

IN THE SUPREME COURT OF MISSISSIPPI
No. 2008-CA-02138

CATHY D. WISE

APPELLANT

V.

TIM WISE

APPELLEE

**ON APPEAL FROM THE CHANCERY COURT OF
PERRY COUNTY, MISSISSIPPI**

ORAL ARGUMENT REQUESTED

**BRIEF FOR APPELLANT
SUBMITTED BY:**

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CERTIFICATE OF INTERESTED PERSONS

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

1. Cathy D. Wise, Appellant
2. Peter Timothy Wise, Appellee
3. Erik M. Lowrey, Attorney for Appellee
4. Thomas W. Crockett, Attorney for Appellant
5. Honorable Sebe Dale, Jr., Chancellor, Perry County, Mississippi

So certified this, the 14th day of July 2009.


By: 

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STATEMENT OF ISSUES

1. Did the decision of the Chancellor fail to meet the mandate of Miss. Code Ann. § 93-5-23 (2004) that the award must be “equitable and just” and therefore was a misapplication of the law?
2. Where the Chancellor failed to value the common stock in Tim’s, Inc., which owned three convenience stores and was the most important marital asset of the parties which was awarded to the husband and also failed to value the assets of one of the stores which were awarded to the wife, should the case be reversed and remanded to the Chancellor to value these assets?
3. If the case is remanded, upon remand, should this Court advise the Chancellor that he may consider standards of value for the marital assets other than the net asset value?

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition in the Court Below

The Appellant and Plaintiff, Cathy D. Wise ("Cathy"), filed a complaint for divorce on the grounds of uncondoned adultery against the Defendant and Appellee, Tim Wise, ("Tim") in the Chancery Court of Perry County, Mississippi. During the pre-trial proceedings, the parties agreed to the entry of a judgment of divorce on irreconcilable differences and to allow the Chancellor to decide the property issues. There were no minor children involved, thus child support and custody were not issues.

The case proceeded to trial and, after a two-day hearing, the Chancellor denied Cathy's request for alimony and divided the marital assets between the parties. Cathy and Tim had each owned 50% of the stock in Tim's, Inc., a corporation that had owned three convenience and filling stations, one in Beaumont and two in Richton, Mississippi. The Chancellor awarded Tim all the stock in Tim's, Inc., and Cathy the assets of the Beaumont store. The Chancellor then divided the remainder of the marital assets, with Cathy receiving approximately \$286,000 and Tim \$405,000. Cathy was forgiven for certain claims for unauthorized expenditures and reimbursement for payment of taxes, the amount of which was not specified.

**Statement of the Facts Relevant to
the Issues Presented for Review**

Cathy and Tim married in 1973 when Tim was 17½ years old. (Tr. vol. 5, 240.) During the first years of the marriage, both Tim and Cathy worked, with both making substantial contributions to the accumulation of the marital assets. (R. vol. 3 at 392-93.) Two girls were born, one in 1974 and another in 1977, but Cathy continued to work after they were born. (Tr. vol. 5, 241-42.) Cathy worked outside the home and also performed the usual household duties of a mother of two children and wife. (R. vol. 3 at 392-93.) Tim and Cathy saved their money, and in 1989, they bought the inventory of an Exxon store in Richton, Mississippi, using their savings as a downpayment and borrowed the remainder, which they paid off in less than a year. (Tr. vol. 4, 51.) During their marriage, all of the assets were a result of their joint efforts. (Tr. vol. 5, 289.)

Cathy and Tim formed Tim's, Inc., in 1996 (Tr. vol. 5, 242), with Tim and Cathy each owning one-half of the stock. In addition to her homemaking duties and outside employment with an engineering firm, Cathy did all the bookkeeping and income taxes for the family farm and the business and personal income taxes, all while working in the business about 35 hours a week. (Tr. vol. 4, 53; R. vol. 3 at 392-94.) Tim and Cathy continued to save and bought a store in Beaumont in 1990. When she was needed, Cathy would, in addition to performing the paper work for the three stores and family farm, assist the accountant on tax returns and

