172 (Miss. App. 1999).

ARGUMENT

1. WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN ITS CLASSIFICATION AND VALUATION OF MARITAL PROPERTY FOR PURPOSES OF EQUITABLE DISTRIBUTION.

In matters of equitable distribution and alimony, the Appellate Courts have only limited powers of review. Chancellors are afforded wide latitude in fashioning equitable remedies in domestic relations matters, and their decisions will not be reversed if the findings of fact are supported by substantial credible evidence in the record. In other words, “[t]he

Court will not disturb the findings of a Chancellor unless the Chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Henderson v. Henderson*, 757 So.2d 285, 289-90 (Miss. 2000) (citations omitted).

Before a Chancery Court reaches the issue of equitable distribution it must first determine what is marital and non-marital property. *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994); *Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss. 1994). In *Hemsley*, as well as in a number of subsequent cases, the Mississippi Supreme Court stated that assets accumulated during the marriage are marital assets unless such assets are attributable to one of the parties' separate estates prior to the marriage or outside of the marriage. *Hemsley v. Helmsley*, 639 So.2d 909 (Miss. 1994).

In addition to the familiar *Ferguson/Hemsley* criteria, the Chancellor correctly applied the law as set forth in *Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss. 1994), which outlined how Courts should apply the Ferguson factors:

1. Classify the parties' assets as marital or non marital based on *Hemsley* criteria.
2. Value and equitably divide the marital property according to *Ferguson* factors.
3. If equitable division adequately provides for both parties, no more need be done.

If not, then alimony should be considered.

Cathy testified that she could run any of the three businesses and that "I can run all three of them together." (TR 62) Specifically, Cathy never testified that she could not run the Beaumont store which was awarded to her by the Chancery Court. Though Cathy stated that she "would like" one of the stores in Richton, Mississippi, the Exxon store, Cathy stated

at trial that she would not take that store without a guaranteed lease from its owner, Mitchell Morris. Tim testified at trial that both of the stores in Richton, Mississippi are owned and operated by Southern Oil, Mr. Morris's company and could not be spun out to Cathy. (TR 273). Mithcell Morris also testified at trial. He stated that he would not lease either of his two service stations in Richton to Cathy (TR 370) and that given the choice he would rather run the businesses himself than leave them to be run by Cathy. (TR 371) Mr. Morris was an independent witness who had not met Tim's attorney prior to the day of trial. (TR 374) With regard to the Beaumont store, Mr. Morris testified that, unlike the two Richton stores, he did not own that store, he only sells the gas there. He also testified that he would not have a problem in continuing this arrangement with Cathy if she ran the Beaumont store. (TR 374) When called by her attorney as a rebuttal witness Cathy testified as follows:

A . Like I said earlier yesterday, I'd love to have the Exxon if I was going to get one. But if Mitchell is not going to lease to me - - if he thinks he'd want to take it back over, I guess I'd have to take the Beaumont Store

(TR 384)

When asked by her attorney whether she would in fact be willing to take the Beaumont store, Cathy testified as follows:

Q. Would you be willing to take that store if you had to take it?

A. If I had to take one, yes.

(TR 384)

Cathy had placed a Hancock Bank Certificate of Deposit, valued at \$33, 166.00 in

her name only, apparently on the advice of one of her former attorneys. (TR 71) Cathy spent monies from the business beyond those that were authorized by the Temporary Order, including checks written to cash, (TR 107) (TR 253) (EX 59) (RE 79) as well as checks payable to third parties from the Tim's, Inc. business account. (EX 62) (RE 80-83) Cathy also charged personal expenses such as fuel and cigarettes to the business. (TR 140) (EX 54) Pending these divorce proceedings Cathy reduced her withholdings of taxes from her pay which resulted in her receiving a higher net pay and Tim receiving a lower net pay, again, according to Cathy, on the advice of one of her former attorneys. (TR 125) (TR 147) (EX. 60)