assist in the kitchen, cooking and doing whatever else was required. (Tr. vol. 4, 53.) Cathy did most of the bookwork for Tim's, Inc., at night and on weekends. (Tr. vol. 6, 387.) By 2006, Tim's, Inc., was owner of the three stores involved here, which grossed \$6,079,156. (Tr. vol. 6, 361.) The record contains little information concerning the relative value of the three stores, except that the sales tax returns for 2007 reflected that the Beaumont sales taxes were \$28,779, the Richton Exxon sales taxes were \$43,893 and the Richton Amoco sales taxes were \$54,701. (Tr. vol. 6, 360.) Thus, the Beaumont store had the smallest amount of gross sales and, according to Cathy, was the least desirable store because of the nature of its clientele. (Tr. vol. 4, 61.)

During the ten years from 1996 to 2006, Cathy and Tim's annual income from Tim's, Inc., averaged about \$120,000, with each receiving \$60,000. (R. vol. 3 at 391.) After 33 years of marriage, Cathy and Tim separated in 2006, and on June 6, 2006, Cathy sued Tim for a divorce on the grounds of uncondoned adultery. Subsequently, Cathy and Tim agreed to a divorce on irreconcilable differences with the court to decide the property issues. (R. vol. 3 at 390.)

In his first appraisal dated as of July 31, 2006, and based on Rev. Rul. 59-60, 1959-1 C.B. 237, the court appointed evaluator, William T. Kelly, appraised Tim's, Inc., to have a fair market value of \$410,000. (Ex. vol. 2, 88.) Later, after being instructed by the court to omit any value for goodwill, he valued the business

at \$80,000 as of July 31, 2006. (Ex. vol. 7, 735.) Mr. Kelly submitted yet a third value effective as of December 30, 2007, showing a value of \$0. (Ex. vol. 8, 797-99.) The assets were not appraised; the appraiser took the value from the tax rolls, which may or may not have been the actual value, and admitted that he did not know the actual value of the assets being appraised. (Tr. vol. 5, 212-13.) Thus, the value of \$80,000 seven weeks after the suit was filed had been reduced to \$0 by seventeen months after the suit was filed.

Notably, as of July 31, 2006, about the time that Cathy and Tim separated, Tim's, Inc., had total assets of \$182,331, liabilities of \$26,273 and equity of \$156,058. (Ex. vol. 2, 107.) Seventeen months after Cathy had left the stores to Tim's management, December 31, 2007, the assets were \$78,409, total liabilities were \$111,273 and reported equity was \$(32,864), a decline of \$188,922. (Ex. vol. 8, 817.)

The case was tried on August 15 and 16, 2008, and the final judgment of divorce was entered on November 26, 2008. (R. vol. 3 at 388.) The Chancellor refused to award alimony, and in making his division of the marital property, the court awarded Tim all of the common stock in Tim's, Inc., thus divesting Cathy of her 50% ownership of the company. The Chancellor awarded Cathy the assets pertaining to the least desirable of the three stores, the Beaumont store, and

relieved her of an unspecified amount of claims that Tim had asserted against her.

(R. vol. 3 at 396-98.)

The Chancellor awarded Tim net assets valued at \$405,550 and Cathy net assets of \$286,335. (*Id.*)

That the awards consisted of a large number of assets (none of which were valued) is demonstrated by the following words of the Order:

To Cathy:

...

- (1) 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 offers and responses 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 receivable, 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.

(R. vol. 3 at 396-97.) The Chancellor did not value either of these awards, except that as a partial justification of his denial of alimony, he cited, among other reasons:

The property distribution as to the income producing business they now own as will be hereinafter set forth can be, as this Court assesses it, reasonably expected to meet the needs of Cathy and Tim without any required contribution by either unto the other, and particularly is this true due to the debt assumption load that will be significantly greater upon Tim than upon Cathy.

(Id.)

The Court assigned 80% of the indebtedness attributable to Tim's, Inc., to Tim and 20% to Cathy. (R. vol. 3 at 398.)

Being aggrieved, Cathy appeals.

SUMMARY OF THE ARGUMENT

I. THIS CASE SHOULD BE REVERSED AND REMANDED BECAUSE THE CHANCELLOR FAILED TO VALUE THE ASSETS BEING DISTRIBUTED AND THE DECISION WAS MANIFESTLY WRONG AND CLEARLY ERRONEOUS.

A. Scope Of Review.

The Scope of Review is the familiar rule: “if manifest error is present or a legal standard is misapplied, the court will not hesitate to reverse.” As in shown points B and C, both of these faults were present in the opinion of the Chancellor.

B. The Failure Of The Chancellor To Value The Assets Distributed Renders Impossible A Meaningful Review By This Court On Appeal.

The principle assets to be divided in this case were the stock and/or assets of Tim's, Inc., a corporation formed by Tim and Cathy in 1996 using borrowed money to buy one convenience store. Using marital income, the couple paid off these borrowed funds and purchased two more stores. By 2006, the three stores owned by Tim's, Inc., were grossing over \$6,000,000 a year, from which Cathy and Tim were each drawing \$60,000. Without making any attempt to value Tim's, Inc., or its assets, the Chancellor awarded to Cathy the assets pertaining to the Beaumont store, the least desirable of the three stores, and awarded the stock of Tim's, Inc., less the Beaumont store, to Tim, thus resulting in Tim owning the two most desirable stores. Without a valuation of these assets, a meaningful appellate review cannot be accomplished. Further, the Chancellor absolved Cathy from the

responsibility for the repayment of certain ad valorem taxes on the home place for her alleged unauthorized charge to American Express of \$23,050 and overpayment of wages during the period of the temporary order as full satisfaction of any claim for lump sum of cash which he asserted. The lack of the valuation of these claims also impedes an appellate review.

C. The Decision Of The Chancellor Was So Unfair And Unreasonable That It Was Manifestly Wrong And Clearly Erroneous And Therefore Should Be Reversed.

The only statutory mandate pertaining to orders by Chancellors in marital cases is that the order should be "equitable and just." Miss. Code Ann. § 93-5-23 (2004). The order is unfair to Cathy because she is deprived of her 50% ownership in Tim's, Inc., which she had owned for 30 years and to which she had made substantial contributions and from which she had drawn \$60,000 a year salary, in exchange for the least desirable of the corporation's three stores, plus only 40% of the marital assets and relief from some unspecified claims. Simple fairness dictates that if Cathy is to be deprived of her ownership of 50% of a company from which she drew \$60,000 a year for the least desirable of the three stores plus relief from some undefined debts or claims, she should receive more than 40% of the remaining marital assets. After thirty years of marriage in which she worked both outside the home and kept books for Tim's, Inc., as well as looking after the family, unless there is some serious fault on her part (of which there is no

evidence), Cathy should be able to live as well as Tim. It is obvious that the income from the least desirable one of three stores will not provide this income.

II. ON REMAND THIS COURT SHOULD GIVE TO THE CHANCELLOR THE DISCRETION TO USE SOME OTHER STANDARD OF VALUE OTHER THAN THE NET ASSET VALUE.

A. The *Yelverton* Case Should Not Be Construed To Require That The Net Asset Value Should Be Used In All Divisions Of Marital Assets.

The language in *Yelverton* is broad enough to be construed that in all marital assets the net asset value standard is required. On remand the Chancellor should be instructed that he is free to use other means of valuation as long as they are reasonable and reach an "equitable and just" result. By requiring the net asset value to be used, this court departed from *Ferguson* which requires that the assets be valued at their fair market value, which except for professional practices, always includes the earning power of the assets combined in the enterprise, sometimes referred to as "goodwill." The facts in the instant case are distinguishable from those in the below-cited *Singley*, *Watson* and *Yelverton* cases in two important ways. First, in the instant case Cathy was not awarded alimony or support of any kind. Of course, the earning capacity of the paying spouse is a factor to be considered in awarding support. Therefore, to consider that factor in valuing the asset would constitute double dipping, which on its face is unfair. However, since Cathy did not receive any support, this unfairness would not be present in considering the earning capacity of Tim's, Inc., in valuing the asset.