Cathy worked as a book-keeper for two of her brothers pending her divorce for which she did not ask for or receive compensation. (TR 124) When asked why she did not charge her brothers to work for them Cathy responded "Because I don't want to." (TR 139) During this time Tim was responsible for the day to day running of Tim's, Inc. After the entry of the Temporary Order Cathy no longer kept the books for Tim's, Inc. As acknowledged at trial by Cathy, for the two years that this divorce action was in litigation, even though Cathy had not worked at Tim's, Inc., or been involved in the book-keeping, she had drawn the highest salaries of her entire marriage. (TR 150-151) The Chancery Court found that the best evidence regarding the parties' respective incomes was their social security statements. (TR 76) (EX 56) (RE 73) (EX 57) (RE 76). Tim testified that Cathy's additional salary and expenses had depleted the value of the business subsequent to the entry of the Temporary Order. (TR 285) Tim also testified that the rise in gas prices had depleted the value of the

business as well. (TR 285) Tim further testified that Cathy charging gas and other items to the company also depleted the value of the business. (TR 286) Julie Brown, court-appointed accountant and book-keeper, testified that in the year 2007 Tim and Cathy, combined, received overpayments from the business of approximately \$30,000.00, each, respectively, in excess of the amounts set forth in the Temporary Order. In the year 2008 Cathy alone was over-paid \$7,822.41 in salary in excess of the Temporary Order. (TR 347)

Based on the facts as presented, and the evidence and testimony at trial, the division of assets and liabilities by the Chancellor was equitable and just as required by Miss. Code Ann. § 93-5-23 (2004). The Chancery Court correctly identified and followed existing Mississippi precedent in the classification and distribution of marital assets and there was no abuse of discretion. The first task of the Chancellor is to classify the assets as marital or non-marital. The second task is to value the marital assets. Next the court is to equitably divide those marital assets and state the reasons for the division in its decision through findings of fact and conclusions of law. *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994); *Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss. 1994). This is precisely what the Chancery Court did in the case at bar. The Court made detailed findings concerning the accumulation and appreciation or depreciation of marital assets and liabilities, as well as the contributions of each party thereto, and provided a detailed analysis of the applicable *Ferguson* factors. As the Mississippi Supreme Court observed in *Culbreath v. Johnson*, 427 So.2d 705, 708 (Miss. 1983) "The trial judge saw these witnesses testify. Not only did he have the benefit of their words, he alone among the judiciary observed their manner and demeanor. He was there on

the scene. He smelled the smoke of battle. He sensed the interpersonal dynamics between the lawyers and the witnesses and himself. These are indispensable.” *Id.*

In evidence are an appraisal for real property located at 227 Cochran Road, valuing that real property at \$150,000.00. (EX 66) and a cattle herd appraisal for net appraised value of \$72,682.75 (RE 72) Also in evidence are *Hemsley* summaries of marital assets and liabilities, the most recent being that revised on August 7, 2008. (EX 51) (RE 67) The parties also operated a business involving three gas stations/convenience stores, two of which were in Richton, Mississippi, one of which was in Beaumont, Mississippi. The parties leased the premises and did not own them. Cathy stated at trial that she “disagreed” with the revised appraisal by Nicholson and Company concerning the valuation of the businesses because “all three are running at full force.” (TR 21) The figures used by Nicholson and Company were provided by the parties on their income tax returns as far as the value of any equipment or assets depreciated. (TR 23) Nicholson and Company acted as a Court-appointed expert and two reports are in evidence as to the value of the businesses, one with a valuation date as of July 1, 2006, (EX 28(a)) (RE 733), the other as of December 31, 2007. (EX 28(b)) (RE 63). Both of these reports were admitted into evidence. (TR 32) This expert relied on the information provided on the books and tax returns for the business. Prior to the Court appointment of an accountant, Cathy was the book-keeper for the business. Subsequent to the entry of the Temporary Order, Julie Brown was a court-appointed accountant and book-keeper. Chancery Courts are vested with authority and discretion to appoint accountants and business valuation experts. *Heigle v. Heigle*, 771 So.2d 341, 349 (Miss. 2000); *Mace v.*

Mace, 818 So.2d 1130, 1134 (Miss. 2002). Cathy chose not to hire her own expert to challenge or refute these appraisals made by the Court-appointed appraiser. Cathy offered no expert testimony or proffered testimony concerning the method of valuation used. It is the duty of the parties, not the Chancellor, to produce evidentiary proof in support of their asserted value. *Wilson v. Wilson*, 975 So.2d 261, 265 (Miss. Ct. App. 2007) The Chancellor cannot be held in error in relying on the uncontradicted expert testimony, opinions and appraisals of the Court-appointed business appraiser. *Mathews Brake Hunting & Fishing Club, Inc. V. Sneed*, 475 So.2d 811, 812-13 (Miss. 1985).

As stated by the Mississippi Supreme Court in *Dunn v. Dunn*:

Where parties provide inadequate proof of an asset's value, a chancellor's valuation with "some evidentiary support" will be upheld. *Dunaway v. Dunaway*, 749 So.2d 1112, 1121(¶28) (Miss.Ct.App.1999). Further, "[I]t is incumbent upon the parties, and not the chancellor, to prepare evidence touching on matters pertinent to the issues to be tried." *Id.* at 1118(¶14).