Second, in *Singley, Watson and Yelverton*, the wife owned no interest in the husband's business and, as far as the opinions show, had made no specific contributions to the business. In the instant case, Cathy had owned 50% of the stock in Tim's, Inc., since its inception in 1996 and had made substantial contributions to the success of Tim's, Inc. It is one thing to award a wife spousal support based on the earning capacity of a business and then consider the value of the business and double-dip by including the earning capacity of the business in the valuation thereof. By contrast, it is another thing to take away the ownership of 50% of the business that the wife has owned for thirty years from which she had been drawing \$60,000 a year with no corresponding award of support.

For the above reasons, the Chancellor should be allowed to use some standard other than the net asset value of Tim's, Inc.

B. The Court Should Allow The Chancellor To Consider All Relevant Facts And Adopt The Method Of Valuation That Would Achieve A Statutorily Mandated Standard Of Equitable And Just.

If the Chancellor is not required to use the fair market value or the net asset value, then what value should he be allowed to use? Again, Plaintiff is not arguing that the Chancellor should be restricted to any one value but simply that he should be allowed to pick the one that reaches an equitable and just result. Under the facts in this case, the use of the investment value would reach such a result. The investment value is defined as "the specific value of an investment to a particular investor or class of investors based on individual investment requirements; [it is]

distinguished from market value, which is impersonal and detached.” Shannon P. Pratt, *Valuing A Business: The Analysis and Appraisal of Closely Held Companies* 43 (5th ed. 2008):

The investment value would be particularly appropriate in the instant case because this case does not involve a liquidation of Tim’s, Inc.—in which the net asset value would be appropriate—nor a sale—in which case the fair market value would be appropriate. The Court would simply look at how much more the ownership of Tim’s, Inc., without the Beaumont store would mean to Tim than the ownership of the Beaumont store means to Cathy and split the marital assets accordingly.

There are probably few assets whose valuation imposes as difficult, intricate and sophisticated a task as interests in close corporations. *Lavene v. Lavene*, 372 A.2d 629, 633 (N.J. Super. 1977).

ARGUMENT

I. THIS CASE SHOULD BE REVERSED AND REMANDED BECAUSE THE CHANCELLOR FAILED TO VALUE THE ASSETS BEING DISTRIBUTED AND THE DECISION WAS MANIFESTLY WRONG AND CLEARLY ERRONEOUS.

A. Scope Of Review

The scope of review is set forth in *Thompson v. Thompson*, 894 So. 2d 603 (¶ 13) (Miss. Ct. App. 2004), as follows:

This Court will not disturb the findings of a chancellor unless the chancellor was *manifestly wrong, clearly erroneous, or applied an erroneous legal standard*. We are required to respect the chancellor's findings of fact that are supported by credible evidence and not manifestly wrong. *Nonetheless, if manifest error is present or a legal standard is misapplied, this court will not hesitate to reverse.*

(emphasis supplied and citations omitted).

As shown in Point B below, the failure to value the assets being distributed is a manifest error, and in Point C below, the decision was clearly erroneous and misapplied the legal standard of "equitable and just."

B. The Failure Of the Chancellor To Value Both The Common Stock Of Tim's, Inc., Less The Assets Pertaining To The Beaumont Store And The Assets Of The Beaumont Store Renders Impossible A Meaningful Review By The Court On Appeal And, Therefore, Constitutes Reversible Error.

These values were essential for this court to determine whether the division of the marital assets was equitable; without them, an appellate review is impossible. The record contains substantial disagreement on the value of Tim's, Inc. In the first opinion of Nicholson & Company, PLLC, the value of 100% of the common stock as of July 31, 2006, was \$410,000. (Ex. vol. 2, 83-84.) After being instructed to remove all value for goodwill, the appraisal as of July 31, 2006, was \$80,000. (Ex. vol. 7, 734-35.) In yet a third appraisal the value at December 31, 2007, was \$0. (Ex. vol. 8, 798-99.) Without a finding of fact by the trial court on what the value of Tim's, Inc., was, less the assets of the Beaumont store and the

value of the Beaumont store assets, and a specification of the amount of debts of which Cathy was relieved, a meaningful appellate review is impossible.