Dunn v. Dunn, 911 So.2d 591, 597 (Miss. 2005)

Cathy did not challenge the net-asset approach, as directed by the Chancellor and utilized by the appraiser, in her post-trial motions. Failure to seek relief first in the Chancery Court, or through a post-trial motion, means that the issue is procedurally barred on appeal. *Chapel v. Chapel*, 700 So.2d 593, 600 (Miss. 1997); *Concannon v. Reynolds*, 878 So.2d 107, 109 (Miss. Ct. App. 2003); MRCP 59; MRCP 52(b). Assignments of error raised for the first time on appeal will not be considered. *In Re. L.D.M.*, 872 So.2d 655, 658 (Miss. 2004); *Ellis v. Ellis*, 651 So.2d 1068, 1073 (Miss. 1995).

The law on equitable distribution in Mississippi is very clear. Since 1994 when the

Mississippi Supreme Court ruled on the seminal case, *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994), the Mississippi Supreme Court rejected the separate property system and Chancellors were to apply the system of equitable distribution. The Mississippi Supreme Court did not order that there was to be equal distribution. Mississippi is not a community property state, where marital assets are divided on a 50/50 basis, and the legislature has declined to make Mississippi a community property state. Instead, the Mississippi Supreme Court has promulgated guidelines for the equitable distribution of marital property and has vested the Chancellors of this State broad discretion in determining what is marital property, in determining the contribution of each spouse toward the accumulation of marital property, and in ordering the division of marital property according to what is equitable and reasonable. This is obviously a highly fact-specific process, which is why a Chancellor's decision is subject to such a highly deferential standard of review. In *Ferguson* the Mississippi Supreme Court stated that "there is no automatic right to an equal division of jointly accumulated property, but rather, the division is left to the discretion of the Court." *Ferguson v. Ferguson*, 639 So.2d 921, 927 (Miss. 1994). More recently the Mississippi Supreme Court provided a concise summation of the law as it now stands with regard to equitable distribution principles:

At the outset, we note that in reviewing a chancellor's judgment as to the distribution of marital property, it is not within this Court's province to conduct a *Ferguson* analysis anew: Rather, the Court will review the chancellor's judgment to ensure that he followed the appropriate standards and did not abuse his discretion. *Phillips v. Phillips*, 904 So.2d 999, 1001(¶8) (Miss.2004). In so reviewing, the Court must keep in mind that equitable distribution does not always mean an equal division of property.

Absent an abuse of discretion, the Appellate Court will uphold the decision of the Chancellor. To disturb the factual findings of the Chancellor, the appellate Court must determine that the factual findings are manifestly wrong, clearly erroneous or that the Chancellor abused his discretion.” *Hollon v. Hollon*, 784 So.2d 943, 946 (Miss. 2001). The appellate court’s scope of review in domestic relations matters is limited by the familiar substantial evidence/manifest error rule. The Chancellor fashioned an equitable remedy in this case which is supported by substantial, credible evidence in the record supported by credible evidence contained in the record as well as the testimony of witnesses and exhibits as offered at trial. Cathy has cited no evidence to warrant disturbing the findings of the Chancellor, or to suggest error in his *Hemsley/Ferguson* analysis for the purposes of classification and equitable distribution of the assets and the liabilities of the parties. The Chancellor accounted for both assets and liabilities in this analysis and accommodated Cathy’s desire to control and be responsible for one of the business locations.

2. WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN FOLLOWING THE NET ASSET RULE FOR VALUATION PURPOSES.

The Chancellor followed the law, and acted well within the discretion of a Court of equity in the equitable distribution of marital assets. As pointed out by Cathy in her brief, the Mississippi Supreme Court has long held that the factors to be considered in determining fair value are within the discretion of the Chancellor. *Richton Bank & Trust Co. v. Bowen*,

798 So.2d 1268 (Miss. 2004) Not only did the Chancery Court act well within its discretion it also correctly applied Mississippi precedent.