The Chancellor must *make a finding of fact to the value of the items being awarded or be faced with reversal and remand*. See *Bresnahan v. Bresnahan*, 818 So. 2d 1113 (¶ 16) (Miss. 2002); *Aron v. Aron*, 832 So. 2d 1257 (¶ 14) (Miss. Ct. App. 2002); and Bell on Mississippi Family Law § 6.07[2], at 178 (2005) and cases cited.

The words of the court in *Gray v. Gray*, 909 So. 2d 108 (¶ 8) (Miss. Ct. App. 2005), are appropriate here. “Nevertheless, we find that the Chancellor committed manifest error in failing to make the required record of the findings of fact and conclusions of law regarding the *Ferguson* factors. This error impedes our appellate review.” See *Goodson v. Goodson*, 910 So. 2d 35 (¶ 14) (Miss. Ct. App. 2005) (“The chancellor erred in not placing a specific value on Judy’s business.”) (referring to *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994)).

In cases where the chancellor failed to make findings on the fair market value of the various assets prior to division, the Court has reversed and remanded for such findings because “[i]t is impossible for this Court to perform its oversight responsibility in the absence of such a valuation” *Horn v. Horn*, 909 So. 2d 1151 (¶ 47) (Miss. Ct. App. 2005); *Scott v. Scott*, 835 So. 2d 82 (¶ 13) (Miss. Ct. App. 2002) (emphasis supplied); *Pucylowski v. Pucylowski*, 741 So. 2d 998 (¶ 17)

(Miss. Ct. App. 1999). All three of the appraisals in this case included the value of the substantial amount of fixed assets in the three stores, but these assets were never appraised. (Ex. vol. 2, 83; Ex. vol. 7, 734; Ex. vol. 8, 798.) The values were merely taken from the tax assessment rolls, which did not necessarily reflect the real value of the assets. The appraiser admitted that he did not know the actual value of these assets. (Tr. vol. 5, 212-13.)

Without the value of the common stock of Tim's, Inc., or the value of the assets of the Beaumont store, this court simply cannot make a meaningful review of the case. It should, therefore, be reversed and remanded.

C. The Decision Of The Chancellor Was So Unfair And Unreasonable That It Was Manifestly Wrong And Clearly Erroneous And Should Therefore Be Reversed.

As has been the case in Mississippi for the past century-and-a-half, the goal in divorce cases is to make such orders as are equitable and just. Miss. Code Ann. § 93-5-23 (2004). Or, as stated in *Stewart v. Stewart*, 2 So. 3d 770 (¶ 7) (Miss. Ct. App. 2009), "the key goal for a Chancellor is to make certain that equity is accomplished, which requires fairness to both parties."

With deference to the learned Chancellor, his Order is far from fair to Cathy. During their thirty-three year marriage, Cathy raised two daughters, worked at an outside job, and did the paperwork for the family farm and for Tim's, Inc., of which Cathy had been an equal owner since its inception and from which they had drawn equal salaries of about \$60,000 per year. After those thirty-three years, the

Chancellor's Order deprives Cathy of her ownership of one half of the stock in Tim's, Inc., in exchange for the least desirable of the three stores and awards only 40% of the other marital assets and relieves her of an unspecified amount of claims asserted against her. On its face this Order is unjust, inequitable and a misapplication of § 93-5-23.

Plaintiff recognizes the wide discretion given to a Chancellor, but to deprive a person of more than two-thirds of the assets of a corporation from which she earned a living, and of which she owned 50% of the stock and awarded her 40% of the other marital assets is unfair on its face. While Plaintiff recognizes that no hard and fast rules can be drawn, Plaintiff thinks the decisions of the Court in other cases of lengthy marriages are illustrative. For instance, in *Palmer v. Palmer*, 841 So. 2d 185 (Miss. Ct. App. 2003), the wife of a thirty-six year marriage received 53% of the marital assets plus \$600 per month in alimony. In *Brooks v. Brooks*, 652 So. 2d 1113 (Miss. 1995), the wife of a thirty-five year marriage received 75% of the marital estate plus \$7,200 per month in periodic alimony. Plaintiff recognizes that no law requires an equal division of the assets, but the law does require a fair division. Under facts of this case, considering Cathy's contributions and the length of the marriage, to award her less than a third of the assets of Tim's, Inc., and only 40% of the other marital assets is on its face unfair and manifestly erroneous.

II. ON REMAND THIS COURT SHOULD GIVE TO THE CHANCELLOR THE DISCRETION TO USE SOME OTHER STANDARD OF VALUE OTHER THAN THE NET ASSET VALUE.

A. *Yelverton v. Yelverton* Should Not Be Construed To Provide That The Net Asset Value Should Be Used In All Divisions Of Marital Assets.

The inclusion or not of goodwill in the valuation of marital assets is a recurring problem in the division of marital assets. As stated in Shannon P. Pratt, *Valuing A Business: The Analysis and Appraisal of Closely Held Companies* 949 (5th ed. 2008):

In many divorce cases, the inclusion and/or measurement of goodwill as a marital asset is by far the largest issue in the valuation of the marital estate's business or professional practice.

The classic definition of goodwill is "the propensity of customers to return for repeat business." The criterion as to whether goodwill exists usually is the ability to earn a rate of return in excess of a normal rate of return on the net assets of the business, after reasonable compensation to operating personnel. The measurement of goodwill often is performed by capitalizing amounts of economic return in excess of a normal rate of return on the net other assets of the business.

Plaintiff acknowledges that the language of *Yelverton v. Yelverton*, 961 So. 2d 19 (¶ 21) (Miss. 2007), which states, in quoting *Singley v. Singley*, 846 So. 2d 1004 (¶ 18) (Miss. 2002), that "[g]oodwill is simply not property[,] thus it cannot be deemed a divisible marital asset in a divorce action" could be interpreted to mean that the only valuation available in the division of assets in a divorce case is the net asset value. Plaintiff respectfully submits that if this is the correct reading of this statement, then this statement is overbroad and is not binding precedent on

the decision in the instant case, which is distinguishable from *Singley*, *Yelverton* and *Watson*, *infra*, in several important particulars.

First, in the instant case, there was no alimony awarded. This removes one of the principal vices of including goodwill in the division of marital assets. For instance, in *Watson v. Watson*, 882 So. 2d 95 (¶ 26) (Miss. 2004), which involved the valuation of the husband's veterinarian practice, the court in relying on *Singley* stated as follows:

The inequity which led to the decision in *Singley*, and the inequity which is so glaringly present in this case, occurs where the marital assets to be divided in a divorce include the goodwill of a professional practice. This is particularly true where, as here, the professional practice has one owner/professional. Unless the valuation of the professional practice carefully avoids any element attributable to the presence and work of the professional, the result will be a double award to the spouse. *The professional's income will be used, first to calculate alimony, and then again to calculate the value of the "business."* That is exactly what happened in this case.

(emphasis supplied).

The same vice was present in *Yelverton* in which the court had awarded substantial alimony and child support to the wife of the owner of the interest in the business. The court in *Yelverton* stated: "[T]he chancellor should take all factors into consideration in making an equitable distribution and *awarding support payments.*" 961 So. 2d 19 (¶ 23) (discussing the use of goodwill in valuing a business) (emphasis supplied).

Thus, in all three of the leading cases denying the inclusion of goodwill, the vice in doing so was that it was double dipping—in that the wife received not only the value of income in the distribution of the assets, but also the value of income had been computed in awarding alimony and/or child support. This is not true in the instant case because the Chancellor, before he considered the distribution of the assets, decided that Cathy was not entitled to any alimony. (R. vol. 3 at 391-92.) Thus, a wife not receiving alimony was a distinguishing factor recognized in *Stewart v. Stewart*, in which the Court stated: “We also distinguish those cases cited by [the husband] as they involved the *wife’s receiving alimony as a part of the divorce settlement*, which is not the case here.” 2 So. 3d. 770 (¶ 13) (Miss. Ct. App. 2009) (emphasis supplied).

Another important difference should be considered: Cathy was, and had been, a 50% owner of the company since it was formed in 1996 and had contributed substantially not only in homemaking duties but also in the building up of Tim’s, Inc. (Tr. vol. 6, 387.) There is no evidence in *Singley, Watson* or *Yelverton* that the spouse had contributed to the value of the assets, or that she owned any interest in the professional practices in *Singley* and *Watson* or the corporation in *Yelverton*. These facts further distinguish the instant case from *Singley, Watson* and *Yelverton* from the instant case and justify a departure from the net asset rule.

The unfairness of the decision of the lower court to order Cathy to convey her 50% share of Tim's, Inc., to Tim without valuation is further demonstrated by the fact that if Cathy were merely a dissenting stockholder in a corporate merger situation, she would be treated much better than this. The court will recall that the fair market value of Tim's, Inc., including goodwill, was appraised at \$410,000. (Ex. vol. 2, 83-84.) Thus, as a 50% stockholder, she would have been entitled to half the value with no discount, that is, \$205,000. *See Richton Bank & Trust Co. v. Bowen*, 798 So. 2d 1268 (¶ 14) (Miss. 2001) (sustaining the Chancellor's finding of fact as to the value of the stock with no discount for non-marketability or minority status, and stating: "This court has held that the factors to be considered in determining 'fair value' [are] *within the discretion of the chancellor.*") (emphasis supplied). Furthermore, it is "peculiarly within the province of the chancellor, as the trier of facts, to evaluate the evidence, resolve conflicts and to draw reasonable inferences from it." *Cal-Maine Foods, Inc. v. Duvic*, 264 So. 2d 383, 384 (Miss. 1972).

Cathy is not arguing that goodwill is a divisible asset in the case of the valuation of a professional practice in which she had no interest, but she is arguing that in order to meet the statutory mandate of § 93-5-23 in reaching an "equitable and just decision," the Chancellor should not be forced into the Procrustean bed of the net asset rule and should be allowed to consider assets of the corporation other

than simply the net asset value. The words of this court in *Goodson v. Goodson* are particularly appropriate here:

The value of a business includes more than physical assets and goodwill, as Judy argues. Contrary to Judy's position, there are many factors, other than physical assets and goodwill, that can be used in arriving at the value of a business. Some of these factors include, but are not limited to, *income generated, accounts receivable, pending contracts, and customer lists. On remand, the chancery court is free to consider factors other than goodwill and physical assets in valuing Judy's Painting Services.*

910 So. 2d 35 (¶ 13) (Miss. Ct. App. 2005) (emphasis supplied).

Having shown that the application of the net asset value in this case will not reach an equitable and just decision as required by the statute, we respectfully submit that there is a standard which would be appropriate to consider in marital property distributions: the investment value of the assets, which is defined by the leading authority on valuing closely held companies as follows:

Without specifically saying so, many family law courts utilize *investment value*—that is, value to a *particular* seller. They tend to zero in on value to the operating spouse.

Pratt, *supra*, at 966.

To this method Plaintiff now turns.

B. The Court Should Allow The Chancellor On Remand To Consider All Relevant Facts And Adopt The Method Of Valuation That Will Achieve The Statutorily-Mandated Standard Of Equitable and Just.

As we have seen in Point I, *supra*, this court is not bound by any statute or binding precedent to instruct the Chancellor on remand in any way other than to use his discretion to reach a fair and equitable result and not to include goodwill as a divisible asset. Although some of the aspects of goodwill, that is the earning capacity of the business, are pertinent to reaching the investment value, this does not result in goodwill being treated as a property subject to being sold. See *Goodson*, 910 So. 2d 35. To the extent that this conflicts with the rulings in *Singley*, *Watson* and *Yelverton*, as discussed above, the facts in this case are distinguishable from those three cases. While not binding on this court, we call the court's attention to the following language of the California Court of Appeals in *In re Marriage of Hewitson*:

We recognize the determination of the value of infrequently sold, unlisted, closely held stock is a difficult legal problem. Most of the cases illustrate there is *no one applicable formula that may be properly applied to the myriad factual situations calling for a valuation of closely held stock*. It is, therefore, incumbent upon a court faced with such a problem *to review each factor* that might have a bearing on the worth of the corporation and hence upon the value of the shares.

142 Cal. App. 3d 874, 888 (1983) (emphasis supplied and citations omitted).

Considering all of the difficulties inherent in the valuation of a closely held stock and the many equities on the side of Cathy in this case, which were not present in *Singley, Watson and Yelverton*, we respectfully suggest that on remand the Chancellor be given the discretion to consider the investment value approach. This approach was advocated in the Mississippi College Law Review in an article entitled *Mississippi's New Equitable Distribution Rules: The Ferguson Guidelines and Valuation* by Thomas W. Crockett and Walter P. Neely, Ph.D. 15 Miss. C. L. Rev. 415 (1999). This section is not being cited because of any great authority of the writer of this brief but to show that the investment value has much to offer and is not a new idea conjured up for the purposes of this case. The article argues that in some cases the fair market value required in *Ferguson* is not appropriate but that the investment value as defined by Shannon Pratt, above, may be. It points out that

[s]pecial benefits include perks of ownership, unique cost of capital, and other characteristics which make investment value different from fair market value.

Investment value has special applications in matrimonial cases. The operating spouse continues in his or her job and retains an excessive salary and other benefits offered by controlling the business. The business or practice is worth more to one spouse than the fair market value to investors. Similarly, goodwill of a doctor's or lawyer's practice may not be sold, but it is valuable to the working doctor or lawyer.

Id. at 424 (emphasis supplied).

The investment value is ideally suited for division of marital property in this case since Cathy was a 50% owner of Tim's, Inc., which she and Tim formed using savings from their joint efforts, and Cathy had worked in the business since its inception and contributed substantially to its success. It recognizes that goodwill is not property and cannot be divided, but it also recognizes, in fairness to the payee spouse, that the operating spouse's ownership may be worth more than the net asset value. It provides a way the court can comply with the mandate of § 93-5-23 of making such orders "equitable and just." This mandate has been in the statute for over 150 years, and this court and its predecessors have strived over the past century-and-a-half to adopt such methods as will accomplish this result. The allowing of chancellors to use the investment value would be another step in this direction.

Two more comments about the instructions on remand:

First, the Chancellor apparently paid little attention to Cathy's homemaking contributions and focused on Tim's contributions to Tim's, Inc. (R. vol. 3 at 392-94.) We submit that the Chancellor should be reminded on remand of the concurring opinion in *Redd v. Redd* as follows:

I would remind the chancellor, *in his reconsideration on remand, that domestic services are to be valued no less than monetary contributions. Hankins v. Hankins*, 729 So. 2d 1283, 1287 (Miss. 1999); *Hemsley v. Hemsley*, 639 So. 2d 909, 915 (Miss. 1994); *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994) (guideline 1b). The

record is replete with testimony that it was the appellant who maintained the home and kept the family life intact unassisted and even hindered by her husband.

774 So. 2d 492 (§ 17) (Miss. Ct. App. 2000) (Payne, J., concurring) (emphasis supplied).

Second, and along the same lines, in applying the *Ferguson* factors, the Chancellor should be instructed that under *Ferguson* each spouse's contribution to the accumulation of the marital assets must be computed on the basis of the *total contribution* by each spouse to the *total value* of the assets, and not to the contribution from each spouse to such assets as was done in this case. Here, the Chancellor deprived Cathy of her 50% ownership of Tim's, Inc., asserting that she had contributed less to the success of Tim's, Inc., than had Tim and still awarded her only 40% of the other marital assets. It is acceptable for the Chancellor to consider the contributions of a spouse to a specific asset in the award of that asset, but the total award should be based on the total contributions. *See Stewart v. Stewart*, 2 So. 3d 770 (§ 13) (Miss. Ct. App. 2009).

CONCLUSION

This case should be reversed and remanded, and upon remand, the Chancellor instructed that he has the discretion to depart from the net asset rule and may, in his discretion, apply the investment value rule. Also, the Chancellor should be reminded that a spouse's homemaking contributions are presumed to be as valuable as breadwinning contributions and that in the final award the

determining factor is each spouse's contribution to the accumulation of assets as a whole and not as to each specific asset.

This the 14th day of July 2009.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Thomas W. Crockett, do hereby certify that I have this day served via hand delivery and/or U.S. Mail, a true and correct copy of the foregoing brief and Appellant's Record Excerpts upon the following interested parties:

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Thomas W. Crockett