Cathy did not challenge the net-asset approach, as directed by the Chancellor and utilized by the appraiser, in her post-trial motions. Failure to seek relief first in the Chancery Court or through a post-trial motion means that the issue is procedurally barred on appeal. *Chapel v. Chapel*, 700 So.2d 593, 600 (Miss. 1997); *Concannon v. Reynolds*, 878 So.2d 107, 109 (Miss. Ct. App. 2003); MRCP 59; MRCP 52(b). Assignments of error raised for the first time on appeal will not be considered. *In Re. L.D.M.*, 872 So.2d 655, 658 (Miss. 2004); *Ellis v. Ellis*, 651 So.2d 1068, 1073 (Miss. 1995).

Pursuant to *Singley v. Singley*, 846 So.2d 1004 (Miss. 2002) and *Watson v. Watson*, 882 So.2d 95 (Miss. 2004) “goodwill” should not be used in the evaluation of a sole proprietorship for purposes of equitable distribution. *Singley* involved a solo professional practice. *Watson* involved a husband’s veterinarian practice. While there may have been the possibility of raising the question as to whether the precedent set by these cases applies to all businesses, or non-professional businesses, the Mississippi Supreme Court subsequently made it abundantly clear in the 2007 case, *Yelverton v. Yelverton*, goodwill, either personal or business enterprise, shall not be included in a business valuation in divorce and equitable distribution cases where business assets are at issue. *Yelverton v. Yelverton*, 961 So.2d 19, 29 (Miss. 2007). The Chancery Court correctly acknowledged and applied this clear precedent to the case at bar.

Cathy is requesting that the reviewing Court change the law in respect to the preferred

method for the valuation of business assets in a divorce case in Mississippi. Cathy's arguments are based principally on cases from other states and treatises that favor the use of the investment value approach. The Chancery Court cannot reasonably be expected to depart from Mississippi precedent and use an approach that has been expressly rejected by the Mississippi Supreme Court.

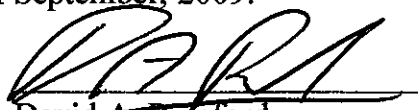
Cathy further argues that because periodic alimony was not awarded in this case, the existing precedent as embodied in *Singley*, *Watson* and *Yelverton* should not apply. Even if this were the law, which it is not, the flaw in Cathy's argument is that she has not challenged the Chancery Court's decision not to award alimony. She could have raised the issue of whether or not the Chancellor should have awarded alimony in her post-trial motion or her appeal, but she elected not to do so.

Neither did Cathy raise any arguments to the Chancery Court concerning the use of the net-asset approach for the valuation of the business in her post-trial motion, effectively denying the Chancery Court the opportunity to address this issue at that time. Instead, Cathy is now asking the reviewing Court to find the Chancery Court in error for following well-established Mississippi precedent concerning the classification, valuation and equitable distribution of marital assets and liabilities. The Chancellor was not clearly erroneous, nor was an erroneous legal standard applied in applying the net-asset valuation approach to the parties' business interests and to do so was entirely consistent with Mississippi precedent.

CONCLUSION

The equitable division of assets and liabilities employed by the Chancellor was equitable and just as required by Miss. Code Ann. § 93-5-23 (2004). The Chancery Court did not abuse its discretion, was not manifestly wrong, clearly erroneous and did not apply an erroneous legal standard in its ruling on the classification and equitable distribution of marital assets and liabilities, or in the use of the net asset approach for purposes of ascertaining the value of the business acquired during the marriage. Arguments raised by the Appellant on appeal concerning the use of the net asset approach to valuation, arguments which the lower Court was not given an opportunity to address though post-trial motions, are also procedurally barred on appeal. The Chancellor's Findings of Fact, Conclusions of Law and Final Judgment was well within the bounds of discretion that has been vested in Chancellors in this State, with no abuse of discretion or manifest error on the part of the Chancellor. The Chancellor made findings of fact and conclusions of law which were anchored in established Mississippi jurisprudence in the areas of divorce and equitable distribution and alimony. For the foregoing reasons, Tim Wise, Appellee, respectfully requests that the decision of the Chancery Court of Perry County, Mississippi be affirmed.

Respectfully submitted this the 9th day of September, 2009.


David A. Purnford
ERIK M. LOWREY, P.A.
Counsel for Tim Wise

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CATHY D. WISE

APPELLANT

VERSUS

NO: 2008-CA-02138

TIM WISE

APPELLEE

CERTIFICATE OF SERVICE AND FILING


I, David A. Pumford, do hereby certify that I have this date mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of the Appellee to the following counsel at their usual mailing addresses:

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I, David A. Pumford, Attorney for the Appellee hereby certify, that I have actually mailed this date the Original and three copies of the Brief of the Appellee to the Mississippi Supreme Court.

THIS, the 9th day of September, 2009.



David A. Pumford

